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GUIDE TO CONTRIBUTORS

The Editorial Board welcomes contributions on all aspects of Southern African Development Community (SADC) law or legal themes of relevance to the SADC legal fraternity.

Contributions should be sent electronically to the Editor-in-Chief (evance.kalula@uct.ac-za), the Managing Editor (afadameh@gmail.com).

Submissions are to comply with the following requirements:

- All contributions are to be in English.
- Submissions need to be original, unpublished work. The Editorial Board may under exceptional circumstances accept an article that has already been published elsewhere, provided that the author provides the Board with a letter from the publisher permitting the publication and reverting the copyright to the SADC Law Journal Trust (SADCLJ Trust).
- All authors whose contributions are to be published in the SADC Law Journal (SADCLJ) by the submission thereof ipso facto waive copyright as author in favour of the SADCLJ Trust.
- Electronically sent contributions should be submitted in the form of an attachment in any version of MS Word.
- The Editorial Board accepts articles, shorter notes on any relevant legal issue, case comments, and book reviews.
- Articles should normally be between 6,000 and 12,000 words, while notes and case reviews can be between 1,500 to 3,000 words. Book reviews should not exceed 3,000 words.
- The SADCLJ follows the house style of the South African Law Journal. The style guide appears with the journal at www.jutalaw.co.za.
- Once a contribution has been accepted for publication, authors need to cooperate with the language editor and comply with his/her deadlines.

The Editorial Board will submit all articles to referees who will determine the desirability of their publication. Articles will be submitted to referees without disclosing the name of the author. The content review process usually takes about six weeks. Authors will be informed of the result of the content review. Submissions will then be subjected to a technical/language review, with feedback to authors.

Authors of new publications are encouraged to submit them for review, but are not entitled to solicit reviews from reviewers of their choice or to influence the decision of the Editorial Board on whom to approach for such a review.

FOREWORD

The year 2015 marks another proud moment in the life of the *SADC Law Journal* as another edition comes off the production line. This is a positive development as the evolution of the journal continues to find and cement its place in the readership of the SADC-Region and beyond. The contribution of the journal to the knowledge and accessibility of information, on and about, legal developments and jurisprudence in SADC is highly appreciated by those who come across this important publication. This appreciation extends to those in academia, lawyers, policy makers, students as well as the ordinary men and women on the streets in the cities across the region and beyond.

The *SADC Law Journal* has succeeded in establishing a reputation in a short period of time as one of the publications to look forward to year after year. The publication continues to highlight interesting topics touching on various matters across the region through a sophisticated legal eye. This edition is dominated by a very important issue, one that has divided many communities and also divided ordinary people from the elites, the issue of land. Solving the problems of land reform in the southern African countries means an important step into the aim of SADC: peaceful integration. The issues and controversies related to land either in the form of demands for access to it or claim for rightful ownership are not unique to a single state in the region but cuts across many borders. Inadequate and/or outdated legislation dealing with land is equally a common phenomenon in the region. The comparative studies and analysis across the countries in the journal brings out complex issues that have contributed to difficulties in finding solutions to challenges relating to land. The domination of land in this journal shows that the region has a long way to go in a search for permanent solutions to this issue.

It is extremely encouraging to observe that the *SADC Law Journal* continues to be of relevance to the readership despite the problems that confronts the SADC Tribunal. This, I argue, is due to the high quality of the journal and high caliber of contributors to the publication. I encourage more aspiring writers from across the region to contribute articles to ensure sustainability of the journal in future. The *SADC Law Journal* certainly has a bright future and a significant role to play as a noteworthy publication.

Dr Bernd Althusmann, Resident Representative KAS Namibia-Angola

EDITORIAL

We welcome our readers to the 2014-2015 edition of the SADC Law Journal. Keeping with the tradition of the Journal, we have assembled excellently written and argued papers that speak to pertinent issues that collectively affect countries in the Southern African Development Community (SADC). The core of the articles in this edition are papers presented at the Bill McClain Memorial Workshop organised by the National Research Foundation (NRF) Chair on Customary Law, Indigenous Values and Human Rights at the University of Cape Town, in collaboration with the Director of International Academic Programme Office, University of Cape Town and the Southern Africa Development Community Law Journal. The other papers were either presented at the Annual SADC Law Seminar Series or were responses to our annual call for publication.

Since its inception in 1992, the Southern African Development Community has continued to accumulate a growing body of norms underpinned by the founding Treaty. Such SADC law includes various protocols, jurisprudence developed by the SADC Tribunal and other norms. However, at the national level, the legal systems of SADC member states comprises a blend of imported laws, domestic legislation and various systems of customary law. This diverse blend of legal systems presents challenges within national jurisdictions and at the regional level in terms of developing a framework for harmonisation of rules. In order to achieve integration among SADC member states, there has to be some form of harmonisation of rules across the region. It is therefore imperative for us to understand the interplay of these rules at the national level in order to identify areas of commonality and divergence for the purpose of seeking harmonisation.

The SADC Law Journal is specifically delighted to have been part of the workshop that was organised in commemoration and in honour of Professor Bill McClain who taught Land Law and African Customary Law at various Southern African universities and elsewhere in Africa, particularly in East and West Africa. The Workshop was titled “**The interplay of customary law rights in land and legal pluralism**”. As a Journal that seeks to propagate the development of regional jurisprudence in the Southern African Development Community, we jumped at the opportunity of partaking in a workshop that explored issues of legal pluralism in the context of customary land law rights. While it has always been the objective of the Journal to focus solely on regional norms, rules and treaties, and not the laws of SADC member states, an understanding of the inherent conflict of laws that arises within SADC member states as a result of legal pluralism is vital to the process of developing or harmonising regional norms within the Southern African Development Community. We therefore implore our readers to carefully apply their minds to the arguments canvassed in this year’s edition of the Journal with the view of strengthening regional jurisprudence in the Southern African Development Community.

We are most grateful to a number of people and organizations that have made this issue possible.

We are most obliged to the sponsors of the Journal, the Konrad Adenauer Stiftung (KAS) for their continued support. We particularly appreciate the personal interest and commitment of Dr Bernd Althusmann, KAS representative for Namibia and Angola and his colleague, Mr Dennis Zaire. Similarly, we gratefully acknowledge the encouragement and support of the SADC Law Journal Trustees, particularly through Professor Nico Horn which has been crucial in our continued success. As always, Ms Michelle Govender, the Juta publisher and her technical team have provided invaluable guidance that has enabled this and previous issues to see the light of day.

We owe a big intellectual debt to Professor Chuma Himonga, the NRF Chair in Customary Law at the Faculty of Law, University of Cape Town. She framed the scope of the workshop that provided guidance to paper presenters and basis of discussion.

We are also grateful to the McClain family, in particular, Mrs May McClain, for their support of the project. Advocate Vusi Pikoli, as representative of the family at the launch of the workshop, set the tone of remembrance of his old teacher, which Bill McClain would have approved of. His Majesty King Letsie III, another of Bill's students, was represented by Professor Nqosa Mahao and was a source of inspiration for workshop participants.

The financial support of Professor Alexander McCall-Smith, Mr Sam and Mrs Fazila Montsi and the NRF rated researchers incentive fund is gratefully acknowledged. Besides his financial support, Professor McCall-Smith kindly remembered his old friend with a glowing tribute. We are equally grateful to Professor Robert Edgar, another long-time friend of Bill McClain for his tribute.

We are also greatly indebted to paper presenters and workshop participants for an intellectually stimulating workshop, and to peer reviewers for kindly responding to requests at very short notice. We wish to single out in particular, Professor Muna Ndulo, who gave the keynote address, for making time to assist the workshop in memory of his old colleague and friend.

The workshop that led to this issue would not have been possible without the commitment and support behind the scenes of a number of colleagues at the Faculty of Law and the International Academic Programmes Office of the University of Cape. We in particular wish to thank, among many others, Ms Faldielah Khan, Ms Lisa Allison and Ms Felicity Mashodi for their support often beyond the call of duty.

Editors

ÉDITORIAL

Nous invitons nos lecteurs à l'édition 2014-2015 de la *Revue Juridique de la SADC*. Conformément à la tradition de la Revue, nous avons compilé des articles parfaitement bien rédigés et argumentés qui traitent des questions pertinentes qui concernent et affectent collectivement les pays de la Communauté de développement d'Afrique australe (SADC). La clef de voûte des articles contenus dans cette édition sont des exposés présentés dans le cadre de l'Atelier organisé en l'honneur du professeur Bill McClain par le Président de la Fondation Nationale de la Recherche (NRF) sur le Droit Coutumier, les Valeurs Autochtones et les Droits de l'Homme à l'Université du Cap, en collaboration avec le Directeur du Bureau pour les Programmes Académiques Internationaux de l'Université du Cap et de la Revue Juridique de la Communauté de développement d'Afrique australe. Les autres articles étaient soit présentés dans le cadre de la Série de Séminaires Annuels portant sur les Systèmes Juridiques de la SADC, soit ils constituaient des réponses à notre appel annuel à publication.

Depuis ses débuts en 1992, la Communauté de développement d'Afrique australe a continué à accumuler un nombre croissant de normes étayées par le Traité fondateur. Cette législation de la SADC comprend divers protocoles, la jurisprudence élaborée par le Tribunal de la SADC ainsi que d'autres normes. Cependant, au niveau national, les systèmes juridiques des Etats membres de la SADC sont constitués d'un mélange de lois importées, de la législation nationale ainsi que de différents systèmes de droit coutumier. Cette combinaison de divers systèmes juridiques pose des difficultés au sein des juridictions nationales et au niveau régional en ce qui concerne l'élaboration d'un cadre pour l'harmonisation des règles. Pour parvenir à l'intégration entre les Etats membres de la SADC, il doit y avoir une certaine forme d'harmonisation des règles dans toute la région. Il est donc impératif pour nous de comprendre l'interaction de ces règles au niveau national afin d'identifier les points de convergence et de divergence dans le but de rechercher une harmonisation.

La *Revue Juridique de la SADC* se réjouit tout particulièrement d'avoir pris part à l'atelier qui était organisé à la mémoire et en l'honneur du professeur Bill McClain qui a eu à enseigner le droit foncier et le droit coutumier africain dans plusieurs universités d'Afrique australe et ailleurs en Afrique, notamment en Afrique orientale et occidentale. Cet atelier a porté sur le thème intitulé "**L'interaction entre les droits fonciers coutumiers et le pluralisme juridique**". En tant qu'une Revue qui vise à propager l'élaboration de la jurisprudence régionale dans la Communauté de développement d'Afrique australe, nous avons saisi l'occasion de prendre part à un atelier qui a traité des questions du pluralisme juridique dans le cadre de droits fonciers coutumiers. Alors que l'objectif de la Revue a toujours été de mettre l'accent uniquement sur les normes, règles et traités régionaux, plutôt que sur les lois des Etats membres de la SADC, une compréhension du conflit intrinsèque des lois qui survient au sein des Etats membres de la SADC en raison du pluralisme juridique est indispensable au processus d'élaboration ou d'harmonisation des

normes régionales au sein de la Communauté de développement d'Afrique australe. Nous prions donc nos lecteurs de se concentrer soigneusement sur les arguments examinés dans l'édition de la Revue parue cette année en vue de renforcer la jurisprudence régionale dans la Communauté de développement d'Afrique australe.

Nous sommes très reconnaissants envers un certain nombre de personnes et d'organisations qui ont contribué à ce numéro.

Nous sommes profondément reconnaissants envers le sponsor de la Revue, la Konrad Adenauer Stiftung (KAS) pour son soutien indéfectible. Nous apprécions tout particulièrement l'intérêt et l'engagement personnel du Dr Bernd Althusmann, le représentant de KAS pour la Namibie et l'Angola et de son collègue, M. Dennis Zaire. De même, nous reconnaissons avec gratitude l'encouragement et le soutien des Administrateurs de la *Revue Juridique de la SADC*, notamment à travers le professeur Nico Horn qui a joué un rôle important dans notre succès à long terme. Comme toujours, Mme Michelle Govender, l'éditeur de Juta et son équipe technique ont fourni des conseils précieux qui ont rendu possible cette nouvelle édition ainsi que les éditions précédentes.

Nous avons une plus grande dette intellectuelle envers la professeure Chuma Himonga, Présidente de la NRF en droit coutumier à la Faculté de droit de l'Université du Cap. Elle a limité la portée de l'atelier qui a fourni des orientations aux intervenants ainsi que la base de discussion.

Nous sommes également reconnaissants envers la famille McClain et, plus particulièrement, envers Mme May McClain pour leur soutien au projet. Maître Vusi Pikoli a, en sa qualité de représentant de la famille au moment du lancement de l'atelier, donné le ton à la commémoration en l'honneur de son ancien professeur, à laquelle Bill McClain aurait bien voulu donner son approbation. Sa Majesté le Roi Letsie III, un autre des élèves de Bill, était représenté par le professeur Nqosa Mahao et était une source d'inspiration pour les participants à l'atelier.

Le soutien financier du professeur Alexander McCall-Smith, de M. Sam et de Mme Fazila Montsi ainsi que le fonds alloué par la NRF pour encourager la recherche sont grandement appréciés. En plus de son soutien financier, le professeur McCall-Smith s'est très aimablement souvenu de son vieil ami en lui rendant un vibrant hommage. Nous sommes également reconnaissants envers le professeur Robert Edgar, un autre ami de longue date de Bill McClain pour ses hommages.

Nous sommes également profondément redevables aux présentateurs, aux participants à l'atelier pour la tenue d'un atelier intellectuellement stimulant, ainsi qu'aux pairs examinateurs pour avoir bien voulu répondre aux demandes à très brève échéance. Nous tenons à remercier tout particulièrement le professeur Muna Ndulo, qui a prononcé le discours liminaire, d'avoir pris le temps d'apporter son assistance à l'atelier à la mémoire de son ancien collègue et ami.

L'atelier qui a abouti à la publication du présent numéro n'aurait pas été possible sans l'engagement et le soutien dans l'ombre d'un certain nombre de collègues de la Faculté de droit et du Bureau pour les Programmes

Académiques Internationaux de l'Université du Cap. Nous tenons tout particulièrement à remercier, entre autres, Mme Faldielah Khan, Mme Lisa Allison et Mme Felicity Mashodi pour leur soutien qui souvent va bien loin au-delà de leurs véritables devoirs.

Les éditeurs

EDITORIAL

Boas-vindas aos nossos leitores e às nossas leitoras à edição 2014-2015 da Revista Jurídica da SADC. Mantendo a tradição da Revista, reunimos artigos escritos e argumentados excelentemente, que lidam com questões pertinentes que afectam colectivamente os países da Comunidade para Desenvolvimento da África Austral (SADC). O núcleo dos artigos nesta edição consiste de ensaios apresentados na Oficina em Memória de Bill McClain organizada pela Presidente da *National Research Foundation (NRF- Fundação Nacional de Pesquisa)* sobre Lei Consuetudinária, Valores Indígenas e Direitos Humanos na Universidade de Cape Town, em colaboração com o Director do Escritório do Programa Académico Internacional, Universidade de Cape Town e a Revista Jurídica da Comunidade para Desenvolvimento da África Austral. Os restantes artigos foram apresentados durante a Série de Seminários Anuais da Lei da SADC ou foram uma resposta à nossa chamada anual para publicação.

Desde o seu encetamento em 1992, a Comunidade para Desenvolvimento da África Austral tem continuado a acumular um crescente corpo de normas assentes no Tratado originário. Tal lei da SADC inclui vários protocolos, jurisprudência desenvolvida pelo Tribunal da SADC e outras normas. Contudo, a nível nacional, os sistemas jurídicos dos membros estados da SADC incluem uma mistura de leis importadas, legislação doméstica e vários sistemas de lei consuetudinária. Esta mescla diversificada de sistemas jurídicos apresenta desafios dentro de jurisprudências nacionais e a nível regional em termos de se desenvolver um quadro para harmonização de regras. Para se atingir integração entre membros estados da SADC, tem de haver alguma forma de harmonizar as regras através da região. É, portanto, imperativo que entendamos a interacção destas regras a nível nacional para identificarmos áreas em comum e de divergência para tentar encontrar harmonização.

A Revista Jurídica da SADC está especificamente encantada por ter sido parte da oficina que foi organizada em comemoração e em honra do Professor Bill McClain que ensinou Terra da Lei e Lei Consuetudinária Africana em várias universidades da África Austral e noutras partes de África, particularmente na África Oriental e Ocidental. A oficina foi intitulada “**A Interacção de direitos consuetudinários sobre a terra e pluralismo jurídico**”. Como uma Revista que tenta propagar o desenvolvimento de jurisprudência regional na Comunidade para Desenvolvimento da África Austral, saltámos à oportunidade de participar numa oficina que explorou questões de pluralismo jurídico no contexto de direitos consuetudinários à terra. Embora tenha sempre sido o objectivo da Revista focar-se somente em normas, regras e tratados regionais e não em leis dos membros estados da SADC, é vital uma compreensão do conflito inerente de leis dentro de países membros da SADC que resulta do pluralismo jurídico, para o processo de desenvolver ou harmonizar normas regionais dentro da Comunidade para Desenvolvimento da África Austral. Imploramos, portanto, aos nossos leitores e às nossas leitoras que considerem cuidadosamente os argumentos examinados nesta

edição deste ano da Revista, visando fortalecer a jurisprudência regional na Comunidade para Desenvolvimento da África Austral.

Estamos imensamente gratos a um número de pessoas e organizações que tornaram possível esta edição.

Estamos muito agradecidos aos financiadores da Revista, Konrad Adenauer Stiftung (KAS) pelo seu apoio contínuo. Apreciamos particularmente o interesse pessoal e o compromisso do Dr Bernd Althusmann, o representante da KAS na Namíbia e em Angola e o do seu colega, o Sr. Dennis Zaire. Semelhantemente, reconhecemos com gratidão o encorajamento e apoio dos membros do Concelho Directivo da Revista Jurídica da SADC, particularmente através do Professor Nico Horn que tem sido decisivo no nosso contínuo sucesso. Como sempre, a Sra. Michelle Govender, da casa editor Juta e a sua equipe técnica têm dado direcção inestimável que permitiu que esta e outras edições vejam a luz do dia.

Temos uma dívida intelectual enorme à Professora Chuma Himonga, a Presidente da *NRF* em Lei Consuetudinária na Faculdade de Lei, Universidade de Cape Town. Ela delineou o escopo da oficina que deu guia aos ensaios dos/as palestrantes e formou base para discussão.

Também estamos gratos à família McClain, particularmente à Sra May McClain, pelo seu apoio ao projecto. O Advogado Vusi Pikoli, como representante da família no lançamento da oficina, estabeleceu o tom de recordação do seu velho professor, que Bill McClain teria aprovado. Sua Majestade King Letsie III, outro dos estudantes de Bill, foi representado pelo Professor Nqosa Mahao e foi uma fonte de inspiração para os/as participantes na oficina.

O apoio financeiro do Professor Alexander McCall-Smith, do Sr Sam e da Sra Fazila Montsi e do fundo de incentivo para pesquisadores avaliados pela *NRF*, é reconhecido com gratidão. Além do seu apoio financeiro, o Professor McCall-Smith bondosamente lembrou o seu antigo amigo com um tributo brilhante. Estamos igualmente gratos ao Professor Robert Edgar, outro velho amigo de Bill McClain, pelo seu tributo.

Estamos também altamente endividados aos apresentadores e às apresentadoras e participantes na oficina, por uma oficina intelectualmente estimulante, e aos revisores paritários por terem respondido gentilmente a pedidos de validação num prazo muito curto. Queremos especialmente mencionar o Professor Muna Ndulo, que deu o discurso de abertura, por ter criado tempo para assistir a oficina em memória do seu velho colega e amigo.

A oficina que levou a esta edição não teria sido possível sem o compromisso e apoio atrás das cenas de um número de colegas da Faculdade de Lei e do Escritório para Programas Académicos Internacionais da Universidade de Cape Town. Entre outros e outras queremos particularmente agradecer a Sra. Faldielah Khan, a Sra. Lisa Allison e Sra. Felicity Mashodi pelo seu apoio, muitas vezes para além da chamada do dever.

Editores

TRIBUTE: PROFESSOR WILLIAM TILDEN MCCLAIN 1923-2011



Professor McClain began his legal profession in Indiana. Soon after graduating from Law School, he worked at the Workers' Compensation Commission and then went on to work with the Illinois Attorney-General's Office in Chicago.

In 1959 he left the United States for the UK to study at the School of Oriental and African Studies (SOAS) at the University of London. At SOAS, his research interest was African Customary Law. A year later, he travelled to Africa to undertake field research which spanned from Kenya to Lesotho (then Basothuland). This marked the beginning of a lifelong commitment and relationship with law and Africa.

His teaching career spanned four decades; lecturing at the Universities of Malawi, Tanzania, Zambia, Lesotho and Swaziland; where he taught contracts, property law, land law, criminal law, African customary law and public international law. In his capacity as Professor and Dean, he oversaw countless LLM students and served as an external examiner to neighbouring law schools.

Over the decades, Professor McClain, taught some of Southern Africa's more prominent lawyers. He taught: a King, chiefs, judges, academics and politicians.

His intellectual prowess went beyond the letter of the law. He is a salacious reader, a lover of jazz, art, politics and many other disciplines. He became involved with Bush Radio, a community radio station by serving on their board for 7 years.

A husband, father, legal scholar and comrade, Professor McClain, or warmly known as Bill, dedicated his professional life imparting knowledge to thousands of African students all in pursuit of social justice.

MESSAGE ON BEHALF OF HIS MAJESTY KING LETSIE III OF THE KINGDOM OF LESOTHO IN HONOUR OF PROFESSOR BILL MCCLAIN

His Majesty King Letsie III is truly humbled by the invitation extended to him to open this august Workshop and participate in its deliberations. As some of us may know, King Letsie was Professor McClain's student. Moreover Professor McClain served in several capacities to His Majesty, the late King Moshoeshoe II, with whom they developed an enduring friendship, mutual respect and admiration. The King would have wished to attend in person to once again reconnect with Professor McClain's family, some of the King's former peers during his university days and to draw wisdom from the very relevant topics of our times to be discussed in this Workshop. Regrettably, the Workshop coincides with pressing matters of statecraft taking place this week in the Kingdom of Lesotho. The King therefore sends his warm greetings and good wishes to the Organisers of the Workshop, all Participants and the McClain family, especially to Aunt May, the children and grandchildren on this auspicious occasion.

Professor William Tilden McClain was born in Shelbyville, Indiana in the United States in 1925 and lived to a ripe age when he passed on in 2011. His long life parallels his illustrious career straddling three continents: the Americas, Europe and Africa. After completing his LLB at the University of Louisville in 1950 he rapidly rose through the public service to become Deputy Attorney-General of the State of Indiana between 1951 and 1953 and went on to hold the position of the Commissioner of the Industrial Board of Indiana until 1957. His ever enquiring mind and urge to learn drove him to leave the public service to undertake postgraduate Legal Studies at Indiana University between 1957 and 1959. I believe it was the same studious mind that made him leave his country of birth, the USA, as he set off to commence studies at the University of London's SOAS in the United Kingdom. While initially he intended to embed himself in Oriental Studies, he quickly found himself drawn to African Studies. I suppose that this was not a difficult decision for him to make. In 1959 when he arrived at SOAS the metaphorical winds of change heralding the Decolonisation Wave were striking the shores of the African Continent with unstoppable ferociousness. For an activist scholar that Bill would be unveiled to be, he would have come to the inescapable conclusion that this young continent emerging from a long haul of colonial clutches, subjugation and underdevelopment, needed his services more. And so he threw himself into the study of what for many must have been exquisite subjects such as African Legal and Judicial Systems, African Law of Family, Land, Succession and Conflict of Laws. His niche as a scholar and sought-after practitioner was thus determined as later several African states would draw

on his considerable knowledge in these fields as they navigated the redesign and transformation of their systems in the post-colonial era.

While still at SOAS as a student, he doubled as a Research Officer in the Restatement of African Law Project which provided him with the opportunity to conduct field research on Customary Law in Botswana, Swaziland, Lesotho, Zambia, Tanzania and Malawi. His love for the region was formed in those ten months of traversing the sub-continent.

Prof McClain was interviewed personally by then Prime Minister of Nyasaland (later President of Malawi) Dr Hastings Kamuzu Banda for the position to found and head the Law School of the contemplated University of Malawi. His stay in Malawi was however short as he left the country in 1963, barely a year later. From Malawi he plied his trade in Tanzania as Legal Secretary of the Conference on Local Courts and Customary Law and as Visiting Lecturer at the University of Dar es Salaam. Subsequently he lectured at the University of Zambia and for a couple of years was a member of the Land Commission of that sister country.

Uncle Bill, as he was reverently known to us, his students, assumed duty at the National University of Lesotho in 1977 and stayed until retirement after 15 long years. Post-retirement he took a teaching contract at the University of Swaziland. At the National University of Lesotho he rose to the rank of Associate Professor and at various times held positions of Head of Department and Dean of the Faculty of Law. Among scores of students he taught were young men and women from Namibia, Zimbabwe, Mozambique, Botswana, Swaziland, Uganda, Kenya, South Africa and of course Lesotho herself. He taught subjects such Criminal Law, The Law of Property, Criminology and Environmental Law. A soft-spoken, unassuming and generous man, Uncle Bill endeared himself to his students and colleagues with his down-to-earth and accessible disposition.

Extra-curricular, Professor McClain with the likes of John Bardill, Sam Rugege and other progressive staff would without fail devote two hours every Thursday evening at a seminar forum known as the Social Science Study Group (SSSG) where select topics in Political Economy would be dissected. In fact SSSG was organised in conjunction with progressive student activists such as the late Mzimukulu Gwentse, the late Dr Judy Kimble, Ajulu Rok, Sehoai Santho, Shiweta Hango and many more. You would also occasionally spot Uncle Bill quietly slipping in and listening intently at discourse at another progressive student forum variously styled "Learning" or "Lenin Square" which was modeled on the London Speaker's Corner. At this forum, which took place during the lunch hour, global current affairs was the diet of debate and Professor McClain not only seemed to enjoy the orations of students, but also their knowledge of intricate global affairs.

It was this flexibility totally to enmesh himself with students; his humility to see himself as one with them; and this rare ability even in class to engage without displaying even an iota of superiority of either knowledge, age or status that, I believe, made Bill McClain such a great human being and such an admired teacher. In what I hold to be an accurate description of Uncle Bill, his former mentor and colleague, Professor James Read, wrote of him as a

“sympathetic and thoughtful teacher with a real concern who ... calls forth feelings of warmth and loyalty from students and colleagues alike”. I must hasten to add that Uncle Bill shared some of these traits with his dear wife, Aunt May. Their house on campus was where many of the students, especially those of them who made the refugee community, turned to when they needed parental comfort and care.

The people of Lesotho remember Professor McClain with fond memories for the service of dedication and selflessness he rendered the country beyond the university also. For many years he served important national institutions loyally. On account of his expertise in Criminology and Humanitarian Law for many years he served Their Majesties King Moshoeshoe II and King Letsie as a member of the King’s Pardons Committee. Lesotho also put his considerable knowledge of Customary Land Law to good use as for those many years he served as an Assessor of the Land Tribunal.

Prof McClain had a gift of foresight and innovation. In an article published in 1985 titled “Lesotho’s Criminal Law: South Africa’s Common Law or Lesotho’s Penal Code?”, he initiated the debate on why Lesotho should develop its own Penal Code. He wrote that: “It (was) difficult to escape the conclusion that the absence of a Lesotho Penal Code depend(ed) more on historical accident than any supposed virtues of the South Africa-derived unwritten criminal law”. Always impatient with inaction, he set forth drafting the Code. In 1987, as a young man still trying to steady my feet in academia, I had the singular privilege when he co-opted me to work with him together with two colleagues, Professor Alexander “Sandy” McCall Smith and a distant relative of Bill, John McClein, both of the University of Edinburgh Faculty of Law on a project to develop Lesotho’s Penal Code. Needless to say that the concept of a Penal Code and the product were fiercely opposed by some legal practitioners in Lesotho who, strange as it may sound, thought that a Penal Code would take away their lawyering businesses. Fortunately almost twenty five years later the Parliament of Lesotho enacted the Penal Code Act, 2010. And so Professor McClain’s efforts were not in vain. The Penal Code Act bears all the hallmarks of the original work he had lead in the 1980s. Without a doubt this critical milestone in the development of the law in Lesotho is a living tribute to his foresight and scholarly activism.

At his demise at the ripe age of 86 Professor McClain had dedicated almost fifty years of his humble and yet inexorably committed life having served five of SADC member countries directly and several more indirectly. He had chosen to forego the comforts and privileges of the First World life of his country of birth to devote to the development of our region and, in particular, to the nurturing of its intellectual resources. Above all, he selected this region as his permanent home and final resting place. For this, the entire region is infinitely grateful to Professor McClain and to his family.

Against this background, with its focus on customary law rights in land this Workshop is such a fitting tribute to the life of Professor McClain for this is an area his name will remain forever associated with. An overview of his research focus in his earlier life leaves one struck by how ahead of the times he was. His wide research included themes such as: “Recent changes

in African Local Courts and Customary Law”; “The legal position of women and children under customary law”; “The rights of widows under customary law”; “Women’s rights”; “Who owns land” and “Problems in reform of the law of succession”.

I note that some of these themes in one form or the other shall be discussed in this Workshop. In a sense this Workshop is very timely because issues of gender, justice, the rights of indigenous peoples, reform and transformation and legal pluralism remain perennial challenges undergirding the so-called land question in all jurisdictions. I am sure participants are conscious of the fact that these questions warrant the search for answers not only within, but also beyond the logic of the ideology of modernity and developmentalism. Indeed they challenge the interrogation of epistemological frameworks within which we probe for answers for real people in real time. In this regard it is particularly gratifying and inspiring to note the breath of geo-political experiences the Workshop will draw from, providing as it does truly useful comparative lessons. I have no doubt that participants will be hugely intellectually enriched by this Workshop. Allow me therefore to wish the Workshop fruitful deliberations.

It is now my privilege and pleasure on behalf of His Majesty King Letsie III to declare the Workshop on The Interplay of Customary Law Rights in Land and Legal Pluralism open.

Professor Nqosa Mahao

Vice-Chancellor, National University of Lesotho

MESSAGE FROM PROFESSOR ALEXANDER MCCALL SMITH

I am particularly delighted and honoured to be able to pay a brief tribute on this occasion to one of the greatest men I ever knew, Professor Bill McClain.

Where did his greatness lie? It lay, I think, in his fundamental sense of justice. A sense of justice is not necessarily something that one can work out in a theoretical way – it is much deeper, more intuitive than that. You have to *feel* for the other person, the victim of injustice, the downtrodden, the oppressed, the small and vulnerable. Bill McClain felt all that. He knew what was right. He knew that unfairness was a stain that could not be ignored. He knew that the weak needed help, through the law, to enable them to lead a decent life. All of that was very clear to him, and he made use of that insight, I think, every day of his life.

The presence of such people in the legal firmament is a great good. This is particularly so when they devote their lives to the education of those entering the legal profession. In this way they provide an example of what a good lawyer should be: not somebody who uses his or her skills to secure some further advantage for the already-advantaged, but one who helps those who have little to achieve their fair share. That, surely, is a noble goal and Bill McClain, whose memory this seminar and this publication now honour, did all that. Those who attend the seminar and those who read these papers will, I think, have this thought in their minds: this good man, this adopted son of Africa, is still with us. He is still here.

MESSAGE FROM PROFESSOR ROBERT EDGAR

I wish I could join you for this occasion because Bill and May McClain have been cherished friends for many decades. Bill was an inspiration – and a source of curiosity – to me because he, like me, was American-born and his life became intertwined with Africa. Bill came from what we call middle America, a belt of mid-western states that are generally very conservative. The expectations for a young man like Bill following World War II were that he would follow a conventional path in both his personal and professional lives. For someone trained in the law as he was, it was assumed that he would join the establishment and not rock the boat. But Bill looked at the United States in an unconventional way. He was dismayed at its deep-seated racism and inequality (and sadly they are still with us) and he was critical of how the American government stumbled and rumbled around the world using the Cold War as a pretext for intervening in countries and propping up repressive regimes. He was also inspired by freedom movements in Africa. As many African countries were receiving their independence in the late 1950s and early 1960s, he set off for the storied School of Oriental and African Studies in London to get a better understanding of these momentous changes. There were other Americans who were following his path and, like Bill, they developed a passionate relationship with the continent.

Then Bill began traveling on the continent and that is where his life took a momentous change. The man with the rugged looks of John Wayne (but not Wayne's politics) met the love of his life, a beautiful Swazi princess from the kingdom of Bedford. After they married, they were to lead a peripatetic life in the coming decades with Bill teaching law at universities in Tanzania, Zambia, Lesotho and Swaziland. And their lives became bound up in the freedom struggle in South Africa.

I met Bill and May at the National University of Lesotho in 1983 or 1984. At Roma most faculty members lived at homes on campus, and we often saw each other as well as our students who lived in nearby dorms. I often look fondly back on my years at NUL because they were some of the most intense but rewarding years of my life. Because resources at the university were scant, you often had to think creatively about your teaching, but we were blessed with a challenging group of students who kept us (the faculty) on our toes. I marveled at how many different law courses Bill taught. Living in a country surrounded by the apartheid regime, you were often confronted with hard choices about your beliefs and commitment that you might have waffled on in a different environment. The university was a place where we were confronted with issues – student strikes, goon squads beating up students, South African raids, expulsions of students from the campus and the country, and a coup – were played out in front of us.

I never had any doubt about where Bill stood when it came to apartheid. I have observed that many academics can be detached bystanders. They say the

right things, but they are noticeably absent when it comes to putting their lives or their beliefs on the line for a cause. You never had to wonder about where Bill's loyalties were, and it is not surprising that Bill and May's home was a place of refuge for anyone who wanted a cup of tea and some stimulating conversation about politics. It is no wonder that many graduates of NUL drew and still draw inspiration from their examples.

We are paying our tributes to Bill for his courageous commitment to social justice, but I would also like to touch on his commitment to May and their children. Although May does not like to call attention to herself, she shared the same commitments as Bill and put her life on the line – I would like to hear her stories some time. I am aware of the remarkable network of friends she cultivated over the decades. As a historian who is always on the hunt for people to interview, I have repeatedly turned to May to locate people she knew around the region.

I find it hard to say Bill's name without saying May's as well. They were inseparable. Whatever challenges their children faced – and there were many of them – they were there for them. Bill was at his best when he could bring his legal skills to bear to sort out problems. Although he could be the imperious patriarch at times, he also doted on his kids. I remember calling Bill and May one Christmas day after they settled in Cape Town. When Bill came on the phone, he chirped about the fact that all his chickadees were with them.

There are lots of things that I could add to my presentation – the orange Volkswagon Beetle that accompanied them around the region, Bill's passionate love of books that threatened to take over their home (I still have a book on Muslim civilisation that Bill loaned me, but May would kill me if I brought it to her now); his love of jazz; and his obsession with cricket that came late in his life. One of their few luxuries was satellite TV. Bill would have watched cricket 24 hours a day except that he was equally obsessed with the internet).

Let me close by reciting a few lines of poetry from one of my favorite American poets, Robert Frost. I know that some South African leaders are fond of turning to the Irish poets for inspiration, but when I think of the path that Bill took in his life, I was instinctively drawn to Frost's "The Road Not Taken" about the consequential choices we make that change not only our own life but also the lives of others. Frost ends his poem with these lines: "Two roads diverged in a wood, and I, took the one less traveled by. And that has made all the difference."

We are all the richer for the less traveled path that Bill took.

THE INTERPLAY OF CUSTOMARY LAW RIGHTS AND LEGAL PLURALISM*

Muna Ndulo**

Professor of Law, Elizabeth and Arthur Reich Director, Leo and Arvilla, Berger International Legal Studies Program, and Director of the Institute for African Development Cornell University

As observed in the conference abstract, legal pluralism poses real challenges for states in the Southern African region and indeed in the rest of Africa as well. In almost all African countries the law of the country is composed of customary law, the common law/civil law/Roman and Dutch and legislation enacted by both the colonial and post-colonial Parliaments.¹ In the colonial period, customary law was administered by traditional/local courts. The courts' jurisdiction was limited to situations where both litigants were Africans. The courts were also limited in terms of the law they could apply by the repugnancy clause. Along with this formalistic dualism between the common law and customary law courts systems, there were vast functional and procedural disparities between the two systems of law. For example the customary courts followed a more informal procedure i.e. no lawyers were available in customary courts nor were technical rules of procedure followed. The decisions were recorded in summary form and almost no precedential value was attached to decisions. At independence many African states maintained a dualist system of customary law and the common/Civil law, but integrated their court systems. The former traditional/local courts were placed at the lowest strata of the court system. The integration marinated the differentiation in substantive law administered by the different courts. No state reverted solely to a customary system and rejected the common/civil law.

In a typical African country, the great majority of the people conduct their personal activities in accordance with and subject to customary law.² Customary law is largely ethnic in origin, and usually operates only within the area occupied by the ethnic group or in disputes where at least one of the parties to the dispute is a member of the ethnic group. It is often thought of as indigenous to the people, based on 'immutable tradition'. However this is misleading. In their book, Mann and Roberts provided a more nuanced explanation of customary law when they stated: 'when Europeans conquered Africa they encountered populations with well-established indigenous and

* Keynote address, Bill McClain Memorial Workshop organized by the National Research Foundation (NRF) Chair on Customary Law, Indigenous Values and Human Rights at the University of Cape Town.

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¹ In the former British colonies the common law was introduced by the English Law (Extent of Application) Act, Cap. 11, 2 Laws of the Republic of Zambia (2002) s 2. See also: Church, 'The Common Law and Zambia', (1974) 6 *Zambia Law Journal* 1; Allot, *New Essays in African Law* (1970) at 21-27.

² In the case of Zambia, an AFRONET study concluded that 'of the five rugs of the judicial power in Zambia, comprising the Supreme Court, the High Court, the Industrial Relations Court, the Subordinate Courts and the Local Courts, it is the latter which play an important part in the settlement of disputes of the majority of the population'. AFRONET, *The Dilemma Of Local Courts In Zambia*, Lusaka, (1998).

Islamic system of law. Conquest did not destroy these systems, although it often subordinated them to metropolitan legal traditions...Indigenous law and Sharia law persisted alongside European civil, criminal, military and administrative law. In addition, the colonial period gave birth to “customary” law, regarded by Europeans as indigenous law, but in fact invented by Africans and Europeans under colonialism’.³ Customary law is not a single, static legal regime based on unchanging tradition, but was and still is ‘living law’ based on an ever evolving legal system which is changing as social and economic conditions change.⁴ African customary law has its sources in the inter-generational traditions and customs of the people. Customary law continues to have significant impact in the areas of land holding, personal law, in regard to matters such as marriage, rights within the family, inheritance and traditional authority.⁵ In recent times the challenges pluralism poses in the area of land rights – such as ownership, access to land and its resources, the agency of traditional authorities in land management and allocation have been exacerbated because of the increased demand for oil, bio fuels, mineral resources and food and has led to the phenomenon of land grabbing. It is estimated that as of 2012 corporations world-wide had invested an estimated fourteen billion dollars of private capital in farmland and agriculture infrastructure.⁶ These investments reflect land deals that cover an area of nearly 1,148 million acres.⁷ Of this land, approximately two-thirds were acquired in Africa. Countries such as Sierra Leone and South Sudan have sold 32% and 10% of their landmass respectively.⁸

It is widely acknowledged that in its present form customary law is distorted and has been influenced by its recent encounter with apartheid and colonial rule.⁹ Various systems of customary law have been affected by inter marriages among tribes and urbanization. In *Alexkor Limited v Richtersveld Community* the South African Constitutional Court observed that ‘although a number of textbooks exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied’.¹⁰ In its application, customary law is often discriminatory especially in relation to capacity of women in areas

³ Mann & Roberts, *Law in Colonial Africa* (Heinemann 1991) at 8.

⁴ Ndulo, ‘The Changing Nature of Customary Marriage’, in *Law in Zambia* (East African Publishing House, 1984) at 143.

⁵ Ndulo, African Customary Law, Customs, and Women’s Rights, in *Indiana Journal of Global Legal Studies* (2011) at 87, 94.

⁶ Narula, ‘The Global Land Rush: Markets, Rights, and the Politics of Food’, (2013) 49 *Stanford Journal of International Law* at 101, 111 (New York University School of Law).

⁷ *Ibid.*

⁸ Anseun, Alden Wily, Cotula & Taylor, ‘Land Rights and the Rush for Land, Findings of the Global Commercial Pressures on Land, Research Project’, International Led Coalition, January, 2012 <<http://www.landcoalition.org/sites/default/fi>> accessed on 27 April 2015.

⁹ Ndulo (n 4) at 143, 153 and Bennett, *A Sourcebook of African Customary Law for Southern Africa* (Juta 1991).

¹⁰ *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (5) SA 460 (CC).

of property ownership and traditional authority.¹¹ It tends to treat women as adjuncts to the group they belong to such as a clan, family or tribe rather than as equal with men. There is a major debate on the continued application of customary law, between human rights activists and traditionalists.¹² While traditionalists argue that customary law by promoting traditional values makes a positive contribution to the promotion of human rights and African values, activists argue that discriminatory practices in customary law undermine the dignity of women and that customary law is used to justify treating women as second class citizens.¹³ Many African constitutions, which are still based on the independence model (Lancaster), contain provisions guaranteeing equality, human dignity and prohibiting discrimination based on gender. However, the same constitutions recognise the application of customary law without providing a mechanism for the resolution of conflicts between some customary law and human rights norms where these arise.¹⁴ This results in conflicts between human rights and customary law norms.

A fundamental question that arises is how to reform customary law so that norms that discriminate against women in such areas of the law as land allocation, access to resources and traditional authority can be eradicated. A strategy is needed because opposition to reform by those who benefit most from maintaining and abusing the customary system as well as from political players should not be underestimated. There are also those that see customary law as part of the African identity that should not be compromised by what they perceive as western influences. Approaches to the reform of customary law can be divided into three. The first approach should be ensuring that African states adopt both international and regional human rights instruments that outlaw all forms of gender discrimination. These instruments lay a foundational framework within which women's rights can be advanced. The second approach should be to ensure that African states incorporate into their national constitutions and legislation human rights norms contained in the human rights instruments they sign on to.

The apartheid regime and colonial administrations recognised customary law and its institutions.¹⁵ Human rights protections did not arise in this period as apartheid and colonialism were premised on the most grotesque violation of human rights. The post-independence constitutions recognised customary

¹¹ Bennett (n 9); Bennett, 'The Compatibility of African Customary Law and Human rights' 1991 *Acta Juridica* 18 at 18-35 and Mwambene, 'Marriage Under African Customary Law in the Face of Bill of Rights, International Human Rights Standards in Malawi' (2010) 10(12) *AHRLJ* 78 at 82.

¹² *Ibid.*

¹³ Rwezaura, 'Traditionalism and law reform in Africa' 539 (January 28 1983), paper presented at a seminar jointly arranged by the Fundamental Rights and Personal Law Project, Center for Applied Social Sciences, and the Department of Law University of Zimbabwe (On file with the author).

¹⁴ Constitution of Zambia, 1991, s 23(1) provides: 'Subject to clause (4), (5), (7) a law shall not make any provision that is discriminatory either of itself or in its effect'. Clause 4 states: 'Clause (1) shall not apply to any law so far as that law makes provision – (b) with respect to persons who are not citizens of Zambia; (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (d) for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons'.

¹⁵ Himonga & Bosch, 'The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?' (2000) 117 *SALJ* 306.

law together with the common law as sources of national law. Unfortunately, post-independence constitutions did not require customary law to conform to human rights norms of non-discrimination against women. The constitutions contained a bill of rights which guaranteed human rights to all on the basis of equality between men and women while at the same time immunising customary law against human rights scrutiny. This has changed with the post-democratisations constitutions. The new constitutions do not immunise customary law from human rights norms. For example the 1985 Uganda Constitution in Article 33 provides that '(1) women shall be accorded full and equal dignity of the person to men...;(4) women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities; (6) laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited by this constitution'.¹⁶ Similarly, the Constitution of South Africa provides that, 'the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'.¹⁷ The 2010 Kenyan Constitution provides that 'traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights and that the Bill of Rights trumps customary law norms that conflict with constitutional provisions'.¹⁸ The post democratisation approach is informed by international and regional human rights norms that outlaw discrimination among them: The Universal Declaration of Human Rights; the Convention¹⁹ on the Elimination of all forms of Discrimination;²⁰ The Civil and Political Covenant;²¹ The Convention on the Elimination of all Forms of Discrimination Against Women;²² The African Charter on Human and People's Rights²³ and the Protocol to the African Charter on Human And Peoples' Rights on the Rights of Women²⁴ in Africa and the SADC Protocol on Gender which all prohibit all forms of discrimination. All African constitutions should outlaw all forms of discrimination against women without any reservations and none of them should immunise customary law against human rights provisions. There is need for constitutional provisions that declare the rights of women and reaffirm their equality with men in all respects. The guiding principle should be the equality of all human beings regardless of gender. As the Namibian High Court observed with respect to the Namibian constitution: 'A constitution with a rights framework cannot but mediate and influence traditional culture. While traditional culture forms part of an individual's identity, so does state culture, which includes

¹⁶ Article 33, Constitution of Uganda, 1985.

¹⁷ Article 211(1), Constitution of South Africa, 1996.

¹⁸ Article 159, Constitution of Kenya, 2010.

¹⁹ Universal Declaration of Human Rights, 1948.

²⁰ International Convention on the Elimination of All Forms of Discrimination, adopted 1965, G.A. Res. 2106.

²¹ International Covenant on Civil and Political Rights, 1966, 999 U.N.T.S 171.

²² United Nations Convention on the Elimination of All Forms of Discrimination Against Women, adopted 1979, G. Res/34/180.

²³ African Charter on Human and People's Rights, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

²⁴ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003, AHG/Res.240 (XXXI).

the understanding that there is a constitutional framework that represents the “emerging consensus” of values which Namibians share”.²⁵

The third major effort should be focused on legal reform of both customary law and ordinary legislation in all African countries to rid African countries of gender discriminatory laws. Reform efforts should start with a comprehensive diagnostic study of each African country’s legal system aimed at identifying laws that require reform to meet the ‘non-discrimination’ test. There are several things that a legal reform project must take account of in order to be successful. It must begin with the underlying task of figuring out which laws are in conflict with human rights norms of equality and non-discrimination. Secondly, reform must examine the social, economic and cultural developments in the affected country. Thirdly, it must understand the aspirations of the contemporary legal system and the status of the authority upon which the rule is based. Customary rules that have been undercut by the march of time and social progress should be modified or eliminated. With respect to customary law, any reform efforts must be mindful of the weapons of the traditionalists who argue that human rights norms are the product of Euro-Christian societies.²⁶ Reformers must assure the public that the human rights project is not about westernising African societies and that on the contrary, is an attempt to integrate the traditional and modern values of the African people with the concepts of human rights and dignity for all persons. The values of the customary law should be studied so that important and non-discriminatory parts are preserved and included in the law reform. Getting to the heart of the values of customary law may be a daunting task, but including those values in a new legal system free from discrimination is the best way to ensure stability, predictability, equality and continued relevance of customary law in African legal systems.

The fourth element of the project should take the fight for gender equality to the courts and the people. This suggests that we need to improve access to courts so that women can bring claims based on discrimination thereby giving opportunities to the courts to reform the law. We have to ensure that the courts interpret the law in such a way that gender equality is advanced and the people should put pressure on the courts and society to act in the interests of gender equality. Courts should be encouraged to contextualise their decisions in the prevailing social and cultural conditions as well as the goals of the justice system. Customary law like any other law is not static and is always changing to reflect how people are living today. In addition legal reform must involve educating society about the laws and what rights and obligations flow from them. Legal education should target a range of different actors, such as individuals, religious leaders, judges, traditional rulers and lawyers. Customary law cannot stand still. It does change. It is important to understand the dynamic and ever changing nature of customary law. As Man and Roberts observed: ‘In Africa, as else wherein the world, laws reflect the

²⁵ *Ex-Parte Attorney General: In re Corporal Punishment by Organs of State* 1991 NR 189.

²⁶ Ayangwe, ‘The Whittling Away of African Indigenous Legal and Judicial Systems’ (1998) *Zambia Law Journal, Special Edition* 46-67 at 48.

imperatives of changing economic, political, and social circumstances and were both transforming and transformed over stretches of time. At the time of European conquest, in most African societies, there was no single, unchanging tradition. There were, instead, contested and continuously reconstituted traditions, best understood as clusters of rules, moralities, expectations, and conflicts, which gave rise to changing regulatory practices.²⁷ Customary law's keeping up with the changing norms of society can only increase its legitimacy and role in society for the betterment of all our societies. It should not be forgotten that the common law has survived largely because it has been flexible and has changed with changing social and economic conditions. In discussing the rule of stare decisis Blackstone observed: '*yet this rule (stare decisis) admits of exception, where the former determination is most evidently contrary to reason; much more of if it be clearly contrary to divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decisions is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law, that is that it is not the established custom of the realm, as has been erroneously determined*'.²⁸ As Chief Justice Black observed in the Pennsylvania case *McDowell v Oyer* in discussing grounds for rejecting a common law norm: '*..there are old decisions of which the authority has become obsolete, by a total alteration in the circumstances of the country and the progress of opinion. Tempora mutatur. We change with times, as necessary as we move with the motion of the earth*'.²⁹ So clearly under the common law where the expectations and conditions of modern society have rendered a rule obsolete or repugnant, or offends the values of justice and equality, the courts can declare the rule inoperable.

Returning to the theme of the conference, land tenure and women's rights, we note that African customary land law is predicated in a pre-modern state. Before the rise of the modern state, people occupied land through a variety of customary systems, all without the benefit of formal land title, which as observed by Haring is a European innovation spread around the world through various legal systems.³⁰ The most common legal status of communal land in Southern Africa is that the government might hold some administrative power over the land but the land is subject to some formal requirements that the land be held for the benefit of the communal land holders. In Zambia for example the state claims title to all land in Zambia but with respect to communal land generally defers to the traditional authorities to organise and distribute the land as per customary law.³¹ This presents unique challenges in the area of land rights. As

²⁷ Mann & Roberts, *Law in Colonial Africa* (Heinemann Educational Books 1991) at 8.

²⁸ Blackstone, *The Commentaries of Sir William Blackstone, Knight, on the Laws and Constitution of England*, Vol. 1 at 69-72.

²⁹ *McDowell v Oyer* (1853) 21 Pa. St. 417.

³⁰ Haring, 'God Gave Us This Land': The Ovahimba, the Proposed Epupa Dam, the Independent Namibian State, and Law and Development in Africa, (2001) 14 *GEO. INT'L ENVTL. L. REV.* 35 at 75-76.

³¹ Mulimbwa, 'Land Policy and Economic Development in Zambia' (1998) *Zambia Law Journal, Special Edition* at 84-90.

we applaud the virtues of the customary law approach to land ownership (its communal approach to land ownership) we must find ways to accommodate the needs of the modern economy such as large-scale farming and mining activities which require individual title to land and security of tenure to be able to raise the financing required for such projects. We must also address the abuse of traditional authority by chiefs of their authority alienating huge tracks of land to land grabbers both national and foreign. Generally African customary land tenure on the whole does not recognise individual tenure. Under African tenure, land belongs to the community and only rarely to an individual. All members of the community, village or family have equal rights to land but in every case the Chief or Headman of the community has charge of the land.³² African countries at independence inherited a dual system of land i.e. the English system of free holds and lease holds on one hand and customary law on the other. The received law applied to a category of land known as state land originally intended for European settlers, while the indigenous customary law applied to land especially carried out as reserves and trust land for occupation by Africans.³³ In the customary land areas land tenure is administered under customary law. It is in this area that land grabs are taking place. Chiefs are using their power to capture communal resources in areas under their jurisdiction and alienating huge tracks of land to foreign corporations, local elites and powerful politicians. These deals are being concluded without any transparency and local consultation. Poor villagers are being forced off their lands in large numbers. The Oakland Institute has observed the land grab that is taking place is accompanied by a major 'water grab' which raises serious concerns over the future of fresh water resources when the vast areas of newly acquired land come under cultivation.³⁴ The Oakland institute suggests that this new pressure on water resources will adversely impact small farmers, and pastoralists who rely on water resources for their livelihoods.³⁵ Researchers also warn that jeopardising Africa's fragile river systems will also have political and ecological consequences.³⁶ These land grabs are happening because in many of these communities local farmers only have insecure legal title to the land i.e. most have no documents for their land. Customary legal reform in this area must therefore seek to secure land rights as well as institute transparency in land deals and ensure the establishment of consultative processes for the alienation of customary land.

Additionally there has to be reform of traditional authority. It is often forgotten that the distortion that has happened to customary law through the

³² *Amodu Tijan v Secretary to the Government of Southern Nigeria* (1921) 2 AC 399 at 404.

³³ Mulimbwa, 'Land Policy and Economic Development in Zambia', (1998) *Zambia Law Journal, Special Edition* 80.

³⁴ The Oakland Institute, 'Understanding Land Investment Deals in Africa: The Role of the World Bank Group', Land Deal Brief, December 2011.

³⁵ *Ibid.*

³⁶ *Ibid.*

agency of colonial rule did not spare traditional authorities.³⁷ Many chiefs are corrupt and authoritarian. There are three views as to what is to be done with traditional authority. One view is that the continued existence of chiefs in the age of modern liberal democracy in Africa is anachronistic. This view would call for the abolition of traditional authority. The second view is that the continued existence of chiefs is a mode of expropriating the modern into the traditional realm. The third view largely, led by anthropologists, see chiefs as necessary for the maintenance of a society structure of traditional societies in the face of rapid social change. Whatever approach is adopted, we must come to grips with the fact that these institutions can at times be oppressive, exploitative, discriminatory and intolerant. The challenge therefore is how to secure land rights for rural people and ensure that traditional structures are accountable to their people. It's only when we have guaranteed these matters that we can ensure that land in traditional society belongs to the people and that it is held by the chief in trust for the people. The chiefs are to ensure that the needs of those working and living on the land are protected and justice prevails. As we work towards these goals we must not underestimate the challenges that are inherent in the task. In Africa the national government and politicians are loath to challenge traditional leaders for fear of losing their loyalty and with it, the votes of the people under their authority.

Conclusion

In conclusion I would argue that reform of customary law and integration of customary law into the mainstream legal system is the only way to ensure that customary law endures, remains relevant and plays a role in African legal systems. Failing to reform it will relegate it to the law of the 'reserves'.³⁸ Courts can help and already are doing quite a lot as can be seen from the Botswana case of *Mmusi and Others v Ramantele and Another*.³⁹ and the South African cases of *Shilubana and Others v Nwamitwa*⁴⁰ and *Bhe and Others v Khayelitsha Magistrate and Others*,⁴¹ as well as the Nigerian Case of *Muojekwu v Ejikeme*.⁴² Courts can help but their achievements will always be limited by the case method. Under this method they are obliged to wait until cases come before them. Further the courts operate in a legal culture which might not always be conducive to speedy reform. Customary law is often unwritten, customary decisions as well (where as the basis of the common law) is a series of previous written decisions with precedential value. The common law is structured around lawyer-governed adversarial proceedings in a case, whereas customary law does not encourage the participation of lawyers in customary law proceedings and customary law trials often focus on

³⁷ Van Binsbergen, 'Chiefs and the State in Independent Zambia', (1987) 26 *Journal of Legal Pluralism* 156-166. See also Ray & van Rouveroy van Nieuwaal, 'The New Relevance of Traditional Authorities in Africa' (1996) 37-38 *Journal of Legal Pluralism* 1-38.

³⁸ Seidman, 'Law and Stagnation in Africa' (1973) 5 *Zambia Law Journal* 39-66.

³⁹ (2012) BWHC 1.

⁴⁰ 2009 (2) SA 66 (CC).

⁴¹ 2005 (1) SA 580 (CC).

⁴² (2000) 5 NWLR 402.

reconciliation, community cohesion or social redress, rather than individual claims. For example the court in *Shilubana* termed its work as ‘recognizing the development by a traditional community for its own law’ and assuming that this is true, then a court within the legal culture was able to recognise, and enforce, living cultural practice. This approach however poses some danger due to the precedential value of decisions in the common law legal culture. The danger is that in view of the *stare decisis* doctrine, such a finding may harden into a new official rule of customary law. But for the difference that the judges are local, this might not be different from what was happening in the colonial courts with the British.

The courts sometimes use assessors and experts on traditional law to help them ascertain the living law customary norms. The choice of experts and people knowledgeable to testify on customary law, still limits the voices allowed to ‘officially’ pronounce what is custom, and thus what is law. Where culture has changed in a manner that dispossesses the traditional sources of some of their power i.e. where the cultural practice itself is contemporaneously being contested or modified, as it arguably was in *Shilubana*, those typically asked to speak for custom have their own incentives to proscribe an advantageous rule than one that reflects culture. Where there is a contest within a culture as to a new norm, or the continuation of an old one, the legal culture’s search for expertise often leads to the voice of vested interests in an intra-cultural dispute, and thus the silencing of those on the other side. Given the issues raised above, it would appear that the legislature is the appropriate agency to undertake the reform agenda. Unlike the courts, the legislature can make a comprehensive analysis of the whole area of law affected and come up with a law that is neither customary nor common law but rather South Africa, Zambian and Lesotho law. The legislature’s actions can be informed by national debates which taps on a wider audience than the courts for solutions to changes in the law. That law if properly done is likely to reflect the needs of the people and advance justice for all regardless of race, gender, social standing or ethnicity. This is not to say that courts have no role in the reform of customary law. On the contrary the article supports the role of the courts. It however points out that there are limits to the court approach and that large scale reform can only be properly done by the legislature.

INTERPLAY OF THE CUSTOMARY LAW OF TESTACY AND STATUTORY REGULATION OF INTESTACY WITH RESPECT TO THE TRANSFER OF CUSTOMARY LAW RIGHTS IN LAND IN SOUTH AFRICA

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Abstract

Legal pluralism, as a feature of the legal systems in the SADC Region, presents real challenges with respect to the applicable laws to land rights. In South Africa in particular, a challenge exists with respect to the acquisition of land rights through customary testacy. Although customary testacy may not be prominently practiced in the country, its existence is acknowledged. The Interstate Succession Act and the Reform of Customary Law of Succession and Regulation of Related Matters Act have been interpreted as precluding the application of customary law of intestacy in the absence of a statutory will. Testacy as referred to in the laws is defined by the Act to mean statutory testacy. This paper however contends that the testacy capable of precluding the application of statutory intestacy law cannot be restricted to statutory testacy. The paper also contends that under South Africa's pluralistic legal system, customary law testacy can preclude the application of these statutory provisions regarding intestacy, and determine ownership rights (whether statutory or customary) pertaining to land and its resources. There are however, problems associated with this argument, such as statutory provisions that have the effect of restraining the application of customary testacy. How this is resolved reveals an intriguing interplay of land devolution under customary law, statutory limitations and constitutional influence. This paper is focused on customary testacy on land rights and its resources.

Keywords: Customary law, customary testacy, land rights, legal pluralism

I Introduction

Land has featured as an important means to achieving economic development for developing countries in the millennium development goals.¹ It is a very basic means of shelter and source of livelihood which bestows some 'sense of personal and communal' identity on the owners, as well as provides a link with their 'ancestry'.² Whether from the stand point of theories that land policies be embedded on 'social capitalism' as with the communal land tenure system

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¹ Obeng-Odoom, 'Land reforms in Africa: Theory, practice, and outcome' (2012) 36(1) *Habitat International* 161-170.

² See Home, 'Towards a pro-poor land law in Sub-Saharan Africa' in Home (ed), *Essays in African Land Law* (PULP 2011) at 25. See also Dlamini, 'Land ownership and customary law reform' in Van der Walt (ed), *Land Reform and the Future of Landownership in South Africa* (Juta 1991) 37-38. See also Bantekas, 'Indigenous land rights and claims under international law' in Chigara, *Southern African Development Community Land Issues: Towards a New Sustainable Land Relations Policy* (Routledge 2013).

practiced in Africa, or on ‘individualised tenurial system’,³ the application of indigenous laws on devolution of land rights which includes customary testacy should be recognised. Transferring land ownership through customary testacy as a customary practice safeguards an aspect of the norms of living customary law from the seeming all encompassing effect of preclusion of customary law of succession by the Reform of Customary Law of Intestacy Act. Boone alludes to a continuous drive towards ‘individualization’ in the ‘transferability of property rights in land in sub-Saharan Africa’.⁴ This drive is an example of the evolving nature of the norms of customary law and it fosters a testator’s exercise of his right to dispose his estate in land however he wants albeit with regards to customary law limitations.

Prior to the introduction of western laws into South Africa, customary law regulated land rights and transactions, including acquisitions and transfer of land rights, titles and land-based resources.⁵ One of the methods of acquisition and transfer practiced then and today is the devolution of estate.⁶ It was the main means through which land ownership was acquired before colonialism introduced other forms of acquisitions, such as acquisition through statutory allocation.⁷

In 1806, Roman-Dutch law was officially adopted in the Cape⁸ at the expense of customary law. However, customary law began to be officially applied in phases from 1849,⁹ but was subject to other sources of law that enjoyed pre-eminence.¹⁰ Between 1849 and the end of apartheid, sundry legislation that regulated the acquisition of land rights and resources, including the devolution of estate, were enacted. Among the legislations was the Proclamation 140 of 1885,¹¹ which empowered blacks to make statutory wills on certain properties in line with the applicable law in the Cape Colony.¹² Another statute worthy of mention is the controversial Black Administration Act (BAA),¹³ and the

³ ‘...in economics, particularly land economics, individualism connotes the idea that it should be possible for property rights to be privately appropriated and sold’. See Obeng-Odoom (n 1) at 162-163.

⁴ Boone, ‘Contested land rights in rural Africa’ in Lust and Ndegwa (eds), *Governing Africa’s Changing Societies: Dynamics of Reform* (Lynne Rienner Publishers 2012).

⁵ Heaton and Roos, *Family and Succession Law in South Africa* (Kluwer Law International 2012) at 25. The authors state that indigenous law was the first legal system that operated in South Africa. Invariably, it regulated land transactions.

⁶ Himonga, ‘Taking the gap – “Living law land grabbing” in the context of customary succession laws in Southern Africa’ in Mostert and Bennett, *Pluralism and Development: Studies in Access to Property in Africa* (Juta 2011) first published as *Acta Juridica* 2011 at 116.

⁷ Rwegasira, *Land as a Human Right: A History of Land Law and Practice in Tanzania* (African Books Collective 2012) at 116.

⁸ The formal cessation of the Cape by Netherlands to Britain in the Treaty of Capitulacion as contained in Bennett, ‘The conflicts of laws’ in Bekker et al, *Introduction to Legal Pluralism in South Africa* 2 ed (LexisNexis Butterworths 2006) at 17.

⁹ Which was made subject to ‘the general principles of humanity observed throughout the civilised world’. *Ibid.*

¹⁰ Rautenbach, ‘South African Common and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition’ (2008) 12(1) *EJCL* 4.

¹¹ In s 36.

¹² Bekker, *Seymour’s Customary Law in Southern Africa* (Juta 1989) at 313. There were however certain restrictions on what cannot be willed; for instance, property allotted to a house or entitled to by the house.

¹³ Act 38 of 1927.

Regulations for the Administration and Distribution of the Estates of Deceased Blacks (RADEDB)¹⁴ which applied by virtue of s 23(10) of the BAA.¹⁵

The estates of deceased blacks were separately regulated by the BAA. Section 23 of the BAA prohibited black Africans from making wills for the devolution of their 'movable house property and land'.¹⁶ Section 23(3) reads that: 'All other property of whatsoever kind belonging to a black shall be capable of being devised by will'. The regulation also alludes to a valid will.¹⁷ However, the word 'will' as used in BAA and the RADEDB was not defined. Until the provisions were repealed, they were taken to have referred to a statutory will.¹⁸ Again, s 1(4)(b) of the Interstate Succession Act,¹⁹ as amended by the Reform of Customary Law of Succession and Regulation of Related Matters Act²⁰ also applies to intestate estates '... which do[es] not devolve by virtue of a will'. The later Act defines the word 'will' to mean a statutory will. The point to this is that customary law testacy was not really acknowledged.

Customary law of succession includes testacy and intestacy. Estates of deceased blacks were basically intestate and the choice of law which applied to their estate posed some challenges. To determine what choice of law should apply in regulating their affairs required the consideration of factors like 'agreement [between the couple], the lifestyle of individuals, the type of marriage, the nature of the property such as family land, justice and equity, or a combination of all these factors'.²¹ Generally, the form of marriage entered into determined what law regulated the devolution of their estate. However, a further condition was required by the RADEDB which is that common law regarding the devolution of estates will apply to the devolution of the estates of persons who contracted marriages, or were married in accordance with Christian rites and in community of property, or had a pre-marriage contract.²² Since most natives did not comply with this requirement,²³ their estate was regulated by their respective customary law of succession which was majorly intestate. The Intestate Succession Act²⁴ applied to the intestate estate of white South Africans. It excluded the estate of blacks from its application.²⁵ New legislation and some judicial decisions regarding customary intestacy

¹⁴ GG 10601 GN R200 of 1987.

¹⁵ GN R188 of 1987. The Interstate Succession Act precluded blacks from the application of its provisions in s 1(4)(b).

¹⁶ Bennett (n 8) at 19. See ss (1) and (2) of s 23.

¹⁷ See Regulations 2, 4(1) and 6(1).

¹⁸ Since reference was made to a document and customary law wills where they exist, are usually oral.

¹⁹ Act 81 of 1987.

²⁰ Act 11 of 2009.

²¹ *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) para 225.

²² Regulation 2(c)-(e). See also Bennett (n 8) at 17 and Mamashela et al, 'The internal conflict of law and the intestate succession of Africans' (2003) 1 *TSAR* 204; *Zondi v President of the Republic of South Africa* 2000 (2) SA 49 (N); (2003) *TSAR* 201-207.

²³ *Ibid.*

²⁴ Act 81 of 1987.

²⁵ See s 1(4)(b) which provides that the estate of persons subject to s 23 of the Blacks' Administration Act is excluded from its application. Regulation 2(d) made a way out for a spouse married by way of civil or Christian rites to submit a petition to the Minister for intervention if they perceive that the application of the customary law of succession will be unfair. See also Bennett (n 8) at 20.

have abolished the application of customary law of intestacy to indigenous Africans. With the passage of the Reform of Customary Law of Succession and Regulation of Allied Matters Act, (RCLSRA) there appears to be a general presumption that where there is no statutory will, estates of indigenous Africans must devolve in accordance with the Intestate Succession Act. This, in effect, excludes all forms of customary law rules regarding the devolution of land rights and resources including the customary law of testacy which is the focus of this paper.

An estate is said to be intestate only if it is not bequeathed through a valid will.²⁶ It is assumed that a will which precludes an estate from intestacy must comply with the formalities required by the Will's Act to be valid.²⁷ This paper refutes this position. It argues that a customary law will can also preclude the application of the Intestate Succession Act, even in particular, with respect to land rights, titles and land-based resources where applicable. It also presupposes that land ownership can devolve in accordance to the wishes of the customary law testator which might be contrary to the provisions of the Intestate Succession Act. Another implication of this is that as in Common law wills, the said testator of a customary law will may provide for the application of the rules of customary law of succession in the distribution of his estate. The application of the customary law of succession must of course be made subject to constitutional provisions.

II Pluralism in South Africa – a brief narrative

South Africa, as do other countries in the SADC Region, operates more than one legal system – a feature of legal pluralism.²⁸ This is irrespective of whether or not some of the legal systems are officially acknowledged by the State.²⁹ This pluralistic feature of South Africa's legal system has evolved from the pre-colonial to the post-apartheid era. The co-existence of the Roman-Dutch law, common law, and African indigenous laws in South

²⁶ See s 1(4)(b) of the Intestate Succession Act as amended by RCLSRA.

²⁷ Act 7 of 1953; Heaton and Roos (n 5) at 203.

²⁸ This is similar to the experience in other African countries and other countries of the world that emerged under similar circumstances where there existed indigenous people and the eventual emergence of foreign control and influence. See Home (n 2) at 27. Scholars have expressed divergent views as to what really constitutes legal pluralism either from the anthropological or socio-legal standpoints. See Twining, 'Legal pluralism 101' in Tamanaha et al (eds), *Legal pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press 2012) at 112, 115. Twining explains legal pluralism as a specie of normative pluralism. Woodman puts it simply 'as the situation in which a population observes more than one law'. See Woodman, 'The development "problem" of legal pluralism' in Tamanaha et al (eds) *ibid* at 129. This definition was made with respect to the particular paper. It has been seen to operate as the co-existence of more than one legal system 'within particular communities, regions or nation' within the 'same time space'. See 114-115. See also Merry, 'Legal pluralism and legal culture' in Tamanaha et al (eds) *ibid* at 67.

²⁹ This entails the existence of various systems of African customary law in South Africa which is a feature of legal pluralism, alongside with other religious laws and the western laws. Broadly speaking, the existence of these other legal systems is a feature of legal pluralism notwithstanding the non-acknowledgment. The broad interpretation of legal pluralism entails the existence and observation of more than one legal system in a society whether or not these legal systems are acknowledged by the state. The state's acknowledgement is immaterial because it is a 'factual situation'. Nieberk, 'Legal pluralism' in Bekker (n 8) at 7, 8.

Africa is an example³⁰ of Goolam's description of a narrow interpretation of legal pluralism which suggests that a state officially recognises at least two legal systems operating within the state 'which run parallel and interact in limited, prescribed circumstances'.³¹ Here law is viewed from the positivist point of view that defines law by the norms formulated or accepted by the institutions of the state whose legitimacy is based on a 'rule of acceptance'.³² Therefore, what is law according to Goolam is that which emanates from the act of legislation, judicial precedence and official recognition and acceptance of indigenous laws. The acceptance of indigenous law in this premise is subject to the fulfilment of certain requirements.³³ Indigenous law is formally acknowledged in the South African Constitution, and may be enforced, subject only to the requirements of the Constitution.³⁴ Currently, South African state law is composed of the Constitution, Roman-Dutch law, the common law, judicial precedents, legislative enactments, official customary law that are contained in legislation, court judgments³⁵ and living customary law. These therefore constitute the state-recognised sources of the laws that regulate devolution of land as an estate of a deceased.

What the Constitution affirms as customary law is the actual normative practice of the people (i.e. living customary law), rather than official versions of customary law which may be a distortion of the actual practice of the people.³⁶ Thus, it is the actual normative practice of the people with respect to devolution of estate-comprising land that must be ascertained and enforced by the courts. The statutory regulation of succession to land actually does conflict with normative realities of customary law testacy and this results in an interface.³⁷ In the parlance of legal pluralism, the status of living customary law of succession as law is not tied to its acknowledgement as such by state institutions. Even though living customary law is part of state law in South Africa, the operation of the Reform of Customary Law of Succession and Regulation of Allied Matters Act may have relegated living customary law of succession to a status of non-state law.

³⁰ Ibid. Through its system of indirect rule, the colonial government eventually incorporated a limited form of indigenous law in order to enforce its influence and power through traditional institutions already in existence which it altered in some instance for its benefit. See Bennett, 'The conflicts of laws' in Bekker (n 8) at 17. See also Home (n 2) at 28-29.

³¹ Goolam et al, *Introduction to Legal Pluralism in South Africa* 2 ed (LexisNexis Butterworths 2006), 7 & 8.

³² These institutions include the legislature and judiciary. Bekker, *ibid.* See also Green, Leslie, 'Legal Positivism' *The Stanford Encyclopedia of Philosophy* (Fall 2009 Edition); Zalta (ed), <<http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>> accessed on 13 August 2014. This position however contradicts the reality of the existence of normative orders which are law in their own rights and are validated by the acknowledgment of the state.

³³ Van Nieberk, 'Legal pluralism' in Bekker et al, *Introduction to Legal Pluralism in South Africa* (LexisNexis Butterworths 2006) at 1-14.

³⁴ Indigenous law in South Africa is said to have transcended the repugnancy test and should only be made subject to constitutional compliance. Taiwo, 'Repugnancy clause and its impact on customary law: Comparing the South African and Nigerian positions –Some lessons for Nigeria' (2009) 34(1) *Journal for Juridical Science* 91.

³⁵ Heaton and Roos (n 5) at 25. The authors state that indigenous law was the first legal system that operated in South Africa. Invariably, it regulated land transactions at 27.

³⁶ *Mabena v Letsolo* 1998 (2) SA 1068 (T).

³⁷ Himonga (n 6) at 117-118.

III Antecedent to the current legal regime of customary law of succession

The separate regulation of the intestate estate of indigenous African people was abolished in the case of *Moseneke and Others v Master of the High Court*³⁸ by the Constitutional Court. The application of the Intestate Succession Act to the estate of black South Africans was achieved by the repeal of s 23 of the BAA³⁹ and its attendant regulation 3(1),⁴⁰ s 1(4)(b) of the Intestate Succession Act,⁴¹ and resultantly s (4)(1A) of the Administration of Estates Act.⁴² This repeal was made by the Constitutional Court in a trio of cases.⁴³ Prior to these cases, based on the segregation policy in South Africa, separate laws regulated the estates of black South Africans. The judgment in the case of *Bhe and Others v Khayelitsha Magistrate and Others*,⁴⁴ achieved this on the grounds that it fostered inequality and racial discrimination. The Constitutional Court's position was to establish 'equality and dignity' in the regulation and administration of the estate of black South Africans.⁴⁵ In this case, the father of the deceased as an heir to the estate of his son based on the male primogeniture rule sanctioned by the BAA sought to administer the estate of the deceased to the detriment of the deceased's two infant daughters who will be left destitute and homeless. The Constitutional Court abolished the male primogeniture rule, and ordered that the separate administration of the estate of blacks was discriminatory. The 1996 Constitution by its recognition of customary law as 'an original source of law' in 'its own right' and at par with the common law restored customary law to its proper place as a distinct legal system to be developed in 'its own right'.⁴⁶ This is a resounding testimony to the realisation that 'the time may have come for development discourses and agendas in Africa to recognise the way things are, and to view them from the ground level of society rather than from top-down and legal centralists' vantage points only.⁴⁷

The decision of the Constitutional Court in *Bhe* on the application of customary law of succession appeared to have created a dilemma between the application of statutory and customary law of intestacy.⁴⁸ This decision seemingly halted the application of customary law of succession by the imposition of the provisions of the Intestate Succession Act to all indigenous South Africans contrary to 'the spirit, purport and objects of the bills of rights in the Constitution which gave recognition to the application of customary

³⁸ 2001 (2) SA 18 (CC).

³⁹ Which states how estates of blacks should devolve.

⁴⁰ R200 of 1987.

⁴¹ This section precluded blacks from the application of the provisions of the Intestate Succession Act.

⁴² Act 66 of 1965.

⁴³ See *Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa* 2005 (1) SA 580 (CC) and *Bhe and Others v Khayelitsha Magistrate and Others*, supra (n 21).

⁴⁴ Supra (n 21).

⁴⁵ Bennett (n 8) at 20, 21.

⁴⁶ Section 39(2) of the 1996 Constitution of South Africa.

⁴⁷ Himonga (n 6) at 117.

⁴⁸ Ngcobo J stated in *Bhe* that '[i]t needs to be emphasised that this judgment is concerned with intestate deceased estates which were governed by section 23 of the Act only'. See ratio at 131.

law'.⁴⁹ Albeit this, since the Intestate Succession Act applies only in the absence of statutory testacy, customary law testacy is ignored thereby excluding the application of both customary law of testacy and intestacy. The Constitutional Court stated in *Bhe* that the 'order made in this case must not be understood to mean that the relevant provisions of the Intestate Succession Act are fixed rules that must be applied regardless of any agreement by all interested parties that the estate should devolve in a different way'.⁵⁰ Therefore, where a deceased made a customary law will and the family agree to implement the contents of this customary law will, the application of the Intestate Succession Act will be precluded.

African customary law continues to regulate the affairs of a vast majority of South Africans even with respect to succession and consequently devolution of land. Research findings indicate that despite the Constitutional Court decision in *Bhe*, normative practices that conflict with the court's judgment still subsists in indigenous communities.⁵¹ Recent research findings indicate that customary law testacy is practiced amongst the Indigenous African people in South Africa⁵² even though it has been stated that the concept of will may be foreign to customary law.⁵³ There is evidence that testacy is practiced under customary law.⁵⁴ To determine how frequently this is done will require some empirical studies. It is therefore more accurate to state that though will in its statutory form is foreign to customary law, the concept of will is known in customary law.⁵⁵

IV Customary law testacy

There are indications that testacy is practiced under customary law in South Africa and should have been acknowledged in the RCLSRA. These few cases indicate the existence and practice of testacy under customary law in South Africa:

In *Alfred Memani v Enoch Memani*,⁵⁶ the deceased made a death bed allotment of cattle to his second son in the presence of the son and of another witness. Though the court failed to uphold the disposition on the ground that the defendant failed to lead sufficient evidence to prove the first son's disinheritance, the court acknowledged testamentary dispositions of death bed allotments of cattle and the disinheritance of an eldest son as a customary practice which must be proved in court through facts.

⁴⁹ *Bhe*, supra (n 21) at para 109.

⁵⁰ *Bhe*, supra (n 21) at para 130.

⁵¹ See Mnisi, 'The interface between living customary law(s) of succession and South African state law' PhD thesis DPhil (2010).

⁵² This was evidenced in the presentation of research findings at the Data Validation Workshop, Chair In Customary Law, University of Cape Town which was held on 12th-13th February, 2014 at the Kramer Law Building, UCT, Cape Town.

⁵³ Bennett, *Application of Customary Law in Southern Africa* (Juta 1985) at 218.

⁵⁴ Ibid. See also Harvey, *The Law and Practice of Nigerian Wills, Probate and Succession* (Sweet & Maxwell 1968) at 43.

⁵⁵ Dadem, *Property Law Practice in Nigeria* 2 ed (Jos University Press 2012) at 266.

⁵⁶ (1930) NAC (C & O) 10.

In *Hlengwa v Ngoco*,⁵⁷ the court acknowledged the dispositions made by the deceased at a meeting he called for the distribution of his estate in the presence of witnesses. The court upheld the evidence given by these witnesses.⁵⁸

In *Mfanekiso v Maggabaza and Mfanekiso v Nohempe*,⁵⁹ the assessors used in the case affirmed in the following words that, '[i]t is custom for a man about to die who has children to call his brothers and children to give out his dying words, so that his orphans will not dispute. The custom has been followed here by Maramnewa...'.⁶⁰

In *Shandu v Qwabe*⁶¹ the court acknowledged customary testacy as a practice in customary law and stated that, '[t]he idea lying behind a final disposition is to give sons other than the heir, a modest portion of the property'. The court also referred to the session of the Native Laws Commission of 1881-1883 where the practice of testamentary disposition was extensively explored to which King Cetywayo testified narrating the Zulu practice in the narrative below:

'Question: Can a man make a deathbed disposition of his property?'

Answer: The father makes a will when he is quite strong and his intentions are carried out.'

He then explained the circumstances under which such dispositions may be investigated or questioned.

Customary law wills are usually oral because they are 'verbal directives' usually made in anticipation of death like death bed wishes. With growing literacy even amongst rural dwellers, a person subject to customary law may choose to put his wishes in writing or instruct a person he knows to be literate to put down his death bed wishes in writing on his behalf. Will these wishes then, because they are in written form be deprived of their status under customary law? According to Bennett, if they fulfil the requirements of a valid will under customary law, even though in written form, they should be enforced.⁶² What is important is whether the intention of the testator is to make a will under statutory law or under customary law. This ought to be determined from the circumstances and the content of the will. A will may be taken to be a statutory will where, for instance, the dispositions flagrantly violate customary rules.⁶³

An important enquiry dwells on the extent to which a testator may exercise freedom of testamentary disposition under customary law. While persons who are subject to customary law were at liberty to go outside the rules of customary law in their testamentary dispositions under statutory wills, which may disadvantage their customary law heirs,⁶⁴ whether a customary law testator can do the same needs to be confirmed. Where this is possible, the

⁵⁷ (1968) BAC (1 & 2) at 7.

⁵⁸ Which Seymours states is the 'best and only possible means of proving the intentions of the deceased family head'.

⁵⁹ NAC Records 1912-1917 (T.T.) 3 AT 51.

⁶⁰ Where such dispositions are disputed, even if they appear reasonable, the circumstances of the dispositions will be examined to ensure that no undue influence was used on the deceased who must have been of a sound mind with no 'unjustified prejudice against the heir'. The court can set aside an unreasonable disposition.

⁶¹ (1938) NAC (T & N) 138.

⁶² Bennett advocated that such wills should be treated as privileged wills where formal requirements are dispensed with. See Bennett (note 54) at 219-220.

⁶³ This is merely an indication of his intention and not conclusive as other circumstances will be used in determining whether the will should be treated as a statutory will or a will under customary law. *Ibid* at 220.

⁶⁴ *Ibid* at 218.

extent to which this is done, or permitted to be done remains to be verified.⁶⁵ Where dispositions are still made within family ties, the ‘sense of personal and communal’ identity, and the link to ancestry with respect to land is still preserved. Bennett however suggests that slight deviations from the customary rules of heirship may be accommodated.⁶⁶ Seymour states that in cultures where there is a distinction between house properties and family home properties, a family head is not at liberty to dispose of house properties,⁶⁷ but he may do so with ‘family home property’⁶⁸ either *inter vivos* or through *mortis causa*. However, his main heir may not be deprived of most of what he should have inherited.⁶⁹ Harvey states in reference to Okoro’s⁷⁰ research findings that entailed a careful review of such cases in Eastern Nigeria, that such ‘variation of the customary norms usually takes the form of the disinheritance of a child for some offence’ against the customary testator.⁷¹ Such customary law dispositions have received judicial backing in Nigeria.⁷²

As with statutory wills, there are advantages that attach to customary law testate disposition of land and its resources. First is the peace and assurance it gives the testator that he has put his house in order with the hope that his testamentary wishes will be respected when he dies.⁷³ The testator has the opportunity to state to whom, and how his land should be distributed, and he can appoint a trusted and reliable person to administer the estate upon his demise.⁷⁴ He may also choose to confer additional powers on the administrator beyond the usual powers that administrators are expected to exercise.⁷⁵ Where necessary, he may appoint a specific guardian(s) for his children – someone he trusts; and may display his magnanimity by making bequests to additional persons who may not ordinarily benefit from his estate⁷⁶ such as an orphan or a loyal worker simply on basis of charity.

⁶⁵ Himonga however suggests that while ‘individualisation of land rights through succession directly contributes to living law land grabbing’, ... any system of transmission of property between and across generations through succession that seeks or purports to individualise rights in the sense of the Western notion of ownership or notions akin to it, is bound to generate conflicts over land rights among the deceased person’s relatives that may result in property grabbing’. See Himonga (n 6) at 139.

⁶⁶ *Ibid.*

⁶⁷ Family House Property belongs to each house i.e. the cluster of a particular wife and her children to be utilised in her support. Bekker (n 12) at 72, 76. Under customary law, ‘an emancipated male inmate of a family home may, however own property in his own right’ and it will not be part of family property. There were however, certain restrictions on what cannot be willed, for instance, property allotted to a house or entitled to by the house.

⁶⁸ This constitutes the property of the family head which he has not apportioned to a definite house or does not automatically belong to the house. *Ibid.* at 134.

⁶⁹ *Ibid.* at 311. The Supreme Court held in the Nigerian case of *Ayinke v Ibidunmi* (1959) 4 FSC 280 that under customary law, a deceased can dispose of his properties either through gifts during his lifetime or at ‘death bed declaration’ made before witnesses as contained in Sagay, *Nigerian Law of Succession: Principles, Cases, Statutes and Commentaries* (Malthouse Press 2007) at 158-159.

⁷⁰ Okoro, *The customary laws of succession in Eastern Nigeria and the statutory and judicial rules governing their application* (Sweet & Maxwell 1966) cf. *Ayinke v Ibidunmi* (1959) 4 FSC 280. See Sagay *ibid.*

⁷¹ *Ibid.* at 44.

⁷² See the cases of *Ayinke v Ibidunmi* (1959) 4 FSC 280 and *Nelson v Nelson* (1932) 1 WACA 215 as contained in Harvey (n 54) at 44.

⁷³ *Dadem* (n 55) at 273.

⁷⁴ *Ibid.* 272, 273.

⁷⁵ *Ibid.* 273.

⁷⁶ *Ibid.*

Despite the advantages of freedom of testamentary disposition, a customary law testator must cautiously ensure that his bequest does not severely defy the applicable customary law of succession. This is because in most instances, the expression of the deceased's wishes as to how he wants his estate to be distributed is executed by the family⁷⁷ only out of respect for the wishes of the dead.⁷⁸ Seymour states that the family head must make such disposition in the presence of his relatives and the persons who may be adversely affected by the dispositions but he may be excused if made before a few elders on his death bed.⁷⁹ The disadvantage that may accrue from a customary law will is the sense of community and affinity that it may affect amongst family members which is central to the African.⁸⁰ This however may not be deeply felt by the family members since already, such affinity and sense of community is to some extent, disintegrating as a result of the changes in customary practices influenced by socio-economic factors.⁸¹ Are these dispositions then legal or are they merely granted out of respect for the dead? To answer this concisely definitely requires further research. As a guide, Omoneukanrin writing on Itsekiri custom and law states that 'the last words of a dying person were regarded as equally legal and the disposal of properties, *mortis causa* donation was a recognised custom in the early days'.⁸²

Of course exercising testamentary discretion touches on a sensitive matter when it comes to the devolution of land held under customary law. This is because units of land and the resources tied to it which are often held as part of a communal or family land hold must remain within such holdings.⁸³ However, the testator may still exercise discretion amongst his customary beneficiaries as to how such land may be distributed without necessarily disinheriting anyone, except as permitted under customary law. Knowing the abilities, acumen and weaknesses of his beneficiaries, he may make distributions that will maximise the potentials of each bequest. For other lands owned by the testator outside these brackets, his discretion may be exercised unhindered. After all, he owns the land and has the right to dispose of it however he may wish. Since under both statutory and customary law of intestacy broadly speaking, a testator's dependents cannot be ignored in his bequest, in making a will under customary law, he must ensure that he makes adequate provisions for his dependents. This is also advantageous in that he

⁷⁷ Harvey (n 54) at 43.

⁷⁸ The dissenting judgment in the *Bhe* case also states that after the demise of the deceased, if families agree concerning the fate of his estate, there would be no need for any interference. See ratio at 239.

⁷⁹ Ibid 12.

⁸⁰ Ibid.

⁸¹ See Home (n 2) at 32. Family and communal land practices cannot however be dismissed because according to Home, they are 'being revived and reconstituted' as an aftermath of post colonialism and improved practice of legal pluralism like in South Africa where customary law is elevated to be at par with other laws. See also the case of *Bhe* supra (n 21) at para 189 and Simmons, 'African Women Their Legal Status in South Africa' (Northwestern University Press 1968) at 238.

⁸² See Sagay (n 69) at 158.

⁸³ Bohannan states that the concept of communal land has been said to be an 'illusion' and a distortion of a form of customary land holding 'through the distorting lens of Western market-oriented and contract-dominated institutions of property and ownership'. See P Bohannan & L Bohannon, *Tiv Economy* (Northwestern University Press 1968), quoted by Ayithey, *Indigenous African Institutions* 2 ed (Martinus Nijhoff 2006) at 328 as contained in Himonga (n 6) at 122.

can now make adequate provisions for his wife contrary to official customary law of intestacy where she is generally ignored except for some usufruct rights on his property.⁸⁴

In advocating a customary law will, consideration as to the testator's capacity i.e. age and mental capacity, and other vitiating factors that will affect the validity of such dispositions cannot be ignored.⁸⁵ Giving attention to these must be done carefully to avoid complicating an otherwise simple practice. It is however expected that the testator must not only have the mental capacity to make such a will, he must also be definite in his description of the property he bequeaths which should be clearly identifiable, and his bequest must have been made in his own volition.⁸⁶

V Testacy on land and its resources

A valid transfer of land ownership through customary testacy should be registered. Despite the considerations of land reform,⁸⁷ land ownership in South Africa is acquired through various means of original acquisition and derivative.⁸⁸ Under the derivative mode, land ownership is automatically conveyed where there is a marriage in community of property, via insolvency and on the occurrence of death.⁸⁹ While the transfer of land ownership for the first two categories is valid without registration or delivery, currently, registration of the new owner is required to transfer valid ownership on the occurrence of death.⁹⁰

The experiences of land ownership by native South Africans have been puzzling. Though capable of owning land under any of the categories stated above, they have also been deprived of ownership⁹¹ through the means of original acquisition like appropriation,⁹² acquisition prescription,⁹³

⁸⁴ Kerr, *The Customary Law of Immovable Property and of Succession* (Grocott & Sherry 1990) at 99.

⁸⁵ Undue influence has been used as a vitiating factor to the validity of such dispositions. *Menani v Menani* 1930 NAC (C & O) 10; *Bamatshaka v Mhlokonywa* 1930 NAC (C & O) 18.

⁸⁶ Harvey (n 54) at 45.

⁸⁷ Gibson, 'Land Redistribution/Restitution in South Africa: A Model of Multiple Values, as the Past Meets the Present' (2010) 40(1) *British Journal of Political Science* 135-169. See also Juul and Lund, 'Negotiating property in Africa: Introduction' in Juul and Lund (eds), *Negotiating Property in Africa* (Heinemann 2002).

⁸⁸ Original acquisition is ownership acquired originally e.g. for the first time. Derivative is a form of transfer of ownership from one person to another. Mostert et al, *The principles of the law of property in South Africa* (Oxford University Press 2010) at 160.

⁸⁹ Van der Merwe and Du Plessis, *Introduction to the Law of south Africa* (Kluwer Law International 2004) at 214.

⁹⁰ Ibid.

⁹¹ Cousins, 'Legislating negotiability: Tenure Reform in Post-Apartheid South Africa' in Juul and Lund (eds) (n 87) at 68-69.

⁹² Ibid 163. This 'applies to unowned property capable of private ownership' of 'never been owned land' and 'abandoned property'. All lands in South Africa that are not allocated belong to the state and there are views that this also applies to abandoned land. Ibid 164.

⁹³ Ibid 179. 'Open and uninterrupted possession of property for a long time can lead to the acquisition of ownership by acquisition prescription'. See also Badenhorst et al (eds), *Silberberg & Schoeman The Law of Property* 4 ed (LexisNexis 2003) at 159.

expropriation,⁹⁴ and crown grants under derivative.⁹⁵ For those who have maintained their ownership acquired under any of these means and those who have sought restitution,⁹⁶ collectively, there are vast lands (already owned and hopefully to be redistributed and restituted)⁹⁷ that will be transferred via devolution. They must therefore not be deprived of their right to transfer such land rights and its resources through means permissible under the applicable living customary practice of testacy despite the seeming total exclusion of the application of customary rules of intestacy.⁹⁸

It does not matter that the land rights of the customary testator was acquired or confirmed statutorily, it can still be transferred through customary testacy. Relating to resources on the land, the Mineral and Development Resources Development Act 2002⁹⁹ (MDRDA) may have altered the common law maxim applicable in South Africa which bestows the right of ownership of that which is beneath and above the land on the land owner.¹⁰⁰ This maxim was however applicable only for as long as the mineral has not been severed 'from the ownership of the land'.¹⁰¹ The MDRDA vests all mineral and petroleum rights on the state as custodian.¹⁰² It remains to be confirmed whether or not these rights vested on the state are restricted to only when the mineral has been severed or before they are severed.¹⁰³ However it is interpreted, the land owner (who may be an indigenous person) should be compensated meaning that the land owner's right to compensation can be passed on at his death, through the devolution of his estate to his beneficiaries. He should not be deprived of his choice to do so through the normative practice of a customary law will by specifically stating who he wants his beneficiaries to be. This bequest still

⁹⁴ Ibid 188. 'This is a mode of original acquisition to the extent that, at a particular point in the process, by operation of law, ownership is acquired by the state'. This form of acquisition is claimed to be in the public interest, and compensation is meant to be paid. See Van der Merwe and De Waal, *The Law of Things and Servitudes* (Butterworths 1993) 146-148.

⁹⁵ Ibid Van der Merwe at 148.

⁹⁶ 'The very purpose of the Restitution Act is to give effect to s 25(7) of the Constitution. It provides for redress to those who were in the past dispossessed of property as a result of racially discriminatory laws or practices. The Land Claims Court held in *Dulabh and Another v Department of Land Affairs* 1997 (4) SA 1108 (LCC) at 1119 that the dispossession for which redress was afforded, was 'dispossession in relation to ethnic groups that have suffered a particular kind of deprivation: the confiscation and denigration of their resources and culture under imperialism and colonial exploitation'. See *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 83.

⁹⁷ See the recently passed Land Restitution Bill passed in February 2014 which states 31 December 2018 as the new deadline for land claims.

⁹⁸ *Alexkor Ltd and Another v Richtersveld Community and Others* supra (n 96) para 6. Section 1 of the Restitution Act provides that rights in land constitutes 'any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question'.

⁹⁹ Act 28 of 2002.

¹⁰⁰ *Cuis Est Solum Eius Est Usque Ad Coelum Et Ad Inferos*. Mostert et al (n 88) at 269-270.

¹⁰¹ Ibid 269.

¹⁰² Section 3. This is contrary to the customary law which vests both land rights as well as the resources on it, on the owner of the land. See also *Alexkor Ltd and Another v Richtersveld Community and Others* supra (n 96) para 64.

¹⁰³ Ibid.

accommodates other rights on the land like a servitude the deceased spouse may be entitled to.¹⁰⁴

VI Recommendations and conclusion

As stated earlier, the Intestate Succession Act and the Reform of Customary Law of Succession excludes both customary law of intestacy and testacy and thereby facilitates the ‘fossilisation’ of customary laws of succession, despite the constitutional obligation for its recognition, application, and the creation of a conducive environment for its adaption to socio-economic realities. To do otherwise would in the words of Himonga, be a ‘debauchery of the concept of development’.¹⁰⁵ However different it may be from the known western practice, it should be given room to thrive and be treated equally.¹⁰⁶

The current trend is to accommodate diversities in pluralistic legal systems. Writing on the ‘challenges of justice in diverse societies’, Bhamra states that ‘the goal of justice is a key imperative behind the need to understand our new diversities and pluralities’¹⁰⁷ and contemporary political philosophies ‘focus exclusively upon contributing to a world that is more hospitable to diversity’.¹⁰⁸ NuBberger asserts that the European Court of Human Rights in addition to its challenge of acknowledging the difference between Civil and Common Law systems, has sought ‘to accommodate a lot of deeply rooted diverse convictions and conceptions hidden behind specific legal regulations and institutions’ despite the challenges it faces in trying ‘to define common minimum human rights standards for different legal cultures’.¹⁰⁹ Justice Ngcobo’s comments on the need for the development and application of the customary law of succession in his dissenting judgment in the case of *Bhe* does buttress this:

...the answer lies somewhere other than in the application of the Intestate Succession Act only. It lies in flexibility and willingness to examine the applicability of indigenous law in the concrete setting of social conditions presented by each particular case. It lies in accommodating different systems of law in order to ensure that the most vulnerable are treated fairly. The choice of law mechanism must be informed by the need to: (a) respect the right of communities to observe cultures and customs which they hold dear; (b) preserve indigenous law subject to the Constitution; and (c) protect vulnerable members of the family.¹¹⁰

¹⁰⁴ Mostert et al (n 88) at 42. The author explains this in the following words: ‘For instance in his will, Jan may bequeath his farm to his son Karel subject to a provision that Jan’s wife (and Karel’s mother), Susan is entitled to the use and fruits of the farm until her death or remarriage. Susan becomes the holder of a limited real right – a usufruct – in respect of the farm when Jan dies. Karel may not have much use and enjoyment of the farm while Susan holds the usufruct as he must accept that Susan occupies the farm and draws its fruits. She may even run the farm as a commercial enterprise for her own benefit...but she does not have the rights of an owner. She may for instance not alienate the farm’.

¹⁰⁵ Himonga (n 6) at 116.

¹⁰⁶ *Bhe* supra (n 21) para 139.

¹⁰⁷ Bhamra, *The Challenges of Justice in Diverse Societies: Constitutionalism and Pluralism* (Ashgate 2012) at 16.

¹⁰⁸ *Ibid* 15.

¹⁰⁹ NuBberger, ‘Rebuilding the Tower of Babel-The European Court of Human Rights and the Diversity of Legal Cultures’ in Linnan (ed), *Legitimacy, Legal Development and Change: Law and Modernization Reconsidered* (Ashgate 2012) at 404-405.

¹¹⁰ *Bhe* supra (n 21) para 236.

While intestate succession under customary law must be acknowledged and developed in its own right, the practice of customary testacy must also be acknowledged.

Commenting on development problems of states that operate legal pluralism, Woodman explains that ‘relations between normative orders’ in the ‘content of the norms’, and ‘normative and institutional recognition’ by state institutions and non-state institutions pose problems.¹¹¹ This is with respect to ‘norms of validation or facilitative norms’ such as the ‘rules designating the manner in which people may transfer title to land’.¹¹² He explains that with regard to contents of the norms, the state law and non-state law – in this case, the living customary law of testacy – may be similar and therefore pose no problem. It may also be conflicting; thereby the non-state law may hinder the effectiveness of the state law. He states that even when each of these laws do not have specific contents, they may adopt policies that accommodate the other by for instance, leaving room for discretions and allowing both laws to co-exist.¹¹³ The statutory law of succession in South Africa excludes the existence and continuing practice of customary testacy as a state law even though it may continue as a non-state law which would consequently, reduce the effectiveness of the content of the statutory law. As part of possible solution to conflicting state and non-state norms on a particular subject, as is the focus of this paper, Woodman’s suggested options of solutions to include the unification of the laws of the state,¹¹⁴ harmonisation and ascertainment of these laws¹¹⁵ to which he also identified potential problems.¹¹⁶

The challenges for unification are real and they pertain to the difficulty of achieving unification with all customary laws in a state. First, the customary laws must be identified and variations discarded in order to achieve unification,¹¹⁷ and then the unification of customary and western law will be attempted. There are numerous customary laws within South Africa, the identification of which will pose a daunting challenge. Added to that is the likely demise of customary law which will result in the violation of the right to culture guaranteed under the Constitution if the unification of customary and statutory law is attempted as is the case with the Reform of Customary Law of Succession and Regulation of Allied Matters Act.¹¹⁸ Heaton and Ross have expressed this consequence which will result in the violation of the constitutional rights of most of the citizens to culture and religion.¹¹⁹ To

¹¹¹ Gordon, ‘The development “problem” of legal pluralism’ in Tamanaha et al (n 28) at 134-137.

¹¹² Ibid.

¹¹³ Ibid 135.

¹¹⁴ That is a situation where a ‘uniform state law becomes the sole law observed by the population’.

¹¹⁵ Ibid 138-140.

¹¹⁶ Ibid.

¹¹⁷ Ibid 139.

¹¹⁸ With respect to customary law of intestacy, though on the face of it the Intestate Succession Act, the Reform of Customary Law of Succession, and Regulation of Related Matters Act appear to be a unification attempt, it is faulted on the ground that it violates the constitutional provision of right to culture by completely excluding the customary law of intestacy.

¹¹⁹ Heaton and Ross (n 5). They however state that partial harmonisation of the customary law and Common law has been adopted with respect to regulation and harmonisation of interstate succession of the indigenous people in the Reform of Customary Law of Succession and Regulation of Related Matters Act.

achieve unification of the various customary laws, a proper understanding of the cultural values sought to be modified, as well as the institutions and structures that regulate and apply living customary law, are prerequisites.¹²⁰ Without such understanding, unification will result in moulding customary law 'into a rigid, conventional, sterile or unimaginative condition',¹²¹ and leave no room for norms that evolve in response 'to changes in...social, economic and political environment' of the society.¹²²

In order to achieve harmonisation,¹²³ 'choice of law rules' must be established.¹²⁴ According to Woodman, the 'attempt to determine through norms of state law the fields of operation of non-state laws' is a problem under harmonisation.¹²⁵ This according to him will amount to 'an attempt to establish state law hegemony and to eliminate deep legal pluralism'.¹²⁶ Therefore, what may be needed here as a solution for the survival of customary law of testacy in particular is that the existence of customary law testacy must be acknowledged and then the details of its operations be discovered in order to distinguish customary law testacy from statutory testacy. This will then determine whether what is put forward as a will should be regulated by customary law or by statute. No doubt, the current Reform of Customary Law of Succession and Regulation of Allied Matters Act will need to be amended to permit the existence and operation of testacy under customary law.

With respect to ascertainment, Woodman explains that relevant statutory and traditional institutions responsible for the implementation of laws under the state and traditional systems may be ignorant or inadequately versed in the content of the laws of the other system.¹²⁷ With reference to state institutions, the means of ascertainment of the non-state law may be utilised to ensure the authenticity of what is ascertained as the content of the law.¹²⁸ However, where the non-state law is not correctly ascertained, conflicts will ensue in what is projected by the state and what is practiced by the people.¹²⁹ Naturally, people may ignore the distorted version which they may be ignorant of, and continue in the observation of their normative practice and this will result in undermining the effectiveness of the state law¹³⁰ affirmed by legislation and/or court judgments.

Succinctly put, the failure of state institutions to acknowledge the practice of customary law testacy will not eliminate its observation by the communities that observe them regardless of court judgments and legislation

¹²⁰ Himonga (n 6) at 116.

¹²¹ This is the definition of the word 'ossification'. Merriam Webster's Dictionary online <<http://www.merriam-webster.com/dictionary/ossification>> accessed on 11 August 2014.

¹²² Himonga (n 6).

¹²³ Here, in order to provide a solution to the problem of 'inconsistency' and 'uncertainty' as to which law will apply in legal pluralism, the conflicts areas will be removed by establishing rules that regulate which law will apply in a given situation.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid* 139-40.

¹²⁹ *Ibid* 140.

¹³⁰ Woodman (n 28) at 130.

to the contrary. While the application of Reform of Customary Law of Succession and Regulation of Allied Matters Act hinders its development, the practice of customary law testacy as living customary law being affirmed by the Constitution as state law by inference is relegated to the status of non-state law and continues to be observed and developed. It is therefore reiterated that further empirical studies be engaged to confirm the practice of customary law testacy as well as its normative content for very cogent reasons which includes its use as a valid means of transfer of land rights in South Africa.

LARGE-SCALE LAND INVESTMENTS AND CUSTOMARY TENURE: A COMPARATIVE LEGAL STUDY OF TANZANIA AND ZAMBIA

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Abstract

This paper analyses the norms that regulate the allocation of land to investors in Zambia and Tanzania, two members of the Southern African Development Community that in the last decade witnessed a significant increase in the flow of agricultural investments. The aim of this work is to compare the process through which land is allocated to investors by focusing on the alienation from the customary domain, in order to identify similarities and differences between the two countries.

The paper argues that, notwithstanding the differences in the statutory framework of Tanzania and Zambia, the shift away from customary rights poses similar challenges to both countries. The reconciliation of development policies with local use rights ought to be addressed, especially when the land use transformations are permanent, as in the cases at study.

The paper relies both on primary and secondary sources. After an analysis of the domestic legal sources, it discusses investment practices in order to provide a better understanding of the challenges posed by large-scale land acquisitions in both countries.

This work aims to contribute to two broad fields of literature. First of all, it aims to advance knowledge on contemporary processes of large-scale land acquisitions by discussing the legal framework in which they take place. Secondly, it aims to contribute to the literature in comparative law by providing a critical comparison of selected aspects of land law in the countries of the study.

Keywords: Customary rights, development policies, land acquisitions, land allocation, land investments.

I Introduction

Starting from the early 2000s, land investments in the developing world have gained new momentum. Foreign investors have increasingly shown interest in the acquisition of long-term rights over agricultural land: whether by means of leases, concessions, or outright purchases, transnational corporations, sovereign funds and other institutional investors have started to secure their access to farmland in developing countries, with the goal of introducing efficient large-scale agricultural productions.

This phenomenon has been scrutinised by media and activists, who came to narrate it as a neocolonial exploitation of the global south, soon to be dubbed

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as ‘land grabbing’.¹ The beginning of the international debate can be traced back to 2008, when South Korean firm Daewoo announced an agreement with the Malagasy government for a 99-year lease of more than 3 million hectares – i.e. more than half the country’s arable land.² The extensive media coverage and the political unrest that followed the announcement³ marked the beginning of the contemporary ‘land grabbing’ debate. Since then, academic researchers have contributed to the discussion by providing a scholarly analysis of the ongoing processes of land acquisition and by clarifying their scope and impact on development policies.⁴

As many authors have pointed out, the actual size of the large-scale land acquisitions is still uncertain.⁵ Notwithstanding this uncertainty, the majority of studies points to the centrality of sub-Saharan Africa in the ongoing farmland investments:⁶ according to the World Bank, more than 60 percent of

¹ The term ‘land grabbing’ was first introduced by Marx in *Das Kapital*, where he discussed British enclosures: ‘land grabbing on a great scale, such as was perpetrated in England, is the first step in creating a field for the establishment of agriculture on a great scale’. (Karl Marx, *Capital*, Volume One: A Critique of Political Economy (Lawrence and Wishart 1977) at 470). In the literature there is no consensus over the use of this term. Some authors refer to ‘land grabbing’ (see, for example: Borras Jr and Franco, ‘Global Land Grabbing and Trajectories of Agrarian Change: A Preliminary Analysis’ (2012) 1 *Journal of Agrarian Change* 12; De Schutter, ‘How Not to Think About Land-Grabbing: Three Critiques of Large-Scale Investments in Farmland’ (2011) 38(2) *Journal of Peasant Studies* 249-279), which is the term used by NGOs as well in their campaigns on land rights (see: Oxfam, *Land and Power: The Growing Scandal Surrounding the New Wave of Investments in Land* (Oxfam International 2011); GRAIN, *Seized: The 2008 Land Grab for Food and Financial Security* (GRAIN 2008)). Other authors opt for the terms ‘land rush’ (Anseeuw, ‘The Rush for Land in Africa: Resource Grabbing or Green Revolution?’ (2013) 20(1) *South African Journal of International Affairs* 159-177; Scoones et al, ‘The Politics of Evidence: Methodologies for Understanding the Global Land Rush’ (2013) 40(3) *Journal of Peasant Studies* 469-483), or ‘large-scale land acquisitions’ (German, Schoneveld, and Mwangi, *Contemporary Processes of Large-Scale Land Acquisition by Investors: Case Studies from Sub-Saharan Africa* Center for International Forestry Research 2011); Nolte, ‘Large-Scale Agricultural Investments under Poor Land Governance in Zambia’ (2014) 38 *Land Use Policy* 698-706). For the purpose of this paper, I will exclusively refer to ‘large-scale land acquisitions’ and ‘land investments’.

² Blas, ‘S Koreans to Lease Farmland in Madagascar’ *Financial Times*, 19 November 2008.

³ For an overview of the controversial Malagasy land lease, see Blas, ‘Land Leased to Secure Crops for South Korea’ *Financial Times*, 18 November 2008 and Burgis and Blas, ‘Madagascar Scraps Daewoo Farm Deal’ *Financial Times*, 18 March 2009.

⁴ The academic debate on large-scale land acquisitions has been led by development students, who mostly focused on agrarian transformations and on their impact on the livelihood of local communities (see for example: Borras Jr and Franco, ‘Global Land Grabbing and Trajectories of Agrarian Change: A Preliminary Analysis’ (2012) 12(1) *Journal of Agrarian Change* 34-59; Makkii, ‘Power and Property: Commercialization, Enclosures, and the Transformation of Agrarian Relations in Ethiopia’ (2012) 39(1) *The Journal of Peasant Studies* 81-104; Peters, ‘Conflicts over Land and Threats to Customary Tenure in Africa’ (2013) 112(449) *African Affairs* 543-562). Legal scholars contributed to the debate mostly by questioning the legality of large-scale land investments under international human rights law (see: Cotula, ‘Commercial Pressures and Legal Rights: The Trouble with the Law Regulating Agricultural Investment in Africa’ (2013) 2 *QA – Rivista dell’Associazione Rossi-Doria* 1-206; De Schutter, ‘The Green Rush: The Global Race for Farmland and the Rights of the Land Users’ (2011) 52(2) *Harvard International Law Journal* 504).

⁵ See, among others: Cotula, *The Great African Land Grab?: Agricultural Investment and the Global Food System* (Zed Books 2013); Marc Edelman, ‘Messy Hectares: Questions About the Epistemology of Land Grabbing Data’ (2013) 40(3) *Journal of Peasant Studies* 485-501; Scoones et al, ‘The Politics of Evidence: Methodologies for Understanding the Global Land Rush’ (2013) 40(3) *Journal of Peasant Studies* 469-483; Zoomers and Kaag (eds), *The Global Land Grab: Beyond the Hype* (Zed Books 2014).

⁶ See for example: Anseeuw et al, *Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project* (International Land Coalition 2012); Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits?* (World Bank Publications 2011); Schoneveld, *The Anatomy of Large-Scale Farmland Acquisitions in Sub-Saharan Africa* (Center for International Forestry Research 2011); Oxfam, op cit; and www.landmatrix.org.

large-scale acquisitions have taken place in this area,⁷ which is characterised by inherently pluralistic legal systems.⁸

According to some authors, large-scale land acquisitions can be especially problematic in contexts of legal pluralism, i.e. where a plurality of legal orders coexist: the presence of (weaker) customary rights alongside (stronger) statutory rights can represent a threat to the livelihood of local communities, which in many countries do not have formal titles to land but rely on it for their livelihood.⁹

In light of these considerations, a comparative study of the norms that regulate the allocation of customary land to foreign investors is timely and can shed light on the legal process through which large-scale land acquisitions unfold and impact on local communities. According to the international database 'Land Matrix',¹⁰ Tanzania and Zambia are among the top destinations for land investments in sub-Saharan Africa.¹¹ A comparison between the land laws of these two countries can offer useful elements to the discussion on large-scale land acquisitions: notwithstanding the differences between the norms that regulate land in the two countries, large-scale acquisitions pose similar challenges to national governments. As some authors have noted, the legal framework is only one of the determinants of the outcomes of large-scale land acquisitions:¹² by referring to the findings of published case studies, this paper argues that legal reforms are not a sufficient guarantee of the fairness of land investments.

This paper is organised as follows. The next section introduces the recent trends of large-scale land acquisitions and makes the case for a cross-country comparison of land legislation. The third section focuses on Tanzania and discusses land tenure regimes in the country, and it then proceeds to outline the mechanisms to allocate land to investors. Likewise, the fourth section

⁷ Deininger and Byerlee, op cit, p. XXXII.

⁸ Many studies have attempted to shed light on the amount of farmland acquired by investors, but no consensus has been reached on the matter. For example, the World Bank reports land investments for 56 million hectares between 2007 and 2009 (Deininger and Byerlee, op cit), whereas Oxfam documents that between 2001 and 2011 more than 227 million hectares had been acquired by foreign investors (op cit).

⁹ Wily, 'Looking Back to See Forward: The Legal Niceties of Land Theft in Land Rushes' (2012) 39(3-4) *Journal of Peasant Studies* 751-775; Cotula, *Land Tenure Issues in Agricultural Investments* (Food and Agriculture Organization 2011); Quan, Tan, and Toulmin, 'Land in Africa: Market Asset or Secure Livelihood?' in *Land in Africa Conference* (Institute for International Environment and Development 2004).

¹⁰ The Land Matrix is a global observatory created both by NGOs and research institutes: its partners are the International Land Coalition, the Centre de Coopération Internationale en Recherche Agronomique pour le Développement, the Centre for Development and Environment, the GIGA German Institute of Global and Area Studies/Leibniz-Institut für Globale und Regionale Studien and the Deutsche Gesellschaft für Internationale Zusammenarbeit. The website (www.landmatrix.org) provides a database on land investments that is constantly updated thanks to the contribution of both partners and users. The strengths and limitations of the Land Matrix database have been discussed in a recent article: Anseeuw et al, 'Creating a Public Tool to Assess and Promote Transparency in Global Land Deals: The Experience of the Land Matrix' (2013) 40(3) *Journal of Peasant Studies* 521-530.

¹¹ In the African continent, the countries where the largest amount of land has been acquired to date are: Sudan, South Sudan, Sierra Leone, Ethiopia, Ghana, Liberia, Congo, Mozambique, Zambia, Senegal, and Tanzania (Land Matrix 2014).

¹² German, Schoneveld and Mwangi, 'Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?' (2013) 48 *World Development* 1-18; Nolte, 'Large-Scale Agricultural Investments under Poor Land Governance in Zambia' (2014) 38 *Land Use Policy* 698-706.

analyses land tenure in Zambia and discusses the procedure for the conversion of customary land into state land. The last section draws a comparison between the two countries and is followed by some concluding remarks on large-scale land acquisitions and on their impact at the national level.

II Land investments in sub-saharan Africa: between ‘land grabbing’ and ‘development opportunities’

As mentioned in the introduction, the international debate on large-scale land acquisitions in the global south gained momentum from 2008 onwards. Academic researchers have analysed this phenomenon from a variety of perspectives, mostly by focusing on its drivers and development implications.

The increased pace of land investments has been connected to the surge in food prices, which in 2007 and 2008 “shook the assumption that the world will continue to enjoy low food prices”.¹³ According to many political economists, the price volatility induced food-insecure countries i.e. countries that rely on imports to satisfy the internal demand for food, to invest in land to ensure their food security by enhancing off-shore agricultural production.¹⁴ At the same time, many authors contend that the hikes in the prices triggered an increase in private investors’ interest in land, due to the high yield potential,¹⁵ and others have connected land investments to the increased demand for bio-fuels and to energy security.¹⁶ In addition, the majority of studies note that the financial crisis is a key driver of land investments.¹⁷

As Ian Scoones writes, the “land rush” has been followed by a “literature rush”:¹⁸ the result is an increasingly polarised academic debate, where on one side land investments are regarded as unjust “grabs”¹⁹ and, on the

¹³ Zoomers, ‘Globalisation and the Foreignisation of Space: Seven Processes Driving the Current Global Land Grab’ (2010) 37(2) *Journal of Peasant Studies* 429-447.

¹⁴ In particular, many authors have focused on the role of Gulf countries in the investments. See for example: Allan et al, *Handbook of Land and Water Grabs in Africa* (Routledge 2013).

¹⁵ Akram-Lodhi, ‘Contextualizing Land Grabbing: Contemporary Land Deals, the Global Subsistence Crisis and the World Food System’ (2012) 33(2) *Canadian Journal of Development Studies* 119-142; McMichael, ‘The Land Grab and Corporate Food Regime Restructuring’ (2012) 39(3-4) *Journal of Peasant Studies* 681-701.

¹⁶ Borras Jr, McMichael and Scoones, ‘The Politics of Biofuels, Land and Agrarian Change: Editors’ Introduction’ (2010) 37(4) *Journal of Peasant Studies* 575-592; Vermeulen and Cotula, ‘Over the Heads of Local People: Consultation, Consent, and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa’ (2010) 37(4) *Journal of Peasant Studies* 899-916.

¹⁷ Akram-Lodhi, ‘Contextualizing Land Grabbing: Contemporary Land Deals, the Global Subsistence Crisis and the World Food System’ (2012) 33(2) *Canadian Journal of Development Studies* 119-142; Allan et al, *Handbook of Land and Water Grabs in Africa* (Routledge 2013); Cotula, ‘Commercial Pressures and Legal Rights: The Trouble with the Law Regulating Agricultural Investment in Africa’ (2013) 2 *QA Rivista dell’Associazione Rossi-Doria* 163-194; Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits?* (World Bank Publications 2011).

¹⁸ Scoones et al, ‘The Politics of Evidence: Methodologies for Understanding the Global Land Rush’ (2013) 40(3) *Journal of Peasant Studies* 469-483.

¹⁹ See for example: Borras Jr. and Franco, ‘From Threat to Opportunity? Problems with the Idea of a “Code of Conduct” for Land-Grabbing’ (2010) 13(2) *Yale Human Rights and Development Law Journal* 507-523; De Schutter, ‘How Not to Think About Land-Grabbing: Three Critiques of Large-Scale Investments in Farming’ (2011) 38(2) *Journal of Peasant Studies* 249-279.

other, welcomed as tools for economic development.²⁰ Amongst the critics of large-scale land acquisitions, legal scholars have focused on the human rights dimension of these investments. Olivier De Schutter and others have argued that in many cases land users find no protection from the forced evictions connected to land investments, especially in countries where customary land rights are not secured sufficiently.²¹ In addition, many studies have denounced the lack of participation of local communities in the decisions concerning the use of their land.²²

The type of land investments differs significantly across regions, so that a single definition cannot account for this diversity.²³ In sub-Saharan Africa, many of the land acquisitions that took place in the past 10 years have been caused by large-scale agricultural projects. The area acquired for these purposes in Tanzania and Zambia is estimated by the Land Matrix to cover approximately 250 and 350 thousand hectares.²⁴

The legal systems of these countries are characterised by the coexistence of different norms that belong to the state and to the customary domain. As the next sections discuss, both Tanzanian and Zambian legislations recognise the role of customary rights and afford protection to customary land users. However, in both the countries the allocation of land to investors results from the marginalisation of customary law in favour of the application of state law. As such, the legal tools that enable large-scale land acquisitions appear central to the understanding of current investment processes: for this reason, a comparative study of the legal provisions that regulate the conversion from the customary to the state domain can fruitfully contribute to the debate on land investments.

III Land law and investments in Tanzania

Due to the considerable size of land acquired by foreign investors, the United Republic of Tanzania has been at the center of the international debate on large-scale land acquisitions. Many empirical studies have traced the implementation of land investments in the country and have specifically

²⁰ See: Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?* (World Bank Publications 2011); Von Braun and Meizen-Dick, "Land Grabbing" by Foreign Investors in Developing Countries: Risks and Opportunities', IFPRI Policy Brief 13 (International Food Policy Research Institute 2009).

²¹ Wily, "The Law Is to Blame": The Vulnerable Status of Common Property Rights in Sub-Saharan Africa' (2011) 42(3) *Development and Change* 733-757; Cotula, 'Property Rights, Negotiating Power and Foreign Investment: An International and Comparative Law Study on Africa', PhD dissertation (University of Edinburgh, 2009); De Schutter, 'The Green Rush: The Global Race for Farmland and the Rights of the Land Users' (2011) 52 *Harvard International Law Journal* (2) 504-559.

²² Vermeulen and Cotula, 'Over the Heads of Local People: Consultation, Consent, and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa' (2010) 37(4) *Journal of Peasant Studies* 899-916; Horne and Mittal, *Understanding Land Investment Deals in Africa. Country Report: Zambia* (Oakland Institute 2011); Mousseau and Mittal, *Understanding Land Investment Deals in Africa. Country Report: Tanzania* (Oakland Institute 2011).

²³ Zoomers and Kaag, op cit.

²⁴ The Land Matrix includes all the investments that 'entail a transfer of rights to use, control or ownership of land through sale, lease or concession; have been initiated since the year 2000; cover an area of 200 hectares or more; imply the potential conversion of land from smallholder production, local community use or important ecosystem service provision to commercial use' (www.landmatrix.org).

focused on the protection of local land users.²⁵ As Laura German pointed out, investment promotion and respect for customary tenure can become conflicting policy objectives:²⁶ in order to understand this potential for conflict, an introduction to the pluralistic tenure system of the country is due.

(a) Land tenure in Tanzania: a historical introduction

Tanzania's land tenure system²⁷ has been deeply shaped by colonial history. The first German rulers partially acknowledged the presence of the natives' rights to land and introduced a dual system of separate but coexisting rights.²⁸ Customary tenure²⁹ was reserved for Africans, whereas German law regulated the land rights of Europeans.

This dualism was prevalent in most of the colonies, including the French and British ones. Customary land rights were never equaled to ownership rights, but were merely awarded the status of usufructuary rights, thus excluding any right to dispose of land.³⁰ Weak customary rights were functional to the appropriation of resources, as they enabled colonial powers to secure prime land in the colonies. The artificial creation of a separate set of land rights for Africans enabled colonial administrators to enforce their control over

²⁵ See for example: Abdallah et al, 'Large-Scale Land Acquisitions in Tanzania: A Critical Analysis of Practices and Dynamics'" in Kaag and Zoomers (eds) *The Global Land Grab: Beyond the Hype* (Zed Books 2014); Cotula et al, 'Agricultural Investment and International Land Deals: Evidence from a Multi-Country Study in Africa' (2011) 3(1) *Food Security* 99-113; Theting and Brekke, *Land Investments or Land Grab? A Critical View from Tanzania and Mozambique* (Spire 2010); Nelson, Sulle and Lekaita, 'Land Grabbing and Political Transformation in Tanzania', Paper presented at the *International Conference on Global Land Grabbing II* (Department of Development Sociology, Cornell University, Ithaca, NY: 2012); Kusiluka et al, 'The Negative Impact of Land Acquisition on Indigenous Communities' Livelihood and Environment in Tanzania' (2011) 35(1) *Habitat International* 66-73.

²⁶ German et al, 'Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?' (2013) 48 *World Development* 1-18.

²⁷ The paper exclusively refers to Tanzania mainland and does not discuss the land laws of Zanzibar.

²⁸ For an excellent treatment of the dualism between customary and state law and of the 'bifurcated state' see: Mamdani, *Citizen and Subject. Contemporary Africa and the Legacy of Late Colonialism* (James Currey 1996).

²⁹ The notion of customary law has been contested by many authors. According to Martin Chanock, customary law is the product of colonial domination and does not reflect pre-existing local norms and customs, as it was functional to the control over the territory by means of indirect rule (Chanock, 'Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure' in Mann and Roberts (eds) *Law in Colonial Africa* (NH: Heinemann 1991). By similarly focusing on the role of colonial powers in the production and reproduction of customary law, Francis Snyder sees its elaboration as part of the process of class creation and of expansion of capitalist economy (Snyder, 'Colonialism and the Legal Form: The Creation of 'Customary Law' in Senegal' (1981) 19 *Journal of Legal Pluralism* 49). This paper acknowledges the complexity of the notion of customary law and of its historical transformations. As Boaventura de Sousa Santos argues, the normative orders of pluralist legal systems interact with each other in a process of 'interlegality' (Santos, 'Law: A Map of Misreading. Towards a Postmodern Conception of Law' (1987) 14(3) *Journal of Law and Society* 279) and 'legal hybridization' (Santos, 'The Heterogeneous State and Legal Pluralism in Mozambique' (2006) 40(1) *Law & Society Review* 39-76). As such, for the purpose of this paper customary law refers to the set of local norms that regulate social relations and that are based on a continuously evolving tradition.

³⁰ The creation of the dual system of land tenure has marginalised all the land uses that were not recognised by colonial authorities, such as grazing rights and other communal rights (Gastorn, *The Impact of Tanzania's New Land Laws on The Customary Land Rights of Pastoralists: A Case Study of the Simanjiro and Bariadi Districts* (Lit Verlag 2008)). Some authors have argued that this process of marginalisation represented a form of enclosure of the commons: see for example Okoth-Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion' in *Occasional Paper* (University of the Western Cape 2002).

the territory and to expand it constantly by means of legal fictions such as “unoccupied land” in British colonies³¹ and “terres sans maître” in French colonies.³²

The British mandate in Tanzania, which started after the First World War, confirmed the dual tenure system. At first the 1923 Land Ordinance³³ regulated only the “granted rights of occupancy”, i.e. the statutory rights granted by the Governor, and vested all the land of the country in the British Crown. In its first version, the Ordinance did not acknowledge the land rights of native people and it was only through the 1928 Amendment that customary rights were recognised as “deemed rights of occupancy”.³⁴

As mentioned above, during colonialism customary tenure was “regarded as inferior to statutory tenure”.³⁵ This approach hardly changed after independence: the old ordinances remained in force and the distinction between granted and deemed rights of occupancy was confirmed. In this context, all the land was vested in the President of Tanzania on behalf of the citizens. After the 1967 Arusha Declaration, the country inaugurated a socialist economic policy. In light of the ambitious modernisation goals set by the government, customary authorities i.e. village chiefs, were abolished, as they were considered an obstacle to development.³⁶ Notwithstanding this significant change, the dual system of tenure was preserved and land remained vested in the President.³⁷

Due to poor economic performance and in light of the foreign debt contracted by the country, the end of the Eighties saw a radical change in the political and economic scenario. The pressures of multilateral financial institutions to introduce legal reforms and liberalise the economy resulted first in the resignation of President Nyerere, and then in the adoption of the

³¹ Wily, “‘The Law Is to Blame’: The Vulnerable Status of Common Property Rights in Sub-Saharan Africa” (2011) 42(3) *Development and Change* 733-757.

³² The French civil code prescribed the nationalisation of all the land not previously ‘owned’. On the application of the concept of ‘terres sans maître’ in French colonies, see: Coquery Vidrovitch, ‘Le Regime Foncier En Afrique Noire’ in Le Bris, Le Roy and Leimdorfer (eds) *Enjeux Fonciers En Afrique Noir* (Karthala 1982).

³³ Ordinance 3 of 1923.

³⁴ Land (Amendment) Ordinance 7 of 1928. For a historical account of land laws in Tanzania, see: Woodman, Wanitzek and Sippel (eds), *Local Land Law and Globalization: A Comparative Study of Peri-Urban Areas in Benin, Ghana and Tanzania* (Lit Verlag 2006) and Debusmann and Arnold (eds), *Land Law and Land Ownership in Africa* (Eckhard Breitingger 1996).

³⁵ Twaib, ‘The Dilemma of the Customary Landholder. The Conflict between Customary and Statutory Rights of Occupancy in Tanzania’ in Debusmann and Arnold (eds) *Land Law and Land Ownership in Africa* (Eckhard Breitingger 1996) at 82.

³⁶ The abolition of customary authorities in Tanzania was implemented through the African Chiefs Act 53 of 1969 and the African Chiefs Ordinance (Repeal) Act 13 of 1963. For an overview of land tenure issues in Tanzania, see: Shivji, ‘Contradictory Perspectives on Rights and Justice in the Context of Land Tenure Reform in Tanzania’ in Mamdani, *Beyond Rights and Culture Talks: Comparative Essays on the Politics of Rights and Culture* (Palgrave Macmillan 2000).

³⁷ The presidential control over land was crucial in the implementation of the villagisation program between 1970 and 1977. For an overview of the villagisation program, see: Twaib. For a political analysis of it, see: Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press 1998).

first economic recovery program sponsored by the International Monetary Fund (IMF) in 1986.³⁸

Structural adjustments aimed to introduce a free market economy in the country. However, the emphasis on a “willing buyer-willing seller” model was not in line with the existing land tenure system, which remained grounded on the dual paradigm in which customary tenure could not be freely alienated.³⁹ In order to solve this inconsistency and to elaborate a new approach to land governance, in 1991 the President formed a Commission of enquiry into land matters.⁴⁰ After the presentation of the Commission’s report in 1992, the government officially introduced the new National Land Policy in 1995.⁴¹ It was only in 1999 that a systematic land reform was promulgated by means of the Land Act and the Village Land Act.⁴² The reform, which entered into force in January 2001, did not aim to redistribute land, but to reorganise the rules that govern land tenure in order to promote land markets.⁴³

(b) The 1999 Land Acts

The two acts confirm a tenure system based on rights of occupancy, as all the land remains public and is vested in the President, who holds it in trust on behalf of the citizens.⁴⁴ Land is classified in three categories, namely: general, reserved, and village land.⁴⁵ The Land Act provides for the definition of general and reserved land, whereas village land is defined in the Village Land Act.⁴⁶

The reserved category, which constitutes approximately the 28 percent of land in Tanzania,⁴⁷ includes all the land set aside for conservation and other

³⁸ For an interesting account of these events, see: Shivji, *Not Yet Democracy: Reforming Land Tenure in Tanzania* (International Institute for Environment and Development 1998) and Sundet, ‘The 1999 Land Act and Village Land Act: A Technical Analysis of the Practical Implications of the Acts’ (2005), available at: www.fao.org/fileadmin/templates/nr/images/resources/pdf_documents/kagera/tanzania/1999_land_act_and_village_land_act.rtf (accessed September 2014).

³⁹ Fred Nelson et al note that in the period following the economic reforms, the effectiveness of the land tenure system was increasingly challenged: ‘several changes worked in concert to encourage large-scale alienation of local communities’ and smallholders’ lands at this time. Private investment and property rights began to be encouraged, including promotion of foreign investment... Similar circumstances in the free-for-all of the immediate post-structural adjustment era across much of the country led to popular outcry and the formation of a Presidential Commission of Enquiry on Land Matters’ (Nelson et al, op cit, 4-6.)

⁴⁰ The report of the Commission was published in 1992 (United Republic of Tanzania, *Report of the Presidential Commission of Inquiry into Land Matters: Land Policy and Land Tenure Structure* (Uddevalla: Bohuslaningensen Boktryckeri, 1994)). The Commission suggested a reduction of the role of the executive in land management, and recommended a more decentralised system. For a critical review of the work of the Commission, see: Shivji, op cit.

⁴¹ Sundet, op cit.

⁴² The land tenure reform has been complemented by the Land Disputes Courts (Tribunals) Act 2 of 2002 and the (Amendments) Act 2 of 2004 (Mortgages).

⁴³ Shivji, op cit.

⁴⁴ Land Act 4 of 1999, s 3(1)(a) and 4(1).

⁴⁵ Ibid, s 3(4).

⁴⁶ The Village Land Act further classifies village land into three categories: communal land i.e. land to be used in the interest of the community, land used by individuals and families and land set aside for individual and communal occupation (s 12).

⁴⁷ Government of Tanzania, Ministry of Lands, Housing and Human Settlements Development, www.arahi.go.tz (accessed September 2014).

specific purposes.⁴⁸ General land – approximately the 2 percent of Tanzanian land⁴⁹ – is defined by exclusion as “all public land which is not reserved land or village land and includes unoccupied or unused village land”.⁵⁰ In order to fully understand the residual definition of general land, one has therefore to refer to the Village Land Act, according to which village land is all the land under the jurisdiction of the Village Council.⁵¹ It is estimated that the 70 percent of land falls under the jurisdiction of the 10,832 demarcated villages.⁵² The management of village land, which is regulated by customary law and by the Village Land Act, and of general and reserved land, which are regulated by statutory law, are devolved to different institutions: the Village Council and Village Assembly for village land, and the Land Commissioner for general and reserved land.⁵³

As Geir Sundet notes, “the Land Act does little more than partially to consolidate earlier legislation”,⁵⁴ as the new acts preserve many of the characteristics of the existing dual tenure system. Nonetheless, the reform strengthens the legal status of customary rights: according to the Village Land Act, “customary right of occupancy is in every respect of equal status and effect to a granted right of occupancy”.⁵⁵ Moreover, the Village Land Act establishes a procedure for the formalisation and registration of customary rights and confers the related authority to village councils.

In light of the objective of promoting land markets, the Land Act introduces derivative land rights i.e. “right(s) to occupy and use land created out of a right of occupancy”.⁵⁶ Derivative rights are regulated by the Land Act and, as the next paragraph will discuss, they play a central role in the allocation of land to investors.

⁴⁸ Land Act, s 6.

⁴⁹ Government of Tanzania, Ministry of Lands, Housing and Human Settlements Development, www.ardhi.go.tz (accessed September 2014).

⁵⁰ Land Act, s 2. It is interesting to note that there is a discrepancy between the definitions of general land contained in the Land Act and in the Village Land Act. The Village Land Act defines general land as ‘all public land which is not reserved land or village land’ (s 2), thus excluding ‘unoccupied or unused village land’. According to the rules of application of the Land Act, its provisions shall prevail in case ‘any provisions of any other written law applicable to land... conflict[s], or [is] inconsistent with any of the provisions of this Act’ (s 181). However, the practice of village land demarcation appears in line with the Village Land Act definition, so that ‘unused’ and ‘unoccupied’ land fall under the jurisdiction of village councils (Isaksson and Sigte, “Allocation of Tanzanian Village Land to Foreign Investors. Conformity to Tanzania’s Constitution and the African Charter on Human and Peoples’ Rights”, LLM dissertation (Umeå Universiteit, 2010).

⁵¹ The Village Land Act preliminarily defines village land as ‘the land declared to be village land under and in accordance with section 7 of this Act and includes any transfer or land transferred to a village’ (s 2). As the Act further clarifies, village land incorporates all the land within village boundaries, including fallow land and pastures (s 7(1)(e)). The Land Commissioner is in charge of the issuance of village land certificates, which demarcate the boundaries between villages and ‘confer upon the Village Council the functions of management of the village land’ (s 7(b)).

⁵² Government of Tanzania, Ministry of Lands, Housing and Human Settlements Development, www.ardhi.go.tz (accessed September 2014). The implementation of the Village Land Act has proved particularly challenging and burdensome. According to the World Bank, in 2010 only 753 villages out of 10,397 had received a Certificate of Village Land from the Land Commissioner (Deininger and Byerlee, *op cit*, at 102).

⁵³ Village Land Act, s 8; Land Act, part IV.

⁵⁴ Sundet, *op cit*.

⁵⁵ Village Land Act, s 18.

⁵⁶ Land Act, s 2.

(c) The allocation of land to investors: converting village land into general land

Rights of occupancy for foreign investors – whether granted or derivative – can only be granted over general land.⁵⁷ This category constitutes merely the 2 percent of land and it is mostly located in urban and peri-urban areas.⁵⁸ As such, the allocation of land to investors in rural areas entails the previous conversion of village land into general land, in accordance with the provisions of the Village Land Act that will be discussed in this section.

Before a right of occupancy can be granted to non-citizens or foreign companies, the Land Act requires investors to approach the Tanzania Investment Center (TIC).⁵⁹ The Center is in charge of the issuance of a “Certificate of Incentives”⁶⁰ which enables investors to receive further assistance from the TIC, to benefit from the incentives provided by the Tanzanian government, and to obtain rights of occupancy over general land.⁶¹

In order to receive the Certificate, investors are required to undergo an administrative process of validation of their projects, as provided by s 17 of the Investment Act. Once the TIC issues the Certificate, the President might convert the land needed for the investment into general land: according to the Village Land Act, “investments of national interest” fall within the definition of “public purpose” that enables village land conversions.⁶²

The conversion of village land into general land is partly decentralised and managed by village authorities, with the exception of conversions exceeding 250 hectares.⁶³ Once the land is identified by a recommendation of the investor or of the TIC, the minister in charge for lands⁶⁴ publishes a notice in the Gazette and sends it to the Village Council that has jurisdiction over the land proposed for conversion.⁶⁵ The notice shall specify, among others, the location, the reason for the land transfer, and the date of the transfer, which

⁵⁷ Only customary rights of occupancy can be obtained over village land, and non-Tanzanian individuals and companies cannot apply for them (Land Act, s 2).

⁵⁸ Government of Tanzania, Ministry of Lands, Housing and Human Settlements Development, www.ardhi.go.tz (accessed September 2014).

⁵⁹ Land Act, s 25(h). The TIC has been introduced by the Tanzania Investment Act 26 of 1997 in order to ‘co-ordinate, encourage, promote and facilitate investment in Tanzania’ (Tanzania Investment Act, s 5). In line with the recommendation of the World Bank and the International Monetary Fund, the TIC represents a ‘one-stop shop’ aimed to simplify investment procedures.

⁶⁰ Tanzania Investment Act, s 17.

⁶¹ Land Act, s 25(h).

⁶² Village Land Act, s 4(2). In accordance with the Investment Act, the Government of Tanzania has developed a Land Bank Scheme to identify land readily available to investors. Notwithstanding the commitment to facilitate land investments, the implementation of the Land Bank has proved lengthy and burdensome, so that to date this scheme only includes ‘parcels [that] are too few, too small, and too scattered to be of much interest to investors’ (USAID, *Usaid Country Profile. Land Tenure and Property Rights: Tanzania* (USAID 2012), at 13). Recent case studies on the allocation of land to investors confirm that the Land Bank has not yet started its operations. As such, the majority of investors obtain land by following the procedure of land conversion (German et al, ‘Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?’ (2013) 48 *World Development* 1-18; Isaksson and Sigte, op cit).

⁶³ Village Land Act, s 4(6)(a).

⁶⁴ I.e. the Minister for Lands, Housing and Human Settlements Development.

⁶⁵ Village Land Act, s 4.

cannot take place earlier than 90 days from the notice.⁶⁶ The Act requires the Village Council to inform all the individuals who have derivative or customary rights over the land, so that they can “make their representations to the Commissioner and to the Village Council”.⁶⁷

Once the procedure has been set in motion by the ministerial notice, the following steps depend on the size of land. For land conversions of less than 250 hectares, the Village Assembly, which is composed of all the adult residents of the village,⁶⁸ is in charge of the approval or rejection of the transfer after “consider[ing] recommendations from the Village Council and any representation made by the District Council of the area where the land is situated”.⁶⁹ For land conversions of more than 250 hectares, the approval of the Village Assembly is not necessary, as the decision-making power is vested in the Minister, who is required to hear representations from the Village Assembly – through the Village Council – and from the Village and District Councils.⁷⁰

Once the land conversion is approved by the Village Assembly or the minister, the Land Commissioner i.e. the delegate of the President for the management of land,⁷¹ decides on the compensation for the local users whose land is affected.⁷² After the compensation is agreed by the Village Council, the Commissioner transfers the land on behalf of the President and converts it into “general land”. The converted land might then be allocated to the investors interested in it, either by means of a granted right of occupancy issued by the Land Commissioner,⁷³ or by means of a derivative right obtained by the TIC.⁷⁴ Investment practices show that the preferred legal solution is the allocation of derivative rights.⁷⁵ In these cases, the Commissioner grants a right of occupancy to the TIC, which in turn grants a lease or another derivative title to the foreign investor.⁷⁶ This title can be renewed, but in case of termination or expiry, the right of occupancy reverts to the TIC.⁷⁷

⁶⁶ Ibid.

⁶⁷ Village Land Act, s 4(5).

⁶⁸ Local Government (District Authorities) Act 1982, s 55.

⁶⁹ Village Land Act, s 4(6)(a).

⁷⁰ Village Land Act, s 4(6)(b).

⁷¹ Land Act, part IV.

⁷² Village Land Act, s 4(8)(a).

⁷³ Land Act, s 25.

⁷⁴ Land Act, s 19.

⁷⁵ See the Investment Guide issued by the Tanzania Investment Center: Tanzania Investment Center, *2014-15 Tanzania Investment Guide*, 2013.

⁷⁶ Derivative titles are regulated by the Land Act, which defines them as the ‘right to occupy and use land created out of a right of occupancy [including] a lease, a sub-lease, a license, a usufructuary right and any interest analogous to those interests’ (Land Act, s 2).

⁷⁷ Land Act 1999, s 20(5).

(d) Investment practices and shortcomings in the implementation of the acts

Since 2008, many case studies have focused on the impact of large-scale land acquisitions on the rights of local land users.⁷⁸ As discussed in the second section of the paper, the “land grabbing” literature has emphasised how, in contexts where land governance is poor and customary rights are not sufficiently protected, local users are at risk of eviction without adequate guarantees of compensation and rehabilitation.⁷⁹

The Tanzanian land acts have been praised for their decentralisation and for the democratic decision-making process they envision through the role of the Village Assembly.⁸⁰ Nonetheless, the procedure to convert more than 250 hectares has been widely criticised, as it centralises the decision without any approval at the village level.⁸¹ Moreover, many authors have questioned the democratic nature of decision-making procedures at the local level⁸² and have raised concerns on the effective protection of local users in relation to investment processes.

Based on evidence from field research, some authors have criticised the procedures through which village assemblies approve land conversions, and have emphasised the undue influence of district authorities and local politicians in the decision-making process.⁸³ Other studies have showed that often villagers are not fully aware of the implications of land conversions, and that the lack of legal literacy is a significant obstacle to decentralised land governance.⁸⁴

Some authors have also emphasised that the transfer from village to general land is a permanent one.⁸⁵ If investors fail to develop their project or stop their operations, the land does not revert under the control of village councils, which could re-allocate it to members of the local community, but it is managed by the TIC (in the case of derivative rights of occupancy) or the Land Commissioner (in the case of granted rights of occupancy). Recent field research has shown that some of the bio-fuel large-scale investments

⁷⁸ See, among others: Vermeulen and Cotula, ‘Over the Heads of Local People: Consultation, Consent, and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa’ (2010) 37(4) *Journal of Peasant Studies* 899-916; Schoneveld, German and Nutakor, ‘Land-Based Investments for Rural Development? A Grounded Analysis of the Local Impacts of Biofuel Feedstock Plantations in Ghana’ (2011) 16(4) *Ecology and Society* 1-16; White et al, ‘The New Enclosures: Critical Perspectives on Corporate Land Deals’ (2012) 39(3-4) *Journal of Peasant Studies* 619-647; Anseeuw et al, op cit; Borrás Jr and Franco, op cit, Theting and Brekke, op cit.

⁷⁹ Wily, “‘The Law Is to Blame’”: The Vulnerable Status of Common Property Rights in Sub-Saharan Africa’ (2011) 42(3) *Development and Change* 733-757.

⁸⁰ Wily, ‘The Village, Villagers and the Village Land Bill’ in *Land Management and Natural Resources Programme* (Arusha Region 1998).

⁸¹ Abdallah et al, op cit; Nelson et al, op cit; Theting and Brekke, op cit.

⁸² See for example: Cotula and Vermeulen, ‘Contexts and Procedures for Farmland Acquisitions in Africa: What Outcomes for Local People?’ (2011) 54(1) *Development* 40-48; Sulle and Nelson, *Biofuels, Land Access and Rural Livelihoods in Tanzania* (Institute for International Environment and Development 2009); Kusalika et al, ‘The Negative Impact of Land Acquisition on Indigenous Communities’ Livelihood and Environment in Tanzania’ (2011) 35(1) *Habitat International* 66-73; Nelson et al, op cit; Mousseau and Mittal, op cit.

⁸³ Mousseau and Mittal, op cit; Isaksson and Sigte, op cit.

⁸⁴ Sulle and Nelson, op cit.

⁸⁵ German et al, op cit.

have currently stopped their operations.⁸⁶ This raises further concerns on the livelihood of local communities: in many cases, the approval of land conversions is influenced by expectations of employment and community development schemes, which in these cases do not materialise.⁸⁷

IV Land law and investments in Zambia

The land tenure system in Zambia shows some similarities with the Tanzanian one: a dual system is in place in Zambia as well, and it is the product of colonial legislation that went almost unchanged after independence.

(a) Land tenure in Zambia: a historical introduction

In the early Twentieth century, the British South Africa Company obtained from Zambian chiefs the rights to use large tracks of land for mineral extraction, and granted back the allocation of sufficient land to native population.⁸⁸ In 1924, control over the Zambian territory was transferred to the Governor of Northern Rhodesia, which in 1928 promulgated the Northern Rhodesian (Crown lands and native reserves) Order in Council. The Order created the categories of native reserves and Crown lands and regulated them in different ways, in order to foster the creation of new white settlements, similarly to the policy in place in Southern Rhodesia.⁸⁹

Native reserves were meant for local people, whereas Crown land was reserved for Europeans for settlements and mining purposes. These two categories were regulated by different sets of norms: Crown land was held under the common law of freehold and leasehold, whereas native land was managed according to local customary law and could not be leased to non-Zambians.⁹⁰

It soon became evident that the proportion of Crown land was in excess with the needs of the settlers, while native land was overpopulated. In 1947 the Northern Rhodesia (Native Trust Land) Order in Council introduced the new category of trust land which – similarly to Native reserves – was reserved for Africans, was administered by customary authorities under customary law, but could also be leased to non-Zambians.⁹¹

At the time of independence in 1964, the existing tenure system was preserved. Simultaneously, efforts to redress the unjust land distribution of the past were undertaken. The dual system of tenure was preserved and Crown

⁸⁶ Abdallah et al, op cit.

⁸⁷ See also: Wise, 'Picking up the Pieces from a Failed Land Grab Project in Tanzania' in *A Blog about Human Rights in Their Many Forms* (<http://www.globalpost.com/dispatches/globalpost-blogs/rights/picking-the-pieces-failed-land-grab-project-tanzania>: 2014).

⁸⁸ Adams, *Land Tenure Policy and Practice in Zambia: Issues Relating to the Development of the Agricultural Sector* (Mokoro Ltd 2003).

⁸⁹ For an overview of the history of land tenure in Zambia, see: Mvunga, *The Colonial Foundations of Zambia's Land Tenure System* (National Education Company of Zambia 1980); Adams, op cit.

⁹⁰ Chileshe, 'Land Tenure and Rural Livelihoods in Zambia: Case Studies of Kamena and St. Joseph', PhD dissertation (University of Western Cape 2005).

⁹¹ Jhon Bruce and Peter Dörner report data on Crown, reserve and trust land in 1950. Reserve land amounted to 71 million acres, trust land to 100 million acres, and Crown land to 10 million acres (Bruce and Dörner, op cit, at 6).

lands were vested in the President, whereas native and trusts lands were left under the control of village chiefs in accordance with customary law.⁹² It was in 1975 that, in line with the socialist economic policy of the ruling party UNIP, the Land (Conversion of Titles) Act⁹³ radically changed land titling in Zambia, as it nationalised all the land. The Act vested all the land in the President on behalf of the Zambians and converted existing freehold titles into leasehold titles for 100 years.⁹⁴

Until a systematic reform of land tenure was passed in 1995, many of the colonial rules remained applicable to reserve and trust land, since the 1975 Act had not repealed them.⁹⁵ An important restriction on land alienation was introduced in 1985, when an administrative circular limited the rights of foreign investors to acquire customary land and set the limit to 250 hectares.⁹⁶

Similarly to what happened in Tanzania, the pressure of neoliberal policies and the shift to a multi-party system took place in the late Eighties. In the following years, a systematic reform of the land tenure regime was introduced under the guidance of structural adjustment prescriptions.⁹⁷

(b) The 1995 Lands Act

The land reform introduced in 1995 aimed to liberalise the land market.⁹⁸ In line with this objective, the Act reduces the restrictions on land titles for foreigners and simplifies the procedure for the alienation of land.⁹⁹

Like in the case of Tanzania, the Act confirms that “all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia”.¹⁰⁰ By merging the categories of native and trust land, the Act reclassifies land into “customary” and “state” land¹⁰¹ and confirms the dualism in the norms that regulate them: the common law of leasehold for state land, and customary law for customary land. According to available data, only the 6 percent of land is classified as state land, whereas the rest is customary land and it is administered by village chiefs at the local level.¹⁰²

⁹² Mvunga, op cit.

⁹³ Land (Conversion of Titles) Act, Cap. 289 of 1975.

⁹⁴ Roth, Khan and Zulu, ‘Legal Framework and Administration of Land Policy in Zambia’ in Roth, *Land Tenure, Land Markets, and Institutional Transformation in Zambia* (Land Tenure Center, University of Wisconsin-Madison 1995).

⁹⁵ Adams, op cit.

⁹⁶ Land Circular no. 1 of 1985.

⁹⁷ Taylor Brown, ‘Contestation, Confusion and Corruption: Market-Based Land Reform in Zambia’ in Evers, Spierenburg and Wels (eds), *Competing Jurisdictions: Settling Land Claims in Africa* (Brill 2005).

⁹⁸ Lands Act, Cap. 184 of 1995.

⁹⁹ Lands Act, s 3.

¹⁰⁰ Lands Act, s 3.

¹⁰¹ Lands Act, s 2.

¹⁰² Adams, op cit, at 6. Nonetheless, data on state and customary land do not account for land conversions under the 1995 Land Act. As Brown notes, “Lack of official data... makes it difficult to accurately assess the areal extent of title conversions. The official figures state that only six per cent of Zambia’s land (4.5 million hectares) is held as state leasehold. This statistic, however, has not been updated since the early 1970s and therefore fails to account for any title conversions that have taken place since then. While officials within the Ministry of Lands still use the six per cent figure, they say privately that it is likely to be as high as 10 per cent”. (At 88). USAID, the United States development agency, refers to customary land as the 10 percent of the land in the country (USAID, *Usaid Country Profile. Land Tenure and*

In order to guarantee the rights of local land users, the Act explicitly recognises all the existing customary rights.¹⁰³ Nonetheless, in line with development policies aimed to formalise land titles¹⁰⁴ and with the promotion of land markets, the Act enables the conversion of customary titles into statutory leasehold rights.¹⁰⁵ According to s 8 of the Act, “any person who holds land under customary tenure may convert it into a leasehold tenure”: after the approval of the chief and the local authorities, the President can grant a 99-years renewable leasehold title.¹⁰⁶ Some studies have noted that these provisions are particularly problematic, as they have led to “widespread land speculation”¹⁰⁷ and, as documented in other cases of land titles formalisation, have resulted in the appropriation of land by powerful elites.¹⁰⁸

According to the Lands Act, land can be alienated to non-Zambians for investment purposes.¹⁰⁹ Foreign investors can directly acquire leaseholds on state land. However, since state land represents only a minor percentage of land, the allocation of land to investors is primarily based on the alienation

Property Rights: Zambia (USAID 2012), at 1).

¹⁰³ Section 7 of the Lands Act clearly states that ‘every piece of land in a customary area which immediately before the commencement of this Act was vested in or held by any person under customary tenure shall continue to be so held and recognised and any provision of this Act or any other law shall not be so construed as to infringe any customary right enjoyed by that person before the commencement of this Act’.

¹⁰⁴ The introduction of formal and secure tenure titles has been one of the central prescriptions of development policies from the Sixties. Formalisation policies are based on the idea that property titles can bring about economic development by providing the right incentives to individual. The seminal work of the Hernando De Soto has contributed to strengthen this view: the Peruvian economist argues that formalised land titles enable the use of land as a collateral and therefore are crucial to the process of investment and economic development.

International institutions have funded numerous projects of land titling in the developing world, but the outcomes have not been as successful as expected. Many studies have shown that the formalisation of land titles might result in the appropriation of land by powerful elites. In the cases where land is formalised without abuses, the mechanism of creation of credit might not materialise as expected, due to a variety of factors. Therefore, instead of increasing the security of land titles, many of these programs have actually showed that the concept of tenure security is not absolute, and that land titling programs should clarify whose security they aim to increase. The literature on tenure reform and development is immense; for a concise discussion of the historical evolution of land tenure policies, see: Peters, ‘Challenges in Land Tenure and Land Reform in Africa: Anthropological Contributions’ (2009) 37(8) *World Development* 1317-1325. For a legal discussion of land titling programs, see: Ubink, Hoekema and Assies (eds), *Legalising Land Rights: Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America* (Leiden University Press 2009). For a critique of the formalisation paradigm, see the seminal article by Platteau: ‘The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment’ (1996) 27(1) *Development and Change* 29-86.

¹⁰⁵ Lands Act, s 8.

¹⁰⁶ The procedure to convert customary titles has been detailed by the Land (Customary Tenure Conversion) Regulations 89 of 1996.

¹⁰⁷ Brown, op cit, at 91.

¹⁰⁸ As mentioned earlier (n 104), the formalisation of land titles might foster social exclusion and benefit those who have access to knowledge, power, and financial resources to undertake land registration and formalisation. In the case of Zambia, Brown notes that ‘investors pay nothing for the customary lands they convert – barring registration and survey costs and the ‘facilitation payments’ that are often given to chiefs. These costs, though often prohibitive for communal farmers, are only a small portion of the market value of the land’ (op cit, at 91-92.). On the problems related to land conversions in Zambia, see also: Nolte, ‘Large-Scale Agricultural Investments under Poor Land Governance in Zambia’ (2014) 38 *Land Use Policy* 698-706; Christensen et al, ‘Caught in the Clash Amid Customs and Market: A Case of the Poor and Marginalized Rural Population’s Access to Land in Zambia’ (2011) 7(1) *Interdisciplinary Journal of International Studies* 27-40.

¹⁰⁹ Lands Act, s 3(3).

of land from the customary domain,¹¹⁰ in accordance with the procedure that will be illustrated in the following section.

(c) The allocation of land to investors: converting customary land into state land

Investors can obtain title to land by following different procedures. First, they can acquire leasehold rights on state land from the current leaseholders through private transactions, so that no customary land is involved in the investment. Second, investors can approach the Zambia Development Agency (ZDA),¹¹¹ which can facilitate their acquisition of leasehold titles over the state land set aside for investments.¹¹² Third, investors can apply for the conversion of customary land into state land. It is on this procedure that the section focuses on, as the conversion of customary land into state land is the precondition for leasehold rights, which cannot be granted over customary land.

The conversion of customary land into state land is regulated by the 1995 Land Act, the Lands Regulations of 1996, and the Administrative Circular no. 1 of 1985. The resulting legal provisions leave large room for discretion and do not specify many aspects of the conversion procedure.

According to the Act, the process of alienation of customary land to both Zambians and non-Zambians requires the consultation of “any persons or body whose interest might be affected by the grant”.¹¹³ The consultation procedure has not been extensively regulated, and there is no sanctioning or monitoring provision to check on its effectiveness: a declaration by the local chief is sufficient to prove that consultations have taken place.¹¹⁴

Before land is converted, the applicant is required to obtain “the prior approval from the chief and the local authority within whose area the land is situated”.¹¹⁵ As such, the District Council and the local chief are responsible for the approval of all the applications for conversion made by investors. This procedure suggests a direct negotiation between investors, chiefs and local

¹¹⁰ Nolte, ‘Large-Scale Agricultural Investments under Poor Land Governance in Zambia’ (2014) 38 *Land Use Policy* 698-706.

¹¹¹ The ZDA has been introduced by the Zambia Development Act 11 of 2006 to ‘to further the economic development of Zambia by promoting efficiency, investment and competitiveness in business and promoting exports from Zambia’ (s 5). The ZDA results from the merger of five pre-existing agencies, namely: Zambia Investment Centre, Zambia Privatisation Agency, Export Board of Zambia, Small Enterprise Development Board, and Zambia Export Processing Zones Authority (www.zda.org.zm).

¹¹² The Zambian government has been committed to attracting investments in the agricultural sector. For this purpose, in 2005 it launched the Farm Block Development Plan aimed at developing ‘large agricultural area[s] where basic infrastructure for agriculture such as feeder roads, electricity, water for irrigation and communication facilities are provided’. (Ministry of Finance and National Planning, *Farm Block Development Plan 2005-2007*, 2005).

¹¹³ Lands Act 1995, s 3(4)(c).

¹¹⁴ Land (Customary Tenure Conversion) Regulations 89 of 1996, form II.

¹¹⁵ Lands Act 1995, s 3(4)(d).

authorities. The payment of compensation for the loss of customary land is not prescribed by the Act nor by the regulations.¹¹⁶

After the approval of the chief, land gets surveyed and the District Council receives the application for tenure conversion.¹¹⁷ Once the request is processed by the local authority, the Land Commissioner, on behalf of the President, proceeds to alienate the land and issues a leasehold title to the applicant investor.¹¹⁸ In case of alienation of more than 250 hectares, the approval of the President is also required.¹¹⁹

The norms do not specify whether the conversion of customary land is permanent or whether land can be reverted back to the customary domain. However, a joint reading of the norms suggests that the conversion is permanent: state land is no longer subject to customary rules nor to the authority of chiefs, but it is managed by the Land Commissioner on behalf of the President, who has the authority to issue leasehold titles over it.¹²⁰

(d) Investment practices and shortcomings in the implementation of the acts

In the gaps between the norms, some recurring practices have emerged. Since the approval of the Lands Act and the liberalisation of the land market, many studies have documented cases of speculation and of enrichment of local elites.¹²¹ As Adams notes, “the Act gives chiefs the legal power to approve requests for tenure conversions, which sometimes enriches individual chiefs. Chiefly authority over title conversions ... is a potentially large source of revenue”.¹²² As similarly noted by recent studies, investors directly negotiate with chiefs on the conditions for the conversion of land and reach agreements that are not regulated by law, with the risk of benefitting chiefs at the expense of local communities.¹²³ Moreover, the absence of compensation requirements increases the risk of impoverishment for the affected land users.¹²⁴

Recently, Zambian media have reported widespread violations in the land conversion procedures.¹²⁵ In particular, the government has denounced that many land alienations have taken place without the approval of the President, which is required for all the conversions of more than 250 hectares.

¹¹⁶ It is important to note that the Environmental Impact Assessment Regulations of 1997 prescribe the payment of compensation to mitigate environmental damages caused by investment projects. For an overview of the environmental assessment procedure in Tanzania and Zambia, which is beyond the scope of this paper, see: German et al, ‘Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?’ (2013) 48 *World Development* 1-18.

¹¹⁷ Administrative Circular 1 of 1985.

¹¹⁸ Lands Act, s 3.

¹¹⁹ Administrative Circular 1 of 1985.

¹²⁰ Lands Act 1995.

¹²¹ See for example: Adams, op cit; Brown, op cit; Chileshe, op cit; Christensen et al, op cit.

¹²² Brown, op cit, at 98.

¹²³ Nolte, ‘Large-Scale Agricultural Investments under Poor Land Governance in Zambia’ (2014) 38 *Land Use Policy* 698-706; German et al, ‘Shifting Rights, Property and Authority in the Forest Frontier: ‘Stakes’ for Local Land Users and Citizens’ (2014) 41(1) *The Journal of Peasant Studies* 51-78.

¹²⁴ German et al, ‘Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?’ (2013) 48 *World Development* 1-18.

¹²⁵ APA, ‘Zambian Government Condemns Huge Land Allocations’, 29 August 2014.

The government has announced that it will not support irregular land alienations,¹²⁶ but concrete steps in this direction have not yet been taken. The lack of oversight on land alienations appears problematic, especially in light of the permanent effects of land conversions.

V Different norms, similar outcomes?

The discussion of the land laws of Tanzania and Zambia and of the allocation of land to investors shows a number of significant differences.

In both countries the majority of land is held under customary tenure, but its management is devolved to different authorities. In Tanzania traditional authorities have been abolished in the Sixties, whereas in Zambia they are recognised by the state and play an important role in the management of customary land. Therefore, in Tanzania the allocation of land to investors is subject to the approval of village assemblies, whereas in Zambia the power to approve the conversion of land is vested in the chiefs, together with the district councils.

Thanks to the membership rules for village assemblies, which are open to all the adult residents of the village, Tanzanian law has the potential to democratise decisions on the use of land and to promote a self-determined conception of local development. On the contrary, Zambian law does not offer comparable guarantees of participation to villagers affected by land investments: the Lands Act does not clarify how the chief should conduct consultations, so that the effectiveness of the process varies significantly across chiefdoms.

Notwithstanding these differences in legal provisions, the literature on large-scale land investments has documented many cases where no effective consultation has been conducted, both in Tanzania and Zambia. In the case of Tanzania, many studies argue that villagers are not provided with enough information on the proposed land conversions, and that powerful local actors are capable to influence the outcome of consultations.¹²⁷ Likewise, in Zambia many authors have documented the risk of benefitting the chiefs at the expense of local communities.¹²⁸

A striking similarity between the two countries lies in the fact that the alienation from the customary domain is permanent. In Tanzania, the conversion into general land places it under the jurisdiction of the Land Commissioner; similarly, in Zambia state land is no longer administered by chiefs, but by the Land Commissioner. In both the countries, customary rights are extinguished permanently: when the process of conversion lacks transparency and is not the outcome of a participated and democratic decision,

¹²⁶ Ibid.

¹²⁷ Mousseau and Mittal, *op cit*; Isaksson and Sigte, *op cit*.

¹²⁸ Wily, “‘The Law Is to Blame’: The Vulnerable Status of Common Property Rights in Sub-Saharan Africa” (2011) 42(3) *Development and Change* 733-757; Cotula, ‘Property Rights, Negotiating Power and Foreign Investment: An International and Comparative Law Study on Africa’ PhD dissertation (University of Edinburgh, 2009); De Schutter, ‘The Green Rush: The Global Race for Farmland and the Rights of the Land Users’ (2011) 52(2) *Harvard International Law Journal* 504-559.

exclusionary processes can affect negatively local communities and benefit local elites.

VI Concluding remarks

Notwithstanding the legal provisions that recognise and protect customary rights, in both the countries local communities and their rights are weak when confronted with other development priorities set by the governments. The study of large-scale land acquisitions in Tanzania and Zambia shows that the strengthening of customary rights and the decentralisation of governance, which have been top priorities in development policies over the past 20 years, might conflict with the liberalisation of land markets and the attraction of foreign investments.¹²⁹ This poses new challenges to national governments, who are now faced with the task of clarifying the type of development they envision for the future.

¹²⁹ German et al, 'Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?' (2013) 48 *World Development* 1-18.

CUSTOMARY LAND AT CROSSROADS: CONTEST FOR THE CONTROL OF CUSTOMARY LAND IN ZAMBIA

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Abstract

Customary land across Africa has come under increasing pressure over the past decade and a half from different angles. Among the factors which account for this growing pressure are population growth, sustained economic growth recorded in most countries over the past 15 years, and urbanisation. For instance in Zambia, the growing demand for land has manifested in the rapid increase of customary land being converted into leasehold tenure by well-resourced Zambians as well as foreign investors. But the practice of converting customary land into leasehold tenure is raising serious questions and concerns about the future of customary land. For some analysts, this is an auspicious moment marking the inevitable transition from communal to individualised land ownership. For example, the Zambian government has been promoting the conversion of customary land into leasehold tenure, arguing that this is the only way to 'open up' rural areas to investments, which is expected to bring development to these areas. However, some analysts argue that conversion of customary land into leasehold tenure undermines traditional authorities and the cultures of the Zambian people, as well as the fight against poverty in rural areas. This paper illustrates that while the privatisation of customary land may appear as a genuine attempt by the state to stimulate rural development, this practice is creating a contest for the control of customary land between traditional authorities (who have always been the custodians of customary land) and the state that seeks to extend its control over land resources in Zambia.

Keywords: customary land, Zambia, traditional authorities, the state, contestation

I Introduction

Land constitutes a critical resource in many parts of Africa. There are many reasons why access to and control of this strategic resource is important in Africa, including the fact that the majority of the people derive their livelihoods directly from the land.¹ The Zambian draft policy on land administration and management,² underscores the significance of land when it states that: '[I] and is the most fundamental resource in any society because it is the basis of human survival'. Given land's central place in society, it is obvious that the 'stakes are high' for the different groups with direct interest in land as they

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¹ See Akuffo, 'The Conception of Land Ownership in African Customary law and Its Implications for Development' (2009) 17 *African Journal of International and Comparative Law* 57-78; Cotula, 'Introduction' in Cotula, (ed) *Changes in Customary Land Tenure System in Africa* (IIED 2007).

² See Republic of Zambia, 'Draft land Administration and Management Policy'. Ministry of Lands, Lusaka (Draft land Policy, 2006) 1.

seek to secure their own interests in this vital resource.³ In the context of the policy and practice of converting customary land into leasehold, this paper examines the contest over the control of customary land which this practice is engendering. To situate the contest in the broader context the paper identifies some of the key factors driving the practice of converting customary land into state land (leasehold tenure) in Zambia.

Although at this point, no accurate data exists on how much customary land has been converted to state land, available evidence suggests that the pace at which customary land is being converted into leasehold has significantly increased since the promulgation of the Lands Act 29 of 1995⁴ and the pace is not slowing down.⁵ What is of interest to note here is the fact that once customary land is converted into state land, it does not revert back to customary land when the lease expires or is cancelled; converted customary land permanently remains state land. This effectively means that customary land is shrinking while state land is expanding.⁶ As customary land shrinks, traditional authorities, whose power and relevancy derive directly from being able to control and administer customary land, are not just watching this from a distance. They are contesting this policy and practice, arguing that alienation of customary land is undermining not just the institutions of traditional authorities, but also the cultures and traditions of the people.⁷

There are two sides to this contest. On one side, the state (mainly through the Zambia Development Agency, ZDA) is encouraging the conversion of customary land into leasehold, by local as well as foreign investors, as the only way to attract investment and eventually bring development to rural areas.⁸ On the other hand, the traditional authorities are realising that they are effectively losing power and control over a critical resource that has always been a source of legitimacy, relevancy and power for them. Although some of the chiefs are actively participating in and encouraging the conversion of customary land (often for their personal financial interests),⁹ many chiefs are aware of the long-term consequences of converting customary land and they

³ Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control* (Princeton University Press 2000) 81.

⁴ See Chizyuka, Kamona, Ufwenuka & Phiri, 'Policies and Strategies for Agrarian Reform and Rural Development to Secure and Improve Access to Natural Resources: National Report – Zambia', (2006); Parliamentary Committee on Agriculture and Land (PCAL), Second Report of the Committee on Agriculture and Land, prepared for the Tenth Session of the National Assembly. Lusaka: Zambia National Assembly (2009).

⁵ See Sitko and Jayne, 'Structural Transformation or Elite Capture? The Growth of Emergent Farmers in Zambia' (2014) 48 *Food Policy* 194-202.

⁶ While all land in Zambia, including customary land is vested in the President, customary land is administered differently from the land under leasehold tenure (state land). Traditional authorities are directly responsible for the day-to-day administration of customary land; see Adams, *Land Tenure Policy and Practice in Zambia: Issues Relating to the Development of the Agricultural Sector* Draft document for DFID. Lusaka, Zambia (2003).

⁷ See Kabilika, 'The Status of Customary Land and How it affects the Rights of Indigenous Local Communities' Submissions to the Committee on Agriculture and Lands (CAL). Caritas Zambia (2010).

⁸ See Zambia Development Agency (ZDA), 'Development and Commercialisation of Nansanga Farm Block' A Memorandum by the Multi-Sectoral Committee on Farm Block. Lusaka: ZDA (2011).

⁹ See 'Policy Statement by Honourable Harry Kalaba, MP, Minister of Lands, Natural Resources and Environment, on the Protection and Administration of Customary Land in Zambia'. Issued on 13 December, 2013.

are contesting, protesting and in some instances, resisting this policy.¹⁰ The view of traditional authorities have been collectively articulated through a communique by the house of chiefs which has stated that the loss of customary land through conversion is undermining the institution of traditional authorities and is detrimental to the culture and welfare of the Zambian people, especially in rural areas.¹¹ Recently, chiefs are reported to have rejected the new proposal to take away the administration of customary land from traditional structures. Chiefs have contested this proposal arguing that ‘[t]his land we are all fighting [for] now is here because it has been preserved by the chiefs and without us it wouldn’t have been here as we have been taking care of it since time immemorial. And for us to have this land, we had to fight wars with other tribes, it didn’t come on a platter of gold’.¹²

It therefore is apparent that the strategy pursued by the state of ‘opening up the countryside to development’ is increasingly seen by traditional authorities as diametrically opposed to their interests to the extent that control over customary land is something central to the existence and relevancy of traditional authorities in society.¹³

In the Zambian context, what has made this contest over land more open is that the state has no more land to allocate since all “state land” (former crown land) has already been titled and allocated to commercial farms and urban development.¹⁴ The only available land for the state to allocate to investors is land under customary tenure. This is one of the reasons why the state has ‘considerable interest in converting customary land to leasehold tenure ...’.¹⁵ The other reason is that once customary land is titled, the state will be able to collect ground rent (as is the case with any leased land), and this is expected to boost revenues, especially for the local government’s authorities.

In view of these dynamics, it is important to examine the apparent contest over customary land, which also raises questions about the future of customary land in Zambia. Given the state’s preference for leasehold titles and its support to convert customary land, will customary land survive this onslaught? And if customary land does survive this assault, given that it has been resilient in the past,¹⁶ what are the impacts of this development on customary tenure and social relations in the country side? The paper draws mainly from secondary data to discuss some of these issues, pointing out that a more nuanced analysis of these issues would require a systematic empirical study into what actually is happening on the ground.

¹⁰ See Zambia Land Alliance (ZLA), ‘Land Policy Options for Development and Poverty Reduction: Civil Society Views for Pro-poor Land Policies and Laws in Zambia’ Civil Society Consultative Forum, Lusaka (2008).

¹¹ See a paper published in the *Lusaka Times* Online on July 3, 2014 by Chief Chitimukulu of the Bemba.

¹² See Kanyanta, ‘The Institution of Chiefs on Slippery Ground’ *Lusaka Times*, 3 July 2014.

¹³ See Herbst (n 3); Kabilika (n 7).

¹⁴ See Chizyuka et al (n 4) at 5.

¹⁵ See Draft Land Policy (n 2) at 14.

¹⁶ See Okoth-Ogendo, ‘Agrarian Reform in Sub-Saharan Africa: An Assessment of State Responses to the African Agrarian Crisis and their Implications for Agricultural Development’ in Basset and Crummey (eds), *Land in African Agrarian Systems* (University of Wisconsin Press 1993) 248-273.

II The context

Majority of rural residents in Zambia, like in many African countries, have access to and use land under customary tenure.¹⁷ Although most of these people combine several sources of income and livelihood, access to land forms the core from which they diversify into other livelihood strategies.¹⁸ According to the Central Statistical Office (CSO), almost 95 percent of the rural households are classified as agricultural households, with almost 90 percent of them engaging in subsistence farming as the main source of livelihood and income.¹⁹ In this instance, access to and use of land becomes central to rural livelihoods. Yet in the last 20 years poorer households living under customary land tenure have increasingly faced constrained access to land, partly due to the pressure generated by the practice of privatising customary land.²⁰ Consequently, the conversion of customary land tenure into state land is generating new dynamics around land relations as the various “web of interests” in land are being constructed and reconstructed.²¹ There are different factors driving the process of privatising customary land, although at this moment the implications of these dynamics are not clear. What is known at this stage, based on the empirical review of evidence on customary land privatisation, is that the de facto land under the control of traditional authorities has shrunk considerably over the past 20 years, contrary to the popular view that 94 percent of land in Zambia is controlled by traditional authorities. Submissions made by a stakeholder to the Parliamentary Committee on Land Environment and Tourism (PCLET) show that land under customary tenure has significantly declined since 1995 leading to displacement of some local residents who are often inadequately compensated for the loss of their land.²² Estimates presented in this paper, suggest that if we take away reserved and protected land (such as game reserves, forest areas, wetlands etc) which is administered by state agencies, the land effectively controlled by customary authorities is actually just over one-third of Zambia’s landmass. If these estimates are correct, it is apparent that the existence of customary land is increasingly under threat, a situation that raises serious concerns about the future of customary land in Zambia and what this means in terms of transforming not just the agrarian structure but the economic and social conditions of people in rural areas.

¹⁷ See United Nations Economic Commission for Africa (ECA), ‘Land Tenure Systems and Sustainable Development in Southern Africa’. ECA Regional office, Lusaka: ECA (2005).

¹⁸ See Metcalfe and Kepe, ‘Dealing Land in the Midst of Poverty: Commercial Access to Communal Land in Zambia’ (2008) 7 *African & Asian Studies* 235-257.

¹⁹ See Central Statistical Office (CSO), Living Conditions Monitoring Survey Report 2006-2010. Lusaka: CSO (2012) 130.

²⁰ See Food Security Research Project (FSRP), ‘The Status of Customary Land and How it Affects the Rights of Indigenous Local Communities’. Submission to the Committee on Agriculture and Land Study, Lusaka: FSRP (2010). See also PCAL (n 4); ZLA (n 10); Kabilika (n 7); Minister of Lands, Policy Statement by Hon. Harry Kalaba, MP, Minister of Lands, Natural Resources and Environment, On the Protection and Administration of Customary Land in Zambia, Issued 13 December 2013, Lusaka.

²¹ See Cotula (n 1).

²² See Parliamentary Committee on Lands, Environment and Tourism (PCLET), Report of the Committee on Lands, Environment and Tourism for the Second Session of the Eleventh National Assembly, Appointed on 27 September, 2012. Lusaka: National Assembly of Zambia (2013) 7.

III Outline

This paper is organised in five sections. Section 2 provides a brief background to the land tenure policy in Zambia, focusing on the last 20 years, since the enactment of the Lands Act 29 of 1995 (Cap 184 of the Laws of Zambia, henceforth, the 1995 Lands Act). Section three looks at the factors driving the policy and practice of alienating customary land in Zambia. Section four discusses the various aspects of the contest for customary land, and how this struggle is shaping debates and policy around land tenure. Section 5 sums up the discussion.

IV Legal and policy background to land administration in Zambia

Since the introduction of colonial rule, Zambia has had a dual land tenure system. From 1928 when the Northern Rhodesia Order in Council demarcated the country's land into Crown Land (state land, which offered freehold tenure to white settlers), and native reserve (reserved for Africans), a dual land tenure system has persisted.²³ This tenure arrangement was partially reformed in 1975 through the Lands (Conversion of Titles) Act 20 of 1975, which abolished freehold tenure, and adopted leasehold tenure instead. But, the dual land tenure system has been preserved by the post-colonial state.²⁴ Apart from the abolishment of freehold title the 1975 Lands Act introduced other administrative and institutional changes including:

The vesting of all land (freehold, leasehold, reserve and trust lands) in the President;

- Converting all freehold titles into leasehold titles with a maximum of a 99-year-lease;
- De-commodification of land by placing a moratorium on the sale of undeveloped land which was deemed to have no value of its own (the no value principle);²⁵
- The requirement for presidential consent prior to transfer of land either through leases, sub-leases, sub-divisions and mortgage;²⁶
- Unutilised farms under freehold land were taken over and became state land/farms.
- The prime motive for introducing these measures is widely believed to have been the need to curb speculation in land (Draft Land Policy, 2006). Other reasons for introducing the 1975 Lands Act include the need to promote

²³ Two of the most important colonial land laws introduced in Zambia were: Orders in Council 1928 to 1964 (which created the Native Reserves), and Orders in Council 1947 to 1964 (which led to the creation of Trust Land). Although a radical land law was introduced in 1975 by the Kaunda Government (the Lands (Conversion of Titles) Act 20 of 1975), it did not repeal the colonial land laws; land continued to be administered under these laws. It was only the 1995 Lands Act which repealed the colonial land laws, but it has also kept the dual tenure system.

²⁴ See Metcalfe and Kepe (n 18).

²⁵ It has been reported that the introduction of the 1975 Lands Act was sparked by the report that one estate agent made a profit of K50 000 over a short period of time by auctioning a piece of less than one acre (Banda C.T., 'Institutional, Administrative and Management Aspects of Land Tenure in Zambia' (no publication date) available at <<http://unu.edu>> accessed on 12 October 2011).

²⁶ See Chizyuka et al (n 4); Adams (n 6).

equitable access to land by preventing the alienation of land, particularly customary land.²⁷ However, these reforms did little to transform the dual land tenure system in Zambia, which ironically was introduced for the purposes of promoting the interest of European settlers.

The 1975 Lands Act was repealed by the controversial²⁸ Lands Act 29 of 1995. While the 1995 Lands Act retained many of the changes introduced by the 1975 Lands Act, such as the proviso to vest the land in the Head of State (s 3(1)), the abolishment of freehold title (ss 6 & 10(1)), the requirement for presidential consent with regard to the sale or transfer of any land (S 5(1)), the provision for maximum lease period of 99 years (S 6); it also introduced some major changes to the country's land tenure policy and legal framework. These include:

The repeal of the Trust and Reserve Land Acts; to create one land entity, namely customary land;

- Restoration of intrinsic value in land, which has made it possible for sale of undeveloped land;
- An explicit provision to allow the alienation of customary land;
- Establishment of a Lands Tribunal to settle land disputes, and the Land Development Fund to coordinate the funding of land development projects;
- Decentralisation of land administration and management.
- Of these changes, perhaps, the most important and relevant to this discussion is the provision that allows customary land to be converted into leasehold tenure. Section 8(1) of the 1995 Lands Act states that '...any person who holds land under customary tenure may convert it into leasehold tenure not exceeding ninety-nine years on application....'. However, the 'conversion of rights from customary tenure to a leasehold tenure shall have effect only after the approval of the chief and the local authorities in whose area the land to be converted is situated....'(s 8(2)).²⁹ But in cases involving big multinational companies such as mining companies, it has been reported that customary land is alienated without the consultation of the local chiefs.³⁰

Prior to the enactment of the 1995 Lands Act, formalisation, conversion or titling of customary land was rare in Zambia (Roth et al, 1995). Titling and formal sale of land was restricted to state land; land under customary tenure was reserved exclusively for the use of Zambians in respective communities,

²⁷ See ZLA (n 10).

²⁸ The 1995 Lands Act was widely rejected by many non-governmental organisations and other civil society groups in Zambia. But the Movement for Multiparty Democracy (MMD) government ignored public concerns and passed the bill using its two-third majority advantage, see ZLA, 2002; Adams, 2003; PCAL, 2009; Ng'ombe, A, 'Customary Land Reform to Facilitate Private Investment in Zambia: Achievements, Potentials and Limitations' (2013) *Urban Forum* 24(1) 33-48; USAID, Property Rights and Resource Governance: Zambia Country Profile (2010). Available at <www.usaid.org> accessed on 11 August 2011.

²⁹ Many civil society and lobby groups have complained about the provision to allow the chief as the only person to issue consent to convert. There have been suggestions that consent to convert should be decided by a committee chosen by the community and not only by the chief alone.

³⁰ Ng'ombe and Keivani, 'Customary Land Reform to Facilitate Private Investment in Zambia: Achievements, Potentials and Limitations' (2013) 24 *Urban Forum* 33-48.

allocated by traditional authorities, mainly, headmen/women and chiefs. Under the current policy and legal framework, a person (Zambian or non-Zambian) who obtains the consent of a traditional leader and local councillor can convert customary land into leasehold title. Following this law, many well-resourced Zambians as well as foreign investors, who do not have existing claim to customary land, have approached chiefs in various parts of the country (especially in areas near large cities such as Lusaka, Ndola, Kitwe, Livingstone and Kabwe) and converted customary land into leasehold tenure.³¹

Although there are no official statistics about how much customary land has been converted to leasehold tenure, it has been reported that the process of conversion has steadily increased since 1995.³²

The Zambia government has adopted the policy of converting customary land into leasehold as a means to promoting economic growth and rural development ('opening up' customary land to investments, especially foreign investors).³³ However, it is not clear at this stage how this policy benefits the poor people who hold land under customary tenure, since the majority have not been able to convert the land they hold under customary tenure.³⁴ What is clear at this stage is that this practice is resulting in some local residents being 'displaced from their ancestral and family land in preference for investors and the urban elite'.³⁵ Thus, while the conversion of customary land into leasehold may appear as a genuine attempt by the state to stimulate rural development, close analysis of the policy and practice suggests that this is generating opportunities for a few, and risks and uncertainties for the majority. At another level, conversion of customary land into leasehold is creating deep-seated struggles between the state and the traditional authorities as they both seek to consolidate control over customary land.

The crucial issue around conversion is that once customary land is converted into leasehold tenure, it does not revert back to customary land after expiry or cancellation of the lease.³⁶ This could be one of the reasons why the state is actively pushing for 'opening up' customary land to investors in the name of bringing development to rural areas, so as to increase not just state revenue through ground rent which is levied on any leased piece of land, but also increase the size of land under state control. Of course, many traditional leaders are realising that they are losing control over land and, subsequently,

³¹ See Sitko and Jayne (n 5) at 197.

³² Data are scattered in various handling departments and there is no agreement regarding the size of land converted so far. For instance the Zambia Investment Centre is reported to have recorded that 240 certificates for commercial farming were issued between 1995 and 2002, while the Ministry of Agriculture reported that over 130 Zimbabwean farmers purchased farm land in Zambia since the beginning of "Fast-Track" land reform in Zimbabwe (see Brown, 'Contestation, Confusion and Corruption: Market-based Land Reform in Zambia' in Evers, Spierenburg and Wels (eds) *Competing Jurisdictions: Settling Land Claims in Africa*. (Brill 2005) 88-89; PCAL (2009); Minister of Lands (2013).

³³ See ZDA (n 8).

³⁴ See Abanda, Ng'ombe, Tah and Keivani, 'An Ontology-driven Decision Support System for Land Delivery in Zambia' *Expert Systems with Applications* (2011) 38 (9) 10896-10905, 10896.

³⁵ See Minister of Lands (n 20) at 3.

³⁶ See Adams (n 6); ZLA (n 10); Kabilika (n 7); Mudenda, 'The Challenges of Customary Land Tenure in Zambia'. Shaping the Change: XXIII FIG Congress, October 8-13, 2006, Munich, Germany (2006).

power. As a result, they have openly contested the policy and practice of privatising customary land, resulting in tensions and open confrontation with councillors and Ministry of Lands' officials,³⁷ but also between some chiefs and local residents.³⁸ Chieftainess Nkomesha, for instance has repeatedly refused to release customary land for the expansion of Chongwe Town and some parts of Lusaka City. There are many media reports of chiefs vowing not to allow conversion of customary land to state land.³⁹

V Policy approach to customary tenure

Current land tenure policy and practice in Zambia is deeply rooted in the colonial architecture of land administration and management. The introduction of statutory tenure in African communities did not just lead to the creation of two parallel tenure systems. From the onset of colonialism, customary tenure has been seen as something regressive, second-rate, unproductive, wasteful, insecure, antiquated, and a major hindrance to investment and productivity.⁴⁰ In contrast, statutory tenure has been widely seen as sophisticated, superior, secure, promotes efficient use of land, provides adequate incentive to invest, and leads to higher productivity, etc.⁴¹ Despite the African nationalists' strong emphasis on decolonising the continent, most of them comfortably adopted the colonial land tenure, administration, management systems and institutions, with a little tinkering on the margins. As a result, land policy and administration is perhaps one of the palpable examples of the failure to decolonise the post-colonial African society. Most post-colonial African states, from Cape to Cairo, have either failed to adequately resolve the dual land tenure system imposed by colonial rule or do not see any problem with the status quo. This situation has resulted in an uneasy coexistence between customary and statutory tenure.⁴²

Over the years, customary tenure has not just been subordinated to statutory tenure, but there have been concerted efforts to do away with customary tenure under the pretext that it hinders economic transformation and development.⁴³ Due to the schizophrenic nature of land tenure systems in Africa, many African states, including Zambia, have been pulling in different directions around the dual land tenure system, often with the deep-seated bias against customary tenure.⁴⁴ For instance the Zambian Draft Land Policy, though it

³⁷ It must be noted here that it is not only the state that is promoting land alienation, but some traditional leaders are actively engaging in land deals, and this has created conflict in communities between the people and traditional leaders (see Brown (n 32); Mudenda (n 36); Sitko, 'Fractured Governance and Local Frictions: The Exclusionary Nature of a Clandestine Land Market in Southern Zambia' (2010) *Africa* 80(1) 36-54.

³⁸ See Ng'ombe and Keivani (n 30).

³⁹ See PCLET (n 22).

⁴⁰ Peters, 'Challenges in Land Tenure and Land Reform in Africa: Anthropological Contributions' (2009) 37(8) *World Development* 1317-1325.

⁴¹ See Platteau, 'The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment' (1996) 27(1) *Development and Change* 29-86.

⁴² See Metcalfe and Kepe (n 18).

⁴³ See Deininger and Binswanger, 'The Evolution of the World Bank's Land Policy: Principles, Experiences and Future Challenges' (1999) 14(2) *The World Bank Research Observer* 247-276.

⁴⁴ See ECA (n 17).

recognises customary land to be important, argues that that the persistence of customary land tenure has perpetrated poverty in rural areas. In other words, to overcome poverty and underdevelopment in rural areas, customary land tenure must be done away with. This logic underlies the current strategy of ‘opening-up’ customary land, though it is not clear if this will actually address the challenges of poverty in rural areas.

Views about customary land tenure system being less productive, inefficient, etc, can be traced back to the early colonial and missionary officials’ attitude toward ‘communal’ forms of landholding as something inferior to individual landholding.⁴⁵ As a result, customary tenure, over the years, has been degraded, weakened and often inadequately recognised.⁴⁶ Conversion of customary land into statutory tenure, which most governments have adopted and encouraged, is one clear example of this bias.

These views on customary land tenure have persisted and keep influencing not only opinions but also land policy, administration and management strategies across Africa. For instance, in recent years, land reform and tenure debates in Zambia are centering on the role of customary land in economic and social transformation. This debate is broadly split into two camps. On one side of the debate are those (mainly civil society groups and academics) who argue that the privatisation of customary land is impacting negatively on local communities and increasingly posing a serious threat to the future of customary tenure, rural livelihoods, and the institutions of traditional authorities and culture.⁴⁷ On the other side of the debate, proponents of land conversion (mainly government officials and donor agencies), argue that converting customary land into leasehold can actually generate positive outcomes for the local people and the national economy at large.⁴⁸ The decision to adopt the policy of converting customary land into state land was based on the argument that titling customary land would effectively transform under-utilised land into more productive land as the new land owners, whether local or foreign investors, invest in the acquired land.⁴⁹ Influenced by the World Bank and the IMF, the Zambian government’s policy on conversion is premised on the view that ‘opening up’ the country-side to investment is the only way to improve the productivity of land in rural areas.⁵⁰

VI Factors driving the conversion of customary land

There are many factors which have contributed to the practice of converting customary land into leasehold tenure. Some of the key factors are briefly discussed below.

⁴⁵ See Peters (n 40).

⁴⁶ See ECA (n 17) at 35.

⁴⁷ See ZLA (n 10), Kabilika (n 7).

⁴⁸ See ZDA (n 8).

⁴⁹ See Roth, Khan and Zulu, ‘Legal and Administration of Land Policy in Zambia’ in Roth (ed), *Land Tenure, Land Markets, and Institutional Transformation in Zambia* (Land Tenure Centre, University of Wisconsin-Madison 1995).

⁵⁰ See Chizyuka et al (n 4) at 5.

(a) The 1995 Lands Act

One of the most obvious factors is the enactment of the 1995 Lands Act which has provided the legal framework for converting customary land into state land. The 1995 Lands Act has clearly provided an environment where conversion of customary land has become, not only possible, but relatively easy to undertake, especially for those who have resources and the knowledge of how the process works. Although Table 1 below does not tell us whether the titles recorded were due to the conversion of customary land, it is highly unlikely that the increased pace of land titles issued after 1995 is a mere coincidence.⁵¹ Though the increasing number of title deeds issued in subsequent years may be attributed to the increase in capacity within the Ministry of Lands to provide land administration services, it is questionable that the capacity to deliver land services is solely responsible for the sharp increase in the titles issued. Reports from the Ministry of Lands single out persisting low capacity as a major challenge in improving land administration.⁵²

Table 1: Title Deeds Issued between 1985-2010

Period	Male	Female	Other	Total	Annual Average
1985-1991	145 (2.6)	22 (0.4)	5 398 (97)	5 565	771
1991-1997	18 656 (64)	3 943 (14)	5 513 (19)	28 107	3 513
2000-2010	-	-	-	94 160	9 416

Source: Author, based on data from the Ministry of Lands Registry.

Note: Figures in brackets are percentages. [-]= no data available

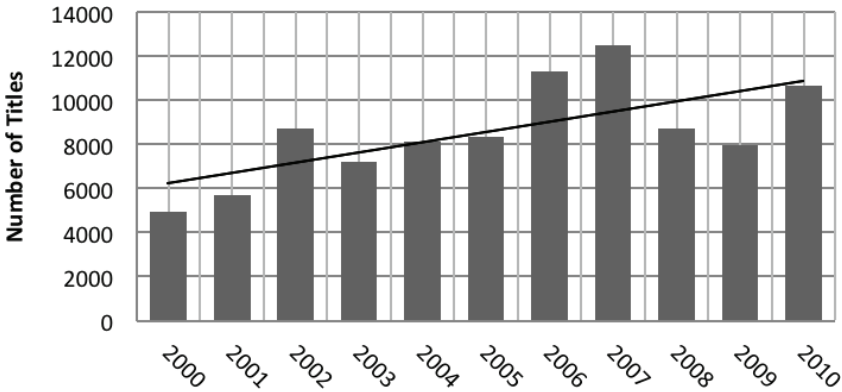
The possible impact of the 1995 Lands Act may be reflected in the fact that the total number of title deeds issued between 1985 and 1997 is only a third of the number of titles issued between 2000 and 2010. It is unlikely that increase in capacity alone accounts for this dramatic rise in the number of land titles issued.

Although it is not possible at present to estimate from the title deeds records at the Ministry of Lands how many of these titles are a result of conversion of customary land, it is probable that as people with adequate resources have become aware of the possibility to convert, they are more aggressively engaging in customary land conversion as Figure 1 suggests.

⁵¹ See Kabilika (n 7).

⁵² See Abanda et al (n 34); PCLET (n 22).

Figure 1: Title Deeds Issued Between 2000-2010



Source: Author based on data from the Ministry of Lands Registry

Recent estimates based on data from the Ministry of Lands’ Deeds Office, suggest that a total of 5098 conversions on customary land have occurred between 1995 and 2012,⁵³ which mean that about 300 conversions have taken place each year, with the average size of 54 hectares per conversion. The same records at the Ministry of Lands show that a total of 280 000 hectares of customary land have been converted between 1995 and 2010, but this is likely to have grossly underreported the size of customary land converted so far, mainly due to the delays at the Ministry to record the titles issued.⁵⁴ Current figures of how much customary land has been converted since 1995 are likely to be higher than these figures (see Table 3 below).

(b) Zambia is a land surplus country

Another vital factor driving the conversion of customary land into leasehold is the belief that Zambia is a land-surplus country, with most of the land in customary areas either being under-utilised or unused. The basis for this is the widely held view, even among senior government officials, that customary land constitutes the bulk (94 percent) of land in Zambia, and that most of this land is under-utilised.⁵⁵ For instance, the former Chief Executive of the Zambia National Farmers’ Union, argues that ‘Zambians often complain that land is scarce’. But that statement is misleading. Our country has vast areas of unused land. While Zambia is fortunate in having so much land to spare, it is obvious that its potential is greatly underutilised”.⁵⁶ Similarly, the former Minister of Agriculture and Cooperatives, Dr. Brian Chituwo, in a media briefing on the

⁵³ See Sitko and Jayne (n 5) at 197.

⁵⁴ Ibid.

⁵⁵ See Chizyuka et al (n 4).

⁵⁶ See Hudson, ‘The Empty Country’ *Journal Platform for Public Policy Analysis*, July-September, 2007. Zambia Institute for Public Policy Analysis. (ZIPPA), Kitwe (2007).

side-line of the 2009 *World Economic Forum on Africa* in Cape Town, told Reuters that, 'We have well over 30 million hectares of land that is begging to be utilised. We are utilising only an estimated 14 percent of our land'. Referring specifically to land for growing sugarcane, Dr. Chituwo added that, 'we have 900,000 hectares of prime land available, so the issue of land really should not be a problem. It is just a question of the mechanics of implementing this'.⁵⁷ It is however not clear when such claims are made whether the land being referred to is occupied or not. What we know is that state land has already been titled and allocated, so the state has exhausted land under its control.⁵⁸

However, as shown below, the actual size of land controlled by traditional authorities has significantly shrunk over the past two decades. Contrary to the widespread view that Zambia is a land surplus country, recent evidence suggests that 'in many customary areas, unallocated land appears to be unavailable, particularly in areas close to urban areas and district towns and along major highways'.⁵⁹ Many chiefs in various parts of the country, during the National Constitution Commission Submissions, complained that they have run out of land to allocate to their people. These complaints have been confirmed by the Parliamentary Committee on Agriculture and Land (PCAL), which observes that, 'land constraints are emerging in many customary farming areas. There is limited access to land within the customary areas....'. And warn that, 'This problem if not tackled immediately will impede the government's ability to achieve its goals of poverty reduction and its other ancillary agricultural growth objectives'.⁶⁰

A recent statement by the Minister of Lands also confirms the existence of land shortages and landlessness in some rural areas: 'my office is overwhelmed with cases of Zambians who are complaining of being displaced from their ancestral and family lands in preference for investors and the urban elite at the expense of vulnerable communities including women, youth and differently abled persons'.⁶¹

(c) MMD policy towards land

The policy and practice of converting customary land into leasehold tenure must be located in the broader economic liberalisation policy adopted by the Movement for Multi-Party Democracy (MMD) government in 1991, which included activating a market in land. The liberalisation ideology adopted by the MMD has contributed to creating an environment where the privatisation of customary land is seen as the only way to reduce poverty in rural areas. This is clear from the various statements issued by party leaders such as the address of the MMD president to the donor community in Lusaka just after the 1991 elections: 'As far as the privatisation programme is concerned there is no sacred lamb. In other words, the government is committed to total

⁵⁷ See Tostevin, 'US, UAE Firms eye Zambian Farming Land' *Reuters*, 12 June 2009.

⁵⁸ See Chizyuka et al (n 4) at 5.

⁵⁹ See FSRP (n 20) at 3.

⁶⁰ See PCAL (n 4) at 4.

⁶¹ See Minister of Lands (n 20) at 3.

privatisation of the parastatal sector'.⁶² The PCAL has also pointed to the MMD policy as one of the factors responsible for the practice of converting customary land into leasehold:

The commitment of the MMD government to the liberalisation programme is evident in the policies that covered almost all sectors of society including water services and land. The economic liberalisation pursued by the MMD government also extended to the liberalisation of the land market or less interference by the state in the land market. This meant that all the obstacles to a free land market embedded under the 1975 Act had to be dropped.⁶³

Subsequent governments have however maintained the same approach to land by promoting the conversion of customary land into leasehold. While government officials mostly argue that this is the only way to bring development to the rural areas and the country at large,⁶⁴ so far there is no clear evidence that this is actually having the intended results.

(d) Population growth & urbanisation

The other important factor that has been driving the conversion of customary land is the growth in national population. The population of Zambia has more than quadrupled over the last 50 years, as Table 2 shows.

Table 2. Demographic Dynamics in Zambia (1963-2010)

	Population	Male	Female	Rural	Urban	Rural %	Urban %
1963	3 405788	1689612	1716176	2 774 914	715 256	81.5	18.5
1969	4 056 995	1 951 414	2 105580	2 864 579	1 192 116	70.6	29.4
1980	5 661 803	2 262 213	2 379 561	3 403 232	2 258 569	60.1	39.9
1990	7 759 117	3 841 576	3 917 541	4 500 288	3 258 829	58	42
2000	9 885 591	4 946 298	4 939 293	6 458 729	3 426 862	65.3	34.7
2010	13 092 666	6 454 647	6 638 019	7 919 216	5 173 450	60.5	39.6
Population Growth Rate							
	1963-1969	1969-1980	1980-1990	1990-2000	2000-2010	Average	
Annual Growth Rate	3.1	3.6	3.1	2.5	2.8	3	

Source: Author based on Census 1969, 1980, 1990, 2000 & 2010

⁶² Fundanga and Mwaba, 'Privatisation of Public Enterprises in Zambia: An Evaluation of Policy, Procedures and Experiences'. Economic Research Paper No. 35. African Development Bank, Tunis (1996) 7.

⁶³ See PCAL (n 4) at 7.

⁶⁴ See ZDA (n 8).

It is also apparent that the majority of people in Zambia (60 percent) still reside in rural areas, and most of them on customary land. Although the annual growth rates have steadily declined, the population is almost doubling every twenty years. This means that there is more pressure on both urban and rural land, and as people realise this, those who have resources are embarking on securing their future access to land by converting customary land into titled land.

Related to the national population increase, is the growth of urban population driven mostly by the natural growth rather than rural-urban migration,⁶⁵ and the pressure resulting from this is directed towards adjacent customary lands. A good example of this is the City of Lusaka which has grown from a settlement of just 260 hectares in 1905 to the current 42 360 hectare, and this is projected to double to 860, 015 hectares, when the 2007 city development plan gets implemented.⁶⁶ Rapid growth of Lusaka City is putting a lot of pressure on adjacent customary lands, mainly Chongwe and Mungule area.

(e) Economic growth

Related to population growth and urbanisation, is sustained economic growth which the country has experienced since the early 2000s. Like many other African countries, Zambia has experienced sustained economic growth over a decade and a half with the economy growing at an average annual rate of over 6 percent between 2000 and 2012, way above the population growth rate of 2.8 percent, resulting in a sustained upward shift in per capita output (income) as Figure 2 below shows. This sustained growth is generating its new dynamism in terms of the demand for land. First of all, the increased activities resulting from sustained growth generates demand for land in rural areas, but mostly in urban and surrounding areas. A growing economy, in its first stages (before it becomes technology/skills-intensive), relies on spatial expansion on which economic activities take place such as mining, agriculture, real estate, and infrastructure. Second, as the economy grows, increased income among the people leads to the search for new investment opportunities, and land investments are often targeted as secure investment outlets.⁶⁷ But to secure their investments, these people buy customary land and convert it into leasehold title which they perceive to be more secure.

⁶⁵ See Chitonge, 'Cities Beyond Networks: The Status of Water Services for the Urban Poor in African Cities' (2012) 73(1) *African Studies* 58-83.

⁶⁶ See Ministry of Local Government and Housing (MLGH) and Japan International Cooperation Agency (JICA). *The Study on Comprehensive Urban Development Plan for the City of Lusaka*, the Republic of Zambia (CUDP). Lusaka: MLGH/JICA, (2007).

⁶⁷ See Platteau (n 41).

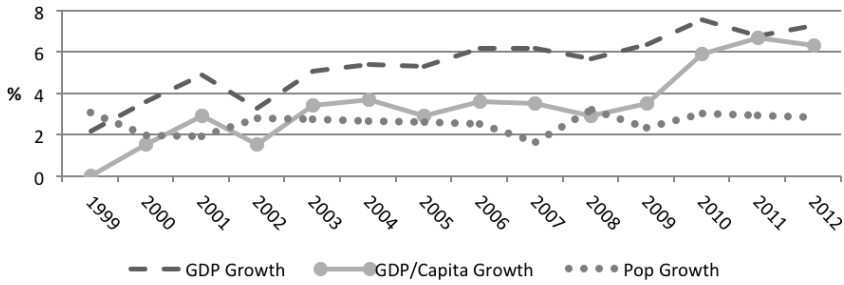


Figure 2: Zambia’s GDP, GDP per Capita & Population Growth 1999-2012

Source: Author based on data from the World Bank Development Indicators 2014

Further, as the economy grows, there is also a change of land use from conventional subsistence agriculture to other more profitable ventures including real estate agro-processing and services. However, this has also induced speculation in land since people can now buy and sell bare land. Since the enactment of the 1995 Lands Act, there are reports that the number of absentee landowners (both Zambian and non-Zambians) has increased significantly.⁶⁸ Although there is a provision to repossess undeveloped land after five years, it is not clear that the state has the capacity to monitor and implement this at any meaningful scale.⁶⁹ Even if the repossession of undeveloped land were possible, the low capacity and inadequate funding within the land administration and management department makes it unlikely that this would be implemented effectively.

(f) Creation of farm blocks

Conversion of customary land into state land is not just being done by urban elite Zambians and foreign investors, the government of Zambia has also curved out large chunks of land from customary areas to create Farm Blocks. Since 2006, at least one Farm Block, measuring 100 000 hectares on average, has been created in each province.⁷⁰ In the bid to attract investors to rural areas, the government embarked on creating Farm Blocks which are advertised to foreign and local investors. As table 3 shows, almost 1 million hectares of land have been curved out of customary land for this purpose.

⁶⁸ One example is a South African investor who acquired land at no cost in Chief Nkanya’s area along the Luangwa Valley to develop a Safari lodge, and two years later sold the land at US\$70 000 without even touching the land (see Brown (n 32) at 92 for more such examples).

⁶⁹ This weakness arises from the mere fact that since its promulgation in 1995, the Lands Act has never had a ministerial regulation to elaborate on its implementation (see Kabilika (n 7); Mudenda (n 36); Adams (n 6)).

⁷⁰ Farm Blocks are initiated by government which identify suitable land, provide services such roads, water and electricity supply, infrastructure and advertise these pieces of land to investors local and foreign (see ZDA (n 8)). Most of the Farm Blocks have been curved out of customary land, and it has been reported that people in communities where these Farm Blocks were established, were not even consulted (see Kabilika (n 7) at 8).

Table 3 Name, Size and Location of Farm Blocks in Zambia

Name	Size '000 Ha	District	Province	Status
Kalumwange	100	Kaoma	Western	Proposal
Luena FB	100	Kawambwa	Luapula	Proposal
Manshya	147	Mpika	Northern	Proposal
Mikelenge	100	Solwezi	North-Western	Proposal
Mungu	65	Kafue	Lusaka	Proposal
Musakashi	100	Mufulira	Copperbelt	Exploration
Mwase-Phangwe	100	Lundazi	Eastern	Proposal
Nansanga	100	Serenje	Central	Exploration
Senanga Citri	1.2	Senanga	Western	Proposal
Simango	100	Livingstone	Southern	Proposal
Total	913.2			

Source: Zambia Development Agency (2011).

Note: the different documents come up with different names and sizes of the proposed farm blocks. The figures here are taken from the most recent report

According to the *Farm Block Development Plan* issued by the Zambian government,⁷¹ '[a] farming block is envisaged to be a large agricultural area where basic infrastructure for agriculture such as feeder roads, electricity, water for irrigation and communication facilities are provided. To justify the large expenses involved in infrastructure development in the farm block, the area involved must be sufficiently large so as to achieve economies of scale'. The three main objectives of the Farm Block programme are: i) To commercialise agricultural land and exploit its full potential in order to attain economic diversification and growth; ii) To enhance food security through production of adequate food for the nation and export; iii) To open up undeveloped rural areas, reduce poverty and minimise rural to urban migration.⁷² According to reports, although the state agency handling the Farm Block project (ZDA) started to advertise these Farm Blocks in 2009, particularly the Nansanga Farm Block (most investors are snubbing these areas) reports indicate that there has so far been no investor who has committed funds to develop any of these ventures.⁷³

(g) Global interest in land

To the above drivers of conversion should be added the growing global interest in land. A study conducted by the World Bank in 2010 shows that between

⁷¹ See Republic of Zambia (GRZ), *Farm Block Development Plan 2005-2007*. Lusaka: Ministry of Finance and National Planning (2005).

⁷² *Ibid* at 3.

⁷³ See ZDA (n 8).

October 2008 and 31 August 2009, a global total of 464 land acquisition projects were reported to be underway globally, involving a total of 56.6 million hectares of land, with 223 projects reported in Africa, accounting for two-third (39.7 million hectares) of the total land area.⁷⁴ In the case of Zambia, where state land has been exhausted, the investors are now targeting customary land which they are converting into leasehold title.

When all the different drivers of conversion are considered there is no doubt that pressure on customary land is mounting, and the key question is will customary land survive this assault from different angles? And if so, in what form? The policy of ‘opening up’ the country side to development is certainly favouring a programme of transforming the current tenure system to one with widespread individual land tenure.

VII Shrinking customary land and the contest for control of customary land

There are several effects of land conversion which include the emergence of land shortages in many customary areas. Recent reports on landholding for small and medium-scale farmers in customary areas suggests that in most of these areas, serious land shortages are beginning to emerge and the average land holding for subsistence farmers has been falling since 2000. Figures from the Ministry of Agriculture and Cooperatives and Central Statistics Office (MACO/CSO)’s Crop Forecast Survey conducted in 2008 reveal that ‘the national average farm size, including cultivated and fallow lands, for small and medium-scale farmers in Zambia declined to 1.9 hectares, down from 2.1 in 2001’.⁷⁵ The Parliamentary Committee on Agriculture and Land which received submissions from the general public on the status of customary land, and conducted visits in various parts of the country, concluded that:

After accounting for state lands, commercial farms, wetlands, game management areas, national parks, and the proposed farm block schemes, it becomes clear that the potential for expansion of customary farm land is not as great as commonly perceived. In addition, leasehold land has continued to increase in size (owing to the conversion of customary land to leasehold tenure), that leaves only an estimated 37 percent as customary land controlled by traditional leaders.⁷⁶

More recent estimates which take into account the conversion of customary land into leasehold tenure suggest that the proportion of land effectively under customary tenure is much lower (estimated at around 34 percent).⁷⁷ If one excludes state land, the new and old Farm Blocks, plus protected areas (which are administered and regulated by statutory bodies), land under customary control is much smaller than the outdated figure of 94 percent which is widely cited in the media and official reports. As table 4 shows, the de facto land under customary control is in fact only a third of the widely quoted 94 percent.

⁷⁴ See Deininger, Byerle, Lindsay, Norton, Selod and Sticker, *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits?* (World Bank Publications 2011) 51.

⁷⁵ See FSRP (n 20) at 3.

⁷⁶ PCAL (n 4) at 12.

⁷⁷ See USAID (n 28).

Table 4 Estimates of Different Categories of Land in Zambia, 1964-2010 (million hectares)

Land Category		1964	1975	2006	2010
State	A	4.5 (6)	4.5	9(12)	15(20)**a
Reserve	B	27.2(36.2)	27.2	N/A	N/A
Trust	C	43.3(57.7)	43.3	N/A	N/A
Customary	B + C	70.5 (93.9)	70.5	32.8 (43.7)*	27.8 (37)**
Forest Reserve	E	9 (12)	9	7 (9)*	7*
Game & Nat. Parks	F	13.8 (18.4)	13.8	13.8	13.8
Lake Area	G	9(12)	9	9	9
Urban		-	-	1.5(2)	1.5
Arable		-	-	30.5(40.6)	30.5
Agricultural		-	-	23.4 (31.1)	23.4
Protected Area	E + F + G	31.8 (42)	31.8	29.8	29.8 (40)**

Source: Own Calculation based on data from Chizyuka et al (2006); Adams (2003); ILUA (2008), PCAL (2009) & FAOstats (2011).

Note: [-] no data available. Figures in brackets are percentages.

[a] includes land under the Farm Block scheme [*] The 2006 land effectively under customary control was estimated based on the assumption that 10% of customary land had been converted to state land between 1985 and 2006 as reported by USAID (2010) and Chizyuka et al (2006).

[**] Estimates based on figures from the Parliamentary Committee on Agriculture and Land (PCAL (2009)).

The 2006 figure for land under forest reserve is estimated based on the assumption that deforestation has been taking place at the rate of 1% per annum (Faostats, www.faostats.org).

If the figures in Table 4 are anything to go by, the rate at which customary land is being alienated is indeed worrying. Between 2006 and 2010, almost 20 percent of customary land was alienated to state land, with the latter increasing by more than 67 percent over the same period. This rate of converting customary land raises serious questions about the future of customary land and the impact this is likely to have on the people relying on customary land.

(a) Contestations over the control of customary land

Debates about the role of chiefs in land administration have focused on the co-operation between the state and traditional authorities, and much less on the possible contest between these two entities. For instance, the bulk of literature on this topic emphasise the strengthening of chiefs as a form of a

co-option tactic used for the convenience of colonial governments.⁷⁸ Other scholars have noted that both the colonial and post-colonial states in Africa courted chiefs as allies in administration of land in rural areas where state institutions were weak or non-existent.⁷⁹ However, Herbst highlights the idea that chiefs are not always complement to the state; they sometimes pursue interests opposed to the state's agenda, leading to conflict, especially when it comes to control over land, leading to tensions and conflict.⁸⁰ Contestations over customary land often surface when the state pursues a policy that threatens the essence of chiefs, such as reform of customary tenure. Because 'land is simply too important for the state not to be vitally concerned' (Herbst (2000)) at 181, the states action on land often touches on other vested interests leading to a contest. Although the state has more obvious powers, the institutions of traditional authorities have powers based on tradition and cultural beliefs which states in Africa often recognise and do not want to brush aside.⁸¹ In Zambia for instance, 'traditional rules are highly respected local authorities, recognised by both their subjects and the state',⁸² and they have been officially recognised in the law on the administration of customary land. The 1995 Lands Act states that even if all land is vested in the Head of State, the President cannot alienate customary land 'without consulting the chief and the local authorities...'.⁸³ Thus, in cases where the state acts against the interest of the chiefs, traditional authorities often contest those actions. This position has more recently been articulated by traditional authorities who are interpreting conversion of customary land together with the proposal to remove the administration of customary land from customary authorities as a ploy to undermine their authority and relevancy.⁸⁴

Although politicians have been careful not to out-rightly antagonise chiefs, by simply disregarding them, the current practice of converting customary land has set the two entities on a collision course. One of the main reasons for the chiefs' contesting conversion is that being able to allocate and settle disputes over land has been the main source of power and influence for traditional leaders in Africa for centuries.⁸⁵ As it has been observed, the 'power to allocate land and judge disputes is the foundation of traditional authority. Transferring land to state control will remove this foundation and erect little in its place.

⁷⁸ See Mamdani, *Citizen and Subject: Contemporary Africa and the legacy of Late Colonialism* (Princeton University Press 1996).

⁷⁹ See Bassett, 'Introduction: The Land Question and Agricultural Transformation in Sub-Saharan Africa' in Bassett and Crummey (eds) *Land in African Agrarian Systems* (University of Wisconsin Press 1993).

⁸⁰ See Herbst (n 3).

⁸¹ See Ubink and Quan, 'How to Combine Traditional and Modernity? Regulating Customary Land Management in Ghana' (2008) 25 *Land Use Policy* 198-213.

⁸² See Metcalfe and Kepe (n 18) at 241.

⁸³ See, Article 3 of the Lands Act 29 of 1995.

⁸⁴ See Kanyanta (n 12).

⁸⁵ See Kabilika (n 7); Mafeje, 'The Agrarian Question: Access to Land and Peasant Response in Sub-Saharan Africa', Civil Society and Social Movement Programme, Paper No. 6, United Nations Research Institute for Social Development (UNRISD, 2003). 1-43; Herbst (n 3); Shipton and Goheen, 'Understanding African Land-Holding: Power, Wealth and Meaning' (1992) 62(3) *Journal of International African Institute* 307-325.

[This practice] could thus spawn serious social disorder'.⁸⁶ Kabilika has also made a similar observation arguing that this 'idea of converting customary land into state land has the potential to dethrone all the chiefs in Zambia. Without land at the disposal of chiefs and their headpersons, traditional authority in Zambia becomes meaningless'.⁸⁷ Converting customary land into leasehold tenure essentially means that the land over which the chief used to exercise power is alienated from customary control since in the current policy arrangement, once customary land is converted into state land, it cannot revert back to customary tenure after the expiry or termination of the lease.

Ironically, it has been reported that there are some traditional authorities who are happily engaging in alienating land through conversion to leasehold title,⁸⁸ in exchange for 'gifts' or the so called 'facilitation fee'.⁸⁹ Although there are claims that chiefs who are approving the conversion of customary land to leasehold are not aware that once the land is converted, it perpetually ceases to be under their control, it is also possible that some chiefs have just fallen prey to the egoistic lure of money and the politics of patronage.⁹⁰ However, there are some chiefs who from the beginning have opposed the conversion of customary land, arguing that leasehold title is 'something that makes them lose control over land and their subjects. Hence, they are reluctant to recommend applications for land'.⁹¹ This view has been confirmed by a communique issued by a group of traditional leaders from different parts of Zambia who cited the loss of customary land as one of the challenges facing customary land administration in Zambia.⁹²

Most chiefs protested against the policy of converting customary land into leasehold during the debates on the 1995 Lands Act. 'When the 1995 Land Act was debated in Parliament, people especially in rural areas rejected it. Chiefs cried foul with authorities pointing out that the government intended to take away the powers of local people over their land in favour of foreign investors...'.⁹³ A Catholic Commission for Justice and Peace (CCJP) study reveals that most people interviewed even in urban centres are not for the idea of conversion. They argue that '[c]onverting customary land to leasehold is a danger to the institution of chiefs and the culture of the people'.⁹⁴

In a way, the fundamental problem is created by the policy of vesting land (including customary land) in the Head of State. That arrangement itself, though it has been argued that the President's power to alienate land under customary rule is constrained by the fact that he or she needs approval of

⁸⁶ See Jorgensen and Loudjeva, 'A Poverty and Social Impact Analysis of Three Reforms in Zambia: Land, Fertilizer and Infrastructure' *Social Analysis*, Paper No. 49 (January 2005).

⁸⁷ See Kabilika (n 7) at 7.

⁸⁸ See Brown (n 32); Minister of Lands (n 20).

⁸⁹ There have been several stories especially in the print media reporting that an increasing number of traditional leaders are being bribed into selling away land to foreign investors who have money. One example is an article in the *Post Newspaper* of Monday, 10 January 2011, which claims that many chiefs have become corrupt and selfish. See also USAID (n 28).

⁹⁰ See Kabilika (n 7); ZLA (n 10).

⁹¹ See Roth et al (1995).

⁹² See ZLA (n 10).

⁹³ See Kanyanta (n 12).

⁹⁴ See Kabilika (n 7) at 8.

local chiefs before alienating land, the fact that land is vested in the President severely undermines traditional leaders' control over customary land. If the land is vested in any person, he or she is most likely to find a 'reasonable justification' to exercise the power entailed by the vestment. The situation would be totally different if customary land was vested in the community, (not even in an individual traditional leader) as it has always been in many communities in Africa.⁹⁵

Further, giving an individual leader the power to approve land alienation has created an environment where abuse of these powers and corruption are the order of the day. As the practice of converting customary land into state land intensifies, it is clear that the role of traditional leaders and control over land will weaken while the state will strengthen its control over land in rural areas. This shift in the configuration of power in rural communities is clearly being contested. The state in its bid to find reasonable ground to exert control over customary land, has accused traditional leaders of abusing the administrative powers given to them. For example the Minister of Lands in a policy statement, argued that 'there has been abuse in some parts of the country by a few traditional leaders where foreigners and in some cases, rich Zambians are secretly approaching chiefs and headmen and are acquiring large portions of land...'.⁹⁶

On the basis of this reported abuse of traditional authority the Ministers proposed to introduce, among others, the Customary Land Administration Bill, which is expected to limit traditional authorities' control over customary land and in turn increase the state's role in the administration of customary land. This is a subtle way in which the state is trying to extend its control over customary land given the high stakes in land as a result of the growing demand for land.

In this contest, surprisingly, both the state and traditional leaders assert that their interest is in protecting the local people from being exploited by greedy chiefs (in the case of the state), or from being displaced by investors and government programmes (in the case of chiefs). But in all this, it is clear that the state wants to increase its control over customary land while the chiefs also want to protect the current powers they have over customary land.

Contest is also expressed by local people in cases where converting customary land into state land has resulted in insecure access to land for local people. This happens when traditional leaders, due to the increase in demand for land, stop considering allocating land to local people in anticipation of an investor who may offer better benefits for the land. Insecurity also often arises when the investor who converts customary land into leasehold evicts the local people from the land. For example, in 2002, Chief Munkonchi approved the conversion of 26 000 hectares of land on which more than 2000 people were living in five villages, and in 2003, the people were asked to vacate the land.⁹⁷

⁹⁵ See Blocher, 'Building on Custom: Land Tenure Policy and Economic Development in Ghana' (2006) 9 *Yale Human Rights and Development Law Journal* 166-202.

⁹⁶ See Minister of Lands (n 20) at 4.

⁹⁷ See Brown (n 32) at 93.

In Chief Chiawa, local people lost their burial land to a Zambeef farmer who fenced off the area including the burial site.⁹⁸ When this happens, often the displaced people find it hard to get alternative land mainly because all the land in the area has been allocated or earmarked for investors. Thus it has been observed that the 'leasehold system itself can be a source of insecurity because chiefs consent to outsiders being granted leases, transgressing the rights of local rights' holders, perhaps denying the right of parents to bequeath land to their offspring'.⁹⁹ This observation is not unique to titling in Zambia but has been recorded in other parts of Africa where land privatisation has occurred.¹⁰⁰

Conversion of customary land into state land is also contested in instances where this practice has resulted in land scarcity, especially in hot spot areas. Cases exist of local people failing to find land especially in areas where there is good infrastructure such as roads, access to markets, health care, education and water.¹⁰¹ Effects of land scarcity have been felt more in areas where a lot of customary land has been converted into state land, and the chief has no more land to allocate. Key examples include the area outside Lusaka in Chieftainess Nkomesha's and Chiawa's area where Lusaka businessmen and professional workers as well as foreign investors have acquired most of the land for farming.

Although scarcity may not be an immediate problem in most areas, given the demographic profile and the level of economic development in Zambia, it is likely to be a major problem in many parts of the country in the medium to long term. As more customary land disappears, it will no longer be easy for the poor to access land by exercising their right of avail as the case has been over the centuries. As pressure on customary land increases, the contest for control of this land is expected to increase, and to avert the negative impact on local populations, it is essential that this issue is properly addressed through a consultative process that includes views from people living in customary areas.

VII Conclusion

For the past twenty years, customary land in Zambia has been facing growing pressure resulting from increasing demand for land by local and foreign investors, supported by the state through programmes such as Farm Blocks. The pressures created by these dynamics are generating new challenges in the allocation, administration and management of customary land. Not only that, but the process has also lead to a state of uncertainty especially for the poor people residing on customary land as to what the future of the land they hold will be, given the pace at which customary land is shrinking. It is in this sense

⁹⁸ See Kabilika (n 7) at 9.

⁹⁹ See Adams (n 6) at 12.

¹⁰⁰ See Havnevik, 'Land Question in Sub-Saharan Africa' in Isaksson (ed) *Land Question in Sub-Saharan Africa*. Uppsala: Department of Rural Development Studies (Swedish University of Agricultural Sciences 1997); Shipton and Goheen (n 85); Platteau (n 41).

¹⁰¹ FSRP (n 20); Mudenda (n 36).

that customary land in Zambia today is at a crossroad, with no clear sign of what will happen tomorrow. For some people, this is a welcome moment that would eventually lead to the transform of the country from one that has poorly utilised land to one that uses land optimally and draws the highest benefit for the larger society. On the other hand, this is cause for concern, especially with regarding the fate of the poor people who are being displaced from their land by well-resourced Zambian and foreign investors.

Despite these differences in the way conversions of customary land are perceived, one thing that is clear is that converting customary land into state land is generating opportunities for some but also risks and uncertainties for local residents. Cases of local people failing to find land especially in areas where there is good infrastructure such as roads, access to markets, health care, education and water are now becoming common place. Effects of land scarcity have been felt more in areas where a lot of customary land has been converted into state land, and the chiefs have no more land to allocate to local people. Key examples include the area outside Lusaka in Chieftainess Nkomesha's and Chiawa's area where Lusaka businessmen and professional workers as well as foreign investors have acquired most of the land for farming.

Although scarcity may not be an immediate problem in most areas, given the demographic profile and the level of economic development in Zambia, it is likely to be a major problem in many parts of the country in the medium to long term. As the pressure on land increases, the struggle for control over customary land is likely to increase with the state expanding its control at the expense of the traditional leaders. Ironically, it has been reported that there are some traditional authorities who are happily engaging in alienating land through conversion to leasehold title in exchange for 'gifts' or the so called 'facilitation fee',¹⁰² and one wonders if they are aware of the effect of converting customary land. To the extent that this undermines the power of traditional authorities, they will contest this and the contest is likely to intensify as the demand for land grows. As things stand, the conversion of customary land undermines traditional authorities, threatens the poor's rights to access land, and is promoting economic exclusion of the poor from productive land, a situation which has created tension within the communities, but also between the traditional leaders and various agents of the state. Thus, the current processes have induced serious tensions and shifts in power relations between the state and the traditional authorities.

¹⁰² See USAID (n 28).

THE ROLE OF TRADITIONAL AUTHORITIES IN LAND ALLOCATION AND MANAGEMENT IN LESOTHO

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Abstract

This paper examines the role of chiefs in land allocation and management in Lesotho and argues that, the process of the introduction of legal dualism and attempts at unification of the legal system through legislation has not brought about the complete transformation of the role of chiefs in land allocation and management. The fundamental principles of a customary land tenure system still permeate throughout the current land tenure system, with chiefs still performing important functions. The paper suggests that improving Lesotho's land tenure system will depend on the integration of the customary land practices and how well the Sesotho customary legal practices are harnessed and developed.

Keywords: traditional authorities; land allocation and management.

I Introduction

Chieftainship is an institution of traditional antiquity in Basotho society. In the context of their local communities and the everyday affairs of village life, chiefs and headmen, as traditional authorities, have had and still have important roles to perform. The main intention of this paper is to examine the role of these traditional authorities in land allocation and management in Lesotho. The paper begins by briefly describing the Lesotho's legal system with a view to locating those traditional authorities within the system.

It proceeds to consider the legal character of chiefs and headmen as traditional authorities. It will further discuss the customary land tenure system bearing in mind the roles and functions of the chiefs and headmen within the system. An attempt will also be made to shed some light on the efforts made to reform the customary land tenure system. The paper will also attempt to provide an overview of the role of these traditional authorities in land allocation and management under the current general law of Lesotho. By way of conclusion, some important highlights will be underscored.

II The legal system of Lesotho

The present day Kingdom of Lesotho emerged as a single polity in the early 1820s under Moshoeshe I.¹ At Moshoeshe's request, Basutoland (as Lesotho was then called) became a British colony by cession in March 1868. The

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¹ Moshoeshe I is the founder of the Basotho Nation.

territory was annexed to the Cape Colony in 1871 and was administered by the Cape until 1883. During that period of annexation, the Cape Colonial common law was applied to Basutoland. In 1883, the administration of the territory reverted to Britain. Legislative power was thenceforth vested in a British High Commissioner.² The High Commissioner issued a regulation providing for the continued operation in Basutoland, of the Cape Colonial common law which had been applied to the territory³ during annexation, in so far as the circumstances permit.⁴ Provision was also made for the continued application of Sesotho customary law in cases where all parties were Africans.⁵ It is worth noting that in keeping with the British tradition of legal pluralism in territories under British rule, customary law was to be applied only by the customary courts. Thus, the resultant colonial legal order was characterised by the coexistence of the Sesotho Customary law and the received law of the Cape (otherwise referred to as Roman-Dutch Law), thereby making the modern legal system of Lesotho dual. The Sesotho customary law operates side by side with the received law in most cases, with neither being superior to the other.

Referring to the Sesotho ‘customary law’ McClain wrote that:

The customary law is made up of the different practices of the people, some of which have been interpreted and acted upon by the courts, and thus making them into “customary law”... Whether, in any one case, the customary or the general law will be applicable, is determined by the nature of the case, ... the parties involved, the provisions of the law being administered and other rules relating to choice of law in a situation of conflict of laws ... Some customary law is written and contained in the Laws of Lerotholi...⁶

What McClain was referring to above is the ‘Living Law’. This is because, as Juma⁷ fittingly points out, a conceptual framework so far adopted by scholars to assert a proper relevance to African law is to distinguish the ‘official customary law’ from the law lived by the African people – what has been called the ‘Living Law’. The former is the rigid form of African law – the law applied by courts and contained in law books. The latter is more of a concept than hard letter law, which embodies the understanding of African law as an evolving phenomenon.⁸ In the context of Lesotho both the official customary law and the ‘Living Law’ exist side by side as reflected in the discussion below. While the ‘Living Law’ in the case of Lesotho is as described by McClain above, the ‘official customary law’ is defined in the Constitution of Lesotho. The Constitution provides that the ‘customary law’ means the customary law of Lesotho for the time being in force subject to any modification or other provision made in respect thereof by any Act of Parliament.⁹ This definition

² See Order in Council of Feb.1884, Part II.

³ See e.g. the regulations promulgated under Cape Proclamation No. 41 of 1877.

⁴ Reg 12 of General Law Proclamation No. 2B of 1884. It is worth noting however that the nature of circumstances were not stated in the regulation.

⁵ Reg 12 of General Law Proclamation No. 2B of 1884.

⁶ McClain, ‘Law and population growth in Lesotho v Criminal Law Treatment of Sexual Activity, Land and Population Personal Mobility’ (Staff Seminar Paper No. 19) 19 April 1979 at 1.

⁷ Juma, ‘Institutions of “African” law and justice administration in Kenya’ (2007) 17 *Lesotho Law Journal* 1 at 7.

⁸ Ibid.

⁹ See s 154(1) of the Constitution of Lesotho 1993.

implies that, in order to have a clear understanding of the customary law of Lesotho, one has to have an appreciation of the combined and consistent body of the ‘official customary law’ as well as the law lived by the Basotho people.

III The legal character of chiefs and headmen as the traditional authorities in Lesotho

In this paper, a reference to ‘traditional authorities’ in the context of Lesotho is a reference to chiefs. In the law of Lesotho a ‘Chief’ does not include the King but includes Principal Chief, a Headman and any other chief whose office is recognised by s 103(1) of the Constitution.¹⁰ In addition, references to a ‘chief’ are references to the person who, under the law for the time being in force on that behalf, is recognised as entitled to exercise the functions of the office of that Chief.¹¹ Some researchers refer to Moshoeshe I as Chief while others call him Paramount Chief.¹² It is doubtful whether that title of ‘Chief’ would be suitable for him regard being had to a leader of his stature. That notwithstanding, the institution of chieftainship is still firmly entrenched in Lesotho.

Anyone familiar with the Basotho way of life will share in the view that chiefs have historically served as ‘governors’ of their communities with authority over all aspects of life, ranging from social welfare to judicial functions within the Basotho society. They enjoyed both administrative and judicial power.¹³ Under the colonial legal arrangement, the High Commissioner was empowered to declare any chief, sub-chief or headman to be such, for any specified area or areas by notice in the gazette.¹⁴ In modern day Lesotho, the legal functions of a chief are conferred on that chief by the Constitution of Lesotho or under any other law.¹⁵ A local chief is an administrator of the village and an arm of the government at the local level.¹⁶ Such a chief and some male villagers constitute what is usually referred to as ‘the chief’s court’.¹⁷ Some minor village disputes are taken to the chief’s court for resolution.¹⁸ It is apparent that the institution of chieftainship is deeply imbedded in Lesotho’s legal system. It cannot be wished away.

¹⁰ S 154 of the Constitution of Lesotho 1993.

¹¹ *Ibid.*

¹² Poulter, *Legal Dualism in Lesotho: A Study of the Choice of Law Question in Family Matters* (Morija Sesuto Book Depot 1981) at 1.

¹³ Regarding the exercise of judicial power, reference should be made to Rugege, ‘The struggle over the restructuring of the Basotho or Chief’s Courts in Lesotho: 1903-1950’ (1987) 3 *Lesotho Law Journal* 159, 160-186.

¹⁴ S 3(1) of Proclamation 61 of 1938.

¹⁵ S 103(3) of the Constitution 1993.

¹⁶ Letuka, Matasane, Mohale, Mamashela and Mbatha, *Women and Law in Southern Africa Research Project Inheritance in Lesotho* (WLSA 1994) at 94.

¹⁷ *Ibid* at 94.

¹⁸ *Ibid* at 94.

IV The customary land tenure system

The Lesotho's customary land tenure system was both 'traditional' and 'communal'.¹⁹ According to the Laws of Lerotholi, all chiefs and headmen must by law provide people living under them with lands to cultivate.²⁰ The tenure of a residential title was itself dependant in broad terms, on loyalty and good behaviour and if either or both are lacking, then the right to residence may be withdrawn and with it will go all the other land rights.²¹

According to Rugege,²² the so-called 'traditional' or 'communal' land tenure system has persisted in Lesotho, albeit in a modified form, from the inception of the Basotho nation to the present, despite attempts by the government of Lesotho to transform it. There is ample literature that with the passage of time, corruption among some of the chiefs became rife and arbitrariness in land allocation and revocation became commonplace.²³

The Lesotho's customary land tenure system was not unique in this regard. In the case of Lagos for example, Chief Justice Rayner said to have remarked in the Report on Land Tenure in West Africa in 1898 that:

The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or, family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in the loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it...²⁴

From the above quote, it is apparent that there is a striking conceptual similarity between the customary land tenure system described above and that of Lesotho. Prior to colonisation, all land in Lesotho was held according to Sesotho custom. Individual's rights in customary land were derived from and determined by rules of custom expounded by chiefs and elders. As time passed by, problems of disorder in land allocation and management emerged. Money started to exchange hands and corruption started creeping in. In practice, land started being bought and sold. Some chiefs started issuing fraudulent certificates of allocation and receiving bribes.²⁵

The above notwithstanding, the traditional custom and the law remained that land neither could be owned privately nor be a subject of a sale transaction. The reason for this salutary customary law principle was that, land belonged to the Basotho Nation as a whole. In the past it was clear that land was held

¹⁹ Conceptually, this system of land control and use in which the land belongs to the whole community for use and was not owned by individuals with rights of disposal is referred to as the 'traditional' or 'communal' land tenure system.

²⁰ Laws of Lerotholi of 1922, Law No. 8. The Laws of Lerotholi were first promulgated in 1903, revised in 1922, 1946 and 1959.

²¹ Sheddick, *Land Tenure in Basutoland* (Colonial Research Studies No. 13) (HMSO 1954) at 156.

²² Rugege, 'Chiefs, Commoners and The Land: Struggles Over Control and Access to Land in Colonial Lesotho' (1992) 8(2) *Lesotho Law Journal* 33 at 34.

²³ Ashton, *The Basutu* 2ed (Oxford University Press 1967) at 147-148. See also Rugege (n 22) at 41-44.

²⁴ See *Amodu Tijani v The Secretary, Southern Provinces* (1921) 2 A.C 399 at 404.

²⁵ *Moletsane and Others v Attorney General and Another* CIV/APN/163/2001 at 67.

by the King in trust for the people and administered and allocated by chiefs under the King.²⁶ The myth has been and still is that, even where land has been bought and sold, it is not considered to have been so done. It was, and still is maintained, that what is said to be bought and sold are the rights and interests in the land, the buildings and other improvements that the individuals made on the land.²⁷ In order to appreciate this point, there is need to examine the role of traditional authorities in land allocation and management under customary law and, to find out what the statutory provisions state regarding the issue whether or not it is permissible to sell land in Lesotho. This exercise is undertaken below.

V The role of traditional authorities in land allocation and management under customary law

A convenient starting point when considering land allocation and management under the customary law of Lesotho is the Laws of Lerotholi.²⁸ In 1938, the Paramount Chief was empowered to issue 'rules' and orders'.²⁹ As a result, there emerged a new version of the Laws of Lerotholi which were issued by the Paramount Chief. Under the Laws of Lerotholi, land for cultivation was allocated by a hereditary chief and was not held in absolute ownership.³⁰ Every chief³¹ was responsible, within his area of jurisdiction, for the allocation of land to his subjects.³² It was the duty of the chief to ensure that land was allocated fairly and impartially.³³ Every chief declared as such by the High Commissioner was obliged to frequently inspect all lands allocated by him in his area for the cultivation of crops and, was empowered to take away land from people who in his opinion had more lands than were necessary for their and their families' subsistence and grant such land to people who had no land or insufficient lands. It was also within the discretion of such chief or Headman to take away a piece of land or lands which he has allocated to any of his subjects who, through continued absence or insufficient reason, failed for two successive years to properly cultivate it or cause to be cultivated.³⁴

On the death of the father or mother, whoever died last, all arable land allocated to them was regarded as land that had become vacant and it had to revert to the chief for re-allocation.³⁵ If there were minor dependants left in such household, it was the duty of the guardian of such minor dependants,

²⁶ Ibid at 34.

²⁷ Ibid.

²⁸ The earliest edition of these Laws was drawn up in 1903 by the Basutoland National Council, which was an advisory body without legislative power. They were named after the Paramount Chief of the time.

²⁹ See ss 8 and 15 of the Native Administration Proclamation, No. 61 of 1938.

³⁰ See Sheddick, *Land Tenure in Basutoland* (H.M.S.O. 1954) at 8-9, 152-153.

³¹ Declared as such by the High Commissioner by Notice in the *Gazette* published in accordance with the provisions of s 3(1) of the Native Administration Proclamation, 1938 (Chapter 54 of the Laws of Basutoland).

³² S 7(1) of the Laws of Lerotholi.

³³ Land might be allocated for several purposes such as: residential, business, planting of trees, growing of vegetables or tobacco, cultivation of crops, burial of the dead, erection of churches, building of stables and kraals etc.

³⁴ S 7(3) of the Laws of Lerotholi.

³⁵ S 7(5)(a) of the Laws of Lerotholi.

or in his absence, the person who had the custody of the minors, to report the presence of such minors to the chief. It was the duty of the chief to make provision for such minor dependants during the period of their minority, from the land or lands of their deceased parents.³⁶ If the minor dependants were sons, the chief was obliged, on such sons attaining majority, to confirm them on the land or lands used for their benefit during the period of their minority.³⁷

In the re-allocation of lands which had reverted to the chief on the death of the previous occupier and, after the needs of any minor dependants had been satisfied, the chief was to give priority (as regards the allocation of the remaining lands should there be any), to the requirements of any adult son or sons of the deceased. This would be so only if such son or sons resided in the village of the deceased.³⁸ Any person aggrieved by the action of the chief in failing to observe that procedure could complain to the Principal or Ward Chief as the case may be. If still dissatisfied with the decision of the Principal or Ward Chief, the complainant could appeal to the Paramount Chief.³⁹

Residential sites were inheritable and were also allocated by the chieftainship. According to the Basotho custom, when a head of the family had passed away and was survived by a son who was to inherit, the practice used to be for the family spokesman to notify the chief of the area at the funeral that, the deceased *o sehile molamu ka khotla* (meaning, 'has left his fighting stick in court'). This was taken to be an adequate notification to the chief that there was an heir to inherit the rights of the deceased to land.

If a man moved from the area of jurisdiction of one chief to another, he forfeited his rights of occupation and use of the land.⁴⁰ Any person removing⁴¹ from one place to another was, after notifying his chief, entitled to dismantle or to sell his hut or huts provided all the building material was purchased by him.⁴² If all or any part of the building material used for the building of his hut or huts was given to him free by his chief, he could not be entitled to sell the material and, it would again become the property of the chief. However, the owner was entitled to remove the doors and windows and frames if they were purchased by him.⁴³ The above exposition of the law subsisted until it was changed by reforms that were later introduced into the law. The various reforms introduced are discussed in the following section.

VI Efforts at reforming the customary land tenure system

Lesotho's traditional land tenure system performed well and equitably whilst land was accessible to all citizens and land management by chiefs posed

³⁶ Ibid.

³⁷ Ibid.

³⁸ S 7(5)(b) of the Laws of Lerotholi.

³⁹ S 7(5)(c) of the Laws of Lerotholi.

⁴⁰ Poulter, *Family Law and Litigation in Basotho Society* (Clarendon Press 1976) at 248-253.

⁴¹ As the High Court of Lesotho correctly pointed out in *Tlali Phakisi v Motlatsi Charles Tlapana CIV/A/30/10*: '[r]emoval in our customary law, is a legal concept consisting in the official migration of a person, from being a subject of one chief to another with the concomitant termination of all bonds of subjectship of the former chief'.

⁴² S 9(1) of the Laws of Lerotholi.

⁴³ S 9(2) of the Laws of Lerotholi.

no problems. However, in the early 1950s, there emerged growing signs of dissatisfaction among the commoners with the way in which the chiefs were handling land allocations and management. This led to the establishment of successive committees to look into the causes for dissatisfaction. One such committee was the Moore committee established in 1953 and whose report was published in 1954.⁴⁴ The report warned against the dangers of vesting the unfettered control of so precious an asset as land, indefinitely in chiefs or headmen. It suggested that a possible solution might lie in the establishment of land boards to superintend the allocation and utilisation of land which was at that time the responsibility of the chieftainship.⁴⁵ This suggestion was met with resistance by the chiefs as it was considered that it would undermine the chieftaincy.

There was another i.e. Moors Report of 1960.⁴⁶ The report argued inter alia that, traditional and customary law concerning the tenure of land throughout Africa appeared to be out of step with the requirements for a modern cash crop agriculture, where the individual must take certain risks and therefore be assured that the reward of so doing would fall to him.⁴⁷ It was in that report that the innovation of land leases for non-agricultural purposes first emerged.

Two years after the Morse Report, there followed the Constitutional Commission Report of 1963. The Commission stated in its report that the overwhelming majority of Basotho people for good and sufficient reasons were neither willing, nor ready, to jettison the fundamental principles of their land law.⁴⁸ However, the Report revived the recommendation made in the Moore committee in 1954 that land boards be established. These recommendations were later incorporated into the Basutoland Constitution of 1965. It has been said that:

[t]he important change brought about by the [1965] Constitution, however, was the requirement that in exercising the power of allocation, granting, revocation or restriction of land rights in the rural areas, a headman or chief could act only after consultation with an advisory board consisting of five persons elected at a *pitso* (public meeting) of all the adult inhabitants of his area of jurisdiction. Decisions regarding appeals by higher chiefs were also to be made after consultation with advisory boards similarly constituted (articles 90 and 1991).⁴⁹

It is also important to emphasise that the chiefs remained central to the issues raised by all these reports and reform initiatives. In all these reports, there was a consensus that land should vest in the King who should hold it in trust for the Basotho Nation. The King was to exercise this power through the chiefs.⁵⁰ The salient features of the traditional land tenure system remained unchanged. In particular, land allocation and administration remained the responsibility of chiefs. Access to land by every Mosotho still formed the main criteria for land allocation. Arable land use rights were restricted to the cultivation

⁴⁴ Basutoland Report of the Administrative Reforms Committee 1954 (The Moore Report) London: HMSO.

⁴⁵ Ibid at paras 146 & 147 at 38.

⁴⁶ Basutoland, Bechuanaland Protectorate and Swaziland: Report of an Economic Survey Mission 1960 (referred to as the Morse Report after its chairman, Professor Chandler Morse). London: HMSO.

⁴⁷ Ibid at 242-245.

⁴⁸ Basutoland Council. 1963. Report of the Basutoland Constitutional Commission. Maseru. (LNA) at 67.

⁴⁹ 1992 Ibid at 62.

⁵⁰ See ss 87 and 88 of the Constitution of Lesotho 1965.

and harvesting of seasonal crops and the land reverted to communal grazing after harvest. Land has officially remained a 'free good' notwithstanding demographic pressures. It appears from the foregoing that despite attempts aimed at ridding the country's land tenure system of chiefs' influence, their role remains deeply rooted in the system. This is apparent from the discussion of the role of chiefs in land allocation and management discussed below.

VII The role of chiefs in land allocation and management under the general law

The phrase 'general law' is used in this paper to include both the received law and the statute law. After independence in 1966 the government enacted two land laws.⁵¹ These land laws effected little change in land allocation, land administration and land use control. However, they served to highlight that the government was aware of the need for proper land records and some form of security of title to land.

In 1973, two land laws were again passed.⁵² The first of these laws (the Administration of Lands Act) was never brought into operation because it proposed land tenure changes which substantially affected the power of chiefs in land allocation and management. It also introduced new tenure innovations such as a lease, land revenue and negotiability of land rights. On the other hand, the Land Act 1973 was accepted and brought into operation because it introduced no major shift from the customary land tenure system. It emphasised the provisions of the Land (Procedure) Act 1967. The only change in the Land Act 1973 was the introduction of Development Committees which were entrusted to advise chiefs in the allocation of land. However, its implementation, it appears, did not contribute to the improvement of land allocation and land use control.

In recognition of this chaotic situation of land allocations and in order to protect people who had developed the land and invested heavily in it by inter alia building houses, an enactment was made to provide that:

Where at the commencement of this Act any land or part thereof has, whether by error or otherwise, been the subject of two or more allocations, the allottee who has used the land and made improvements thereon shall hold title to the land in preference to any allottee who left the land unused and undeveloped.⁵³

The previous Act⁵⁴ had reaffirmed that the land vested in the Basotho nation. But land administration vested in the King whose powers were to be exercised by chiefs and headmen.⁵⁵ In the exercise of those powers, chiefs were to 'be subject to such duties and have such further powers as may be imposed or conferred on them by this Act or any other law'.⁵⁶ The confusion in the land administration was confounded by the fact that the Land Administration

⁵¹ The Land (Procedure) Act 24 of 1967 and the Deeds Registry Act 12 of 1967.

⁵² These were the Land Administration Act 16 of 1973 and the Land Act 20 of 1973.

⁵³ See s 82 of the Land Act 17 of 1979.

⁵⁴ Land Act 20 of 1973.

⁵⁵ That is, allocation and revocation of rights over land.

⁵⁶ See s 4(2) of the Land Act 20 of 1973.

Act⁵⁷ had provided that, '[i]t is hereby confirmed that the ownership of land is irrevocably vested in the Nation, represented by the State of Lesotho'.⁵⁸

The Land Administration Act was repealed by the 1979 Act⁵⁹ before it could even come into operation.⁶⁰ Thus, land had been administered by chiefs.⁶¹ What is significant is that the Land Administration Act tried to remove land and its administration from the King and chiefs by replacing them with government. After the Parliament of the day had passed a law, it changed its mind and superseded the Land Administration Act with another law without repealing it or bringing it into operation.

The Land Act 1979 which was brought into operation in 1980 preserved the fundamental principle that all land in Lesotho is vested in the Basotho Nation. This is accepted by every Mosotho. However, the Act mentioned that this nation's asset is held in trust by the State instead of the King. This became a source of discontent to many Basotho because the Sesotho translation equated State with government. There was need for the law to be amended to stress that land is held in trust by the King as Head of State or to revert to the traditional concept that all land in Lesotho belongs to the Basotho Nation.

The Land Act 1979 introduced many tenure options. Under the Act, the power to allocate land and to revoke such allocation was delegated to land committees instead of chiefs.⁶² However, the chiefs chair persons of those land committees. The implementation of the Land Act 1979 was generally, a disappointment for various reasons. Firstly, the allocation of land has been fraught with irregularities.⁶³ Secondly, the illegal sale of land continued and was overlooked from the inception of the Land Act 1979 up to the present. These were being perpetrated by the chiefs and their development committees. Thirdly, under the Military government laws were made to provide compensation for allottees of land and to validate further irregular allocations.⁶⁴ However, the allocation of alternate sites as compensation that chiefs and Development Committees used to make with owners of the fields did not stop.

Lastly, agricultural plots were illegally being converted into residential plots in the urban sprawl taking place in Maseru today because chiefs and the

⁵⁷ See s 2 of Land Administration Act 16 of 1973.

⁵⁸ S 2 contrary to what is in the subsequent Land Act 20 of 1973.

⁵⁹ Land Act 17 of 1979.

⁶⁰ It is important to draw attention to s 2 of the Land Administration Act 16 of 1973 because the King is the head of State which is represented by the central government while he is also head of the chiefs who up to now have been customary law rulers of rural areas albeit with reduced powers.

⁶¹ This is borne out by the terms of both the Constitution of 1966 and the Land Act 20 of 1973.

⁶² There were also many other changes: a use right called a lease, land revenue, Land Tribunal, the powers of the minister in land allocation, the power to declare Selected Development Areas and other provisions were incorporated as tenure innovations under this Act.

⁶³ As Maqutu J correctly points out in *Moletsane and Others v Attorney General and Another* CIV/APN/163/2001 at 36, 'the allocation of land has been fraught with irregularities that the legislature has not yet addressed. As already stated the illegal sale of land is a reality that has been overlooked from the inception of the Land Act 1979 up to the present. During the military government laws were made to provide compensation for owners of land and to validate further irregular allocations. See Land (Amendment) Order No. 23 of 1989. It seems the land allocation fiasco and its irregularities continue. The allocation of alternate sites as compensation that chiefs and Development Committees used to make with owners of the fields has not stopped'.

⁶⁴ See Land (Amendment) Order 23 of 1989.

development committees, who include chiefs, entered into private agreements in terms of which parts of the fields were cut into sites for residential use in which the owners of the fields got their children and nominees to be allocated land.⁶⁵ The other parts were cut into sites by the chiefs, to be allocated to those (of the chief's choosing) who are in need of residential sites. The chiefs and their Development Committee members and the owners of the fields did sometimes illegally sell some of these sites. It became necessary therefore to control this undesirable situation of land mismanagement by the chiefs through the introduction of innovative systems that determine the new role of chiefs. This new role is considered below.

VIII The role of chiefs under the current dispensation

The current Constitution of Lesotho came into force in 1993. It provides that, without prejudice to any allocation of land that was made before the commencement of this Constitution and subsisting immediately before such commencement, all land in Lesotho is vested in the Basotho Nation.⁶⁶ This also applies to any interests or rights in or over land that were otherwise vested in any person immediately before such commencement. The power to allocate and revoke allocations to land is vested in the King in trust for the Basotho Nation.⁶⁷ This power is to be exercised in accordance with the Constitution and any other law. The phrase 'any other law' includes any instrument having the force of law made in exercise of a power conferred by a law and the customary law and any other unwritten rule of law.

Chiefs in terms of section 93 of the 1966 Constitution were empowered to allocate and revoke allocations of land in the King's name.⁶⁸ The role of the chiefs, in land allocation and management, has been omitted in the current Constitution. Section 108(2) of the current Constitution only provides that although the King holds the land in trust for the people with the power to allocate or revoke rights or interests over land, it does not say how. The power to allocate land remains with the village Development Committees whose officio chairmen are chiefs. This implies that nothing has changed because chiefs in the past acted with Land Advisory Committees. Land allocation still revolved around the office of chiefs who had to have a Land Allocation Committee or a Development Committee or Council over which they were chairmen.⁶⁹

Consequently, it is arguable that the allocations that have been made in terms of the Land Act 1979 and the Land Regulations remain valid and cannot be challenged as they conform to Basotho custom as modified by statute. Third

⁶⁵ This was because there was no machinery of compensation for owners of the land until the Land (Amendment) Order 23 of 1989.

⁶⁶ See s 107 of the Constitution of Lesotho, 1993.

⁶⁷ See s 108(1) of the Constitution of Lesotho, 1993.

⁶⁸ See s 93 of the Constitution of Basutoland, 1965; Schedule 1 to Basutoland Order, 1965, Laws of Basutoland Vol. X. at 16-122.

⁶⁹ It seems the Land Regulations of 1974 and the Land Regulations of 1980 still stood when one has regard to Regulation 26 of the 1980 Land Regulations which only repeals Regulations 9, 10 and 11 of the Land Regulations of 1974.

parties can of course, challenge what chiefs have done in the allocation of land, if their rights are infringed thereby and if what is done is done illegally.⁷⁰

It is submitted that in the absence of clear violations of the law (at the instance of third parties) chiefs can be held accountable.⁷¹ The general public is entitled to expect chiefs as peace officers and organs of government to maintain the law. The chiefs like government, were also expected to deal firmly with: '[a]ny person who occupies land and any person who causes, aids or abets any person to occupy land without proper authority ... and the court convicting the offender may order the person to vacate the land forthwith or within a specified time'.⁷² The parliament intervened by introducing legislation to curb this situation. Thus, the following pieces of legislation, inter alia, aim to address this problem. The first legislation worth considering concerns land husbandry. This law was introduced in the 1960s. The second law is the latest piece of legislation which is currently applicable. These pieces of legislation are briefly examined below in this connection.

(a) The Land Husbandry Act 22 of 1969

The Basotho are an agrarian society. Animal husbandry forms an important part of the society's mode of life. It did not come as a surprise therefore that when the Land Husbandry Act was enacted in 1969, the role of chiefs in land allocation and management was also contemplated.⁷³ The provisions of the Act and the regulations made under the Act apply only to agricultural land. The purpose of these enactments is to control and improve the use of land in respect of agricultural land. They also provide for the role of chiefs in the land allocation and management system created under the legislation. These enactments also empower the minister of Agriculture to make regulations to ensure that land is employed in the most beneficial uses.⁷⁴ Under the regulations, chiefs are given broad powers and duties to participate in various ways in land allocation and management.

(b) The Land Act 8 of 2010

The Land Act 2010 is the current land legislation and was intended to consolidate the Land Act 1979 amendments and related laws. It also introduces reforms in land administration and land tenure security with a view to promoting efficiency in land services and enhances use of land as an economic asset in Lesotho.⁷⁵ Under this Act, the power to allocate and to revoke allocations to land vests in the local authority having jurisdiction in the area.⁷⁶ The chief participates in every land allocation as a non-voting member

⁷⁰ As Lord Blackburn observed in *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cases 450 at page 455-456: 'No action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to any one ...'.

⁷¹ *Moletsane and Others v Attorney General and Another* CIV/APN/163/2001 at 48.

⁷² See s 87(1) of the Land Act 17 of 1979 (as amended).

⁷³ See s 6(1) of the Land Husbandry Act 22 of 1969.

⁷⁴ See s 4(1) of the Land Husbandry Act 22 of 1969.

⁷⁵ See s 1 of Government Notice No. 45 of 2010.

⁷⁶ See s 14(1) and 14(3) of the Land Act 8 of 2010.

except where the chief is an *ex officio* member of the allocating authority.⁷⁷ In the urban areas the power to grant title is exercised by an allocating authority having jurisdiction in an urban area in consultation with the chief having jurisdiction in the area.⁷⁸

Whenever a person holding land, other than land held under a lease upon commencement of this Act, is desirous of registering it or creating or granting any interest in the land held by him, such person has to lodge an application for a lease with the Commissioner for issue of a lease in the manner prescribed in the regulations.⁷⁹ Such person is required to produce inter alia, an affidavit by the chief or other proper authority that the applicant lawfully uses or occupies the land.⁸⁰ Any land other than agricultural land is taken to have been abandoned where the lessee or allottee of developed land has vacated and neglected the land for at least a period of 10 years and neither the chief of the area or any other person knows of his whereabouts.⁸¹

Where it appears to, inter alia, the chief of the area that land has been abandoned, the allocating authority has to carry out an investigation and submit a report to the minister who must then determine whether the land qualifies as an abandoned land in terms of the law.⁸² Where the minister determines that the land has been abandoned, the minister shall publish in the Gazette a declaration of abandonment and revocation of title and must send a copy of that declaration, inter alia, to the chief of the area and the allocating authority having jurisdiction.⁸³ The Commissioner must, inter alia, consult with the chief of the area selected for regularisation and must prepare a draft scheme of regularisation in accordance with the regulations and in conjunction with Local Councils within whose jurisdiction the proposed scheme area is situate or most closely contiguous to where the regularisation area is situate.⁸⁴

IX Conclusion

In conclusion, the following points are worth highlighting. First, land allocation in Lesotho is based on Chapter XI of the Constitution. The traditional authorities still play a big role in land allocation and management in Lesotho, even though their power has been considerably reduced. All attempts at ridding the system of the influence of chiefs remain unachieved. Second, administration of land in Lesotho had been beset with problems caused by untrained chiefs, who were advised by committees and later assisted by Development Committees of one type or the other from 1965 until today. Thirdly, land allocation records and registers were supposed to be kept, but they were not. The state was supposed to supervise land administration and

⁷⁷ Reg 5(6) of the Land Regulations, Legal Notice 21 of 2011.

⁷⁸ See s 25(1) of the Land Act 8 of 2010.

⁷⁹ S 30(1) of the Land Act 8 of 2010.

⁸⁰ S 30(2)(c)(iii) of the Land Act 8 of 2010.

⁸¹ S 43(2)(c) of the Land Act 8 of 2010.

⁸² S 43(3) of the Land Act 8 of 2010.

⁸³ S 43(5) of the Land Act 8 of 2010.

⁸⁴ S 61 of the Land Act 8 of 2010.

proper keeping of land registers as well as other records of land administration. For one reason or another, this was not done.

Fourthly, a great deal of uncertainty and disagreement exists as to whether Chiefs still have a role in land allocation and management under the law among the ordinary Basotho not educated in the law. The situation becomes even more complex where it is suggested that a chief's power to allocate land can simply be terminated by a declaration of an urban area both under the current law and the previous laws. It becomes very difficult to determine people's culpability where the authority of chiefs continues unimpaired and government has done nothing over the years. It is so, because the chiefs are the main arm of the law and the State in rural areas.

Lastly, the dualism of government between the chiefs and the central government in land administration made the problem worse. The central government had a tendency to declare adjoining rural areas as urban areas without proper preparation consultation and creation of capacity. During the first phase of military rule there was a declaration that powers of chiefs would be restored.⁸⁵ This led the chiefs to assume most of their traditional powers without legislative authorisation. Land allocation was no exception. It is submitted that Lesotho would do better by consolidating the various pieces of legislation into one comprehensive law which addresses the various aspects of land allocation and management in Lesotho so as to avoid the problems highlighted in this paper. Such initiative will take the country a step forward and out of the current situation of land mismanagement.

⁸⁵ *Moletsane and Others v Attorney General and Another* CIV/APN/163/2001 at 67.

SEEKING A GENDER EQUITABLE CUSTOMARY SYSTEM OF DISTRIBUTIVE JUSTICE: THE CASE OF THE LOZI OF WESTERN ZAMBIA

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Abstract

This paper looks at African customary law as a system of distributive justice capable of fulfilling the just distribution of basic goods in state. In this case that good is the right to property (land) and those seeking a fair entitlement to it are women. The aim of the paper is to re-vision customary law to appropriately fulfill its mandate as an inclusive gender sensitive system of justice. The paper is premised on the fact that not only is land a pre-requisite for securing a livelihood, much of it is regulated by customary law. Furthermore, women's land rights are mostly sanctioned by customary law. And yet the significance of customary law is not reflected in the dual legal system that applies which ranks customary law below state or general law, and thereby renders rather precarious any entitlements to land derived from customary law. If justice is to prevail, customary law should be accorded its rightful status. However that is not the primary concern of this paper. The appropriate recognition of customary law comes only later after customary law has adequately provided for women. Thus its recognition should be earned by its own renewal as a system that is not based on gender hierarchy or a denial of women's status as persons under the law with a full set of rights and obligations. Thus prior to or through the process of recognition, customary law must pass the test required of a distributive justice system by feminist theory.

Lozi (Western Zambia) customary law is used to illustrate this argument: First it reminds the reader that as originally conceived, customary law is a system of law capable of providing for the distribution of basic goods in society. Secondly and more significantly, Lozi customary law shows that whilst it has the potential to serve as a system of distributive justice, its orientation towards gender hierarchy undermines that capacity. Thus what follows is a proposal to move customary land tenure from a system that espouses bilateral traits with a bias towards the father-right to a truly equitable system capable of a gender-just distribution of land rights. In short, the paper is a proposal for effectuating gender justice.

Keywords: African customary law, distributive justice, gender sensitive, property rights, women's land rights

I Introduction

Recent pressures on rural land¹ stemming from the so called land grabs² that have swept the African continent have brought to the fore the need to fully rationalise the dualism of the land tenure systems Africa inherited from the

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¹ Land in this paper refers to surface rights and includes natural resources such as soil, water, plants/trees as well as developments such as dwelling houses in rural areas regulated by customary law.

² This is the new wave of large scale land acquisitions fuelled by the search for Foreign Direct Investment in Africa. It also includes internal and inter-personal competition for land intensified by external pressures.

colonialists. Since the land grabs focus on the taking of large tracts of land by foreign investors, and this land is being 'grabbed' mostly from men (as they 'own' most of the customary land), the 'grabs' have attracted a lot of attention. Much less so, the daily taking of land from women by their male kin, a process which in Zambia is legitimised by customary law and labelled private by the Constitution. The process is so 'normal' that it hardly attracts any public attention. For many rural women this legalised grabbing premised on nothing more than male entitlement and female disempowerment because of their gender results in women losing a livelihood and subsequent impoverishment in the same way that foreign or local investor grabs deprive nationals or customary land holders.

The rationalisation of the land tenure system should in the opinion of this paper, focus on this less visible deprivation since the process is taking place at a time when human rights including, women's rights, have become central to any legitimate government policy aimed at development economically, socially and culturally. In rationalising land tenure, African states need to ensure that not only are the systems of land tenure benefiting the majority of the people, but that those people include women.³

The reality of women's lives in rural Africa is highly complex and there is no easy solution to be found in state law: In other words policy makers must unbundle the beneficiaries of their policies as women and men; they must locate them within their lived realities including the customary law that they are most comfortable with; they must interrogate the utility of arguments that continue to deny the substantive role played by customary law; and they must devise new instruments of governance that will respond to a grounded gender sensitive way of thinking. A new approach necessitates tapping into the potential of customary law to be modernised into a legitimate gender-just distributive system. This paper explores this argument and proposes changes to customary land tenure through a consideration of distributive justice, feminist legal theory and Lozi customary law.

II Lozi customary law and system of land tenure

The question of whether customary law is law in the full sense of the term has not been conclusively resolved. This paper thus takes customary law as a given since contemporary jurisprudence accepts pluralistic legal orders, in which customary law is seen as a constructive element rather than something determined by the general law.⁴ Thus however much is said about the problems of codifying or in the alternative, of restating it,⁵ '[t]rue customary law, of the older type ... is obligatory in itself and quite independent of judicial sanction or approval and indeed may operate even in the absence of any judicial

³ Women often do not have access to land in their own right because of a mix of factors which constitute gender inequality including law, culture, family & marriage.

⁴ Hinz and Kwenani, (2006) 'The Ascertainment of Customary Law', in Hinz (ed) *The Shade of New Leaves: Governance in Traditional Authority; A Southern African Perspective* (LIT Verlag Münster 2006) at 203-204.

⁵ *Ibid* at 205.

system'.⁶ Consequently, despite its disregard by many elite African lawyers, customary law has survived, its longevity deriving from the 'continuous dialogue that the people hold with it, ... the perceived moral content of the law ...[and]... the strong ethics ...' that support modern African societies in the face of alienating state laws.⁷

What provides a context to the paper is the consequential effect of customary law's second class status. In many common law jurisdictions, customary law is to this day accorded second class status as it can be subjected to either the test of longevity or that of legal validity in the eyes of the court. It is the gender insensitive use or non-use of this vetting process which places customary law and women's rights in a subordinate position vis-a-vis state or general law and entitlements thereunder.⁸ The Zambian legal system serves as a good example. Under s 16 of the Subordinate Court's Act and s 12 of the Local Courts Act, customary law that is incompatible with the written law or repugnant to justice, equity and good conscience (in the case of the former) and to natural justice and morality (in the case of the latter) is inapplicable.⁹ Furthermore, Article 23(4)(d) excludes customary law from the necessity to conform to the constitutional guarantee of non-discrimination, effectively making it a non-issue until it has been recognised by the courts.¹⁰

The paper's context is the relationship between customary law and justice, specifically distributive justice. The law and economics approach with its pareto analysis (examining parity in preferences) which in recent decades has become very influential¹¹ explains the link between distributive justice and customary law. The approach is relevant to the discussion even though it is linked to utilitarianism and justification of private property rights because it rationalises the necessity in any social grouping of a system of ownership rights.¹² Given the nature of land as a primary resource for survival and given the centrality of farming, hunting, fishing and gathering for rural communities, it is only logical that the Lozi people of Western Zambia (formerly known as Barotseland), would have a system of land rights and that the system would be premised on some sense of fairness.¹³ The extent of that fairness is considered in this paper.

Whilst there is little doubt about the importance of customary law as a distributive justice system for ordinary Africans, it is impossible to ignore its controversial role in the women's rights context. Its importance, at least as far as policy makers are concerned, tends to rise or wane depending on the issue they are addressing. Viewing African customary law with suspicion and

⁶ Lloyd, *The Idea of Law* (Penguin Books 1976) 247.

⁷ Okupa, 'African Customary Law: The New Compass', in Hinz (ed), *The Shade of New Leaves: Governance in Traditional Authority; A Southern African Perspective* (LIT Verlag Münster 2006) 203-204.

⁸ *Ibid* (n 6).

⁹ Chapters 28 and 29 of the Laws of Zambia, respectively.

¹⁰ Constitution of the Republic of Zambia 1991 as amended in 1996.

¹¹ Bix, *Jurisprudence: Theory and Context* (Carolina Academic Press 2012) at 189.

¹² Freeman, *Lloyd's Introduction to Jurisprudence*, 7 ed (Sweet & Maxwell 2001) at 112.

¹³ *Ibid* at 560. That line of analysis however cannot take me further because of the difficulty in equating justice with wealth maximisation at the expense of the majority, particularly women.

disdain is rooted in Africa's early relationship with its subsequent colonial masters.¹⁴ The colonialists in seeking to justify their domination, portrayed African indigenous law as barbaric and primitive and therefore repugnant to justice and morality whereas its fundamental principles such as compensation and restitution which were contrary to colonial policy were quickly replaced by criminal law sanctions.¹⁵ It regained some of its popularity in the post-colonial era as a way of recapturing lost identity and history but legally it was subjected to the same demeaning restrictions. In short the historical disregard of customary law has since dissolved into ambiguity about the status of customary law particularly in the face of a country's development agenda. Peculiarly, that ambiguity is quickly replaced by a reification of customary law whenever women's equality is mentioned; presumably in order to justify the labelling of equality demands as 'Western nonsense'.

The Lozi provide an example of a well-developed customary law system and in that sense one of the best examples of the efficacy of customary law in providing distributive justice and maintaining social order. The discussion that follows is intended to impart an understanding of the basic principles of customary land tenure and the values underpinning them. The paper does not discuss either the Lozi governance system or institutions neither does it consider their relationship with the state law and institutions. It also does not discuss the process of dispute settlement in any depth other than the extent to which the process is revealed by the system of land tenure. Suffice to observe that the Lozi have historically had a highly organised system of courts with full powers to enforce their decisions.¹⁶ Furthermore the aim of most judgments is not litigation but rather to reconcile the parties; so judges tend to enquire into all the grievances and breaches of obligation that are brought up in the course of the hearing. The judges must pass legal and moral opinions on the same because the process of reconciliation must also include a defence of the law.¹⁷ A task made somewhat easier by the general acceptance of the same standards of right doing and wrongdoing.¹⁸ Gluckman observes that: '...The Lozi can cite to an inquirer a series of "legal propositions" which their courts state and follow in judging disputes'.¹⁹

The hierarchy of customary landholding begins with the Lozi King (Litunga) who grants primary estates of administration over cultivable land and some fishing sites to heads of villages including, himself, each of whom must then provide land for his subordinates by granting secondary estates of administration to secondary holders who in turn grant land to those lower down the ladder.²⁰ The process culminates in the granting of land rights to family members including that of a husband granting land to his wife or a

¹⁴ Ibid (n 7) at 375.

¹⁵ Ibid (n 7) at 377.

¹⁶ Gluckman, *The Ideas in Barotse Jurisprudence* Storrs Lectures on Jurisprudence, Yale Law School 1963 (Yale University Press 1965) at 8.

¹⁷ Gluckman (n 16) at 10.

¹⁸ Ibid (n 16) at 10.

¹⁹ Ibid (n 16) at 103-104.

²⁰ Ibid (n 16) at 91.

parent granting land to his or her offspring. Most importantly, if a ‘man makes a direct grant of part of his land to another, the latter becomes subordinate to him in the series and he retains his holding in the land since if the grantee departs he resumes control of the land’.²¹ This sets the tone for the unfairness of women’s land rights elaborated below.

The main principles of the Lozi landholding system which are similar to what pertains in other ethnic groups state that both authorities and their subjects own land in virtue of their status within the social hierarchy, clearly holding rights against each other and having obligations to one another: Since a person maintains rights of tenure only if they fulfill obligations to both superiors and subordinates, title is based on fulfillment of obligations rather than title itself and each land holder and holder of an estate of administration owes an obligation to render obedience, support and tribute to the King or immediate source of title; additionally those who hold estates of administration must control his group according to the law.²² Thus a kinsman or woman resident elsewhere may be allowed by the grace of the headman to work an estate of production where such land is not required by the residents as security for his or her claim to return to the village.²³

The type of tenure is communal in the sense that every subject is entitled to minimal use of land something which constitutes the dominant right running through a pattern of rights. All Lozis can claim the right to be given a field to work privately and to make certain use of public lands or waters. Once an individual takes over products from these public resources, they are his.²⁴ However individual appropriation is merely the basis of consumption given that even ‘...though the producer has dominant power over his goods, he owes duties to distribute some of these to specific persons within a complicated pattern established by status relationships’.²⁵ The land itself however has no monetary value and cannot be sold.²⁶

The Lozi customary distributive system thus combines both communal and individual entitlements which are not absolute. Individual ownership is confined to the fruits of one’s labour; and even then an element of sharing is encouraged. This is expected, given the inter-connectedness of persons living in village communities in a subsistence economy. There is inter-connectedness in the land holding system that speaks to female values and welfarism, both of which are discussed further in the paper.

As intimated above, Lozi women’s land rights reveal the cracks in the distributive justice aspects of the system much in the same way such rights are compromised across the African continent. Despite the diversity in customary landholding in Africa it can briefly be stated that nowadays land is held semi-communally rather than by individuals.²⁷ Women’s land rights in Africa are

²¹ Ibid (n 16) at 92.

²² Ibid (n 16) at 79.

²³ Ibid (n 16) at 93.

²⁴ Ibid (n 16) at 101.

²⁵ Ibid (n 16) at 103.

²⁶ Barotse Royal Establishment Circular, 1968.

²⁷ Grant Bowman and Kuenyehia, *Women and Law in Sub-Saharan Africa* (Sedco 2003) at 128.

for the most part derivative²⁸ and limited and this remains the case even where attempts have been made to change the law.²⁹ Whilst the national Constitution may as in the case of Zambia, guarantee equality and non-discrimination, such protection does not extend to personal and customary laws.³⁰

To elaborate, Lozi women may own land through political status as well as through kinship. Princesses and queens and other royals are granted primary estates of administration over villages that they do not reside in but exercise control over through resident headmen.³¹ The majority of women are assigned land by their male kin because although the Lozi are bilateral, they emphasise the father right.³² This places most women at the bottom of the land distribution chain.

Where a man settles in his wife's village as occasionally happens, she is cultivating her own land and he has no claim on any crops she grows however the crops he grows on land allocated to him are his own.³³ The man has no claim on his wife's crops because the land belongs to her natal kin. The land he is given for his own use is treated like any other allocation of land unaffected by the marriage that brought him to the village. Land that a woman owns in her natal village cannot be claimed by her husband after her death.³⁴ Similarly a widow has no right to inherit her husband's land but she may be permitted to stay on in the village after her husband's death.³⁵ Her presence in her husband's village does not entitle her to a normal allocation of land which is secure until she chooses to leave the village.

Land disputes following the death of a spouse show that because a woman's children belong mainly to the father's kin and village she may desire to remain in the husband's village but her in-laws may not encourage her to stay on.³⁶ She enjoys only a right to use her husband's land while he is alive because he is compelled to 'give at least one field of a reasonable size to her'. She cannot transmit rights in her field to her heirs including her marital children.³⁷ The husband and his heir can dispossess a woman of the fields given to her by her husband. He has a legal entitlement to the fruit of her labour whereas she has only a right to maintenance even if she works the field as evidenced by the following quote:

[A]...man and his wife ultimately have a right to a half each of the produce grown by her on a [field] given by him, since they divide the crops on divorce or the death of one spouse. They are in a sense, joint owners of the crops. Often the Lozi speak of the man as the owner but his rights to touch the crops are very limited. He is entitled with his relatives to be fed from the granary of his wife and his

²⁸ Ibid.

²⁹ Kethusegile, *Beyond Inequalities: Women in Southern Africa* (Southern African Research and Documentation Centre (SARDC), Women in Development Southern Africa Awareness (WIDSAA) programme, 2000) at 101-102.

³⁰ Ibid at 148.

³¹ Gluckman (n 16) at 93.

³² WLSA, *Inheritance in Zambia: Law and Practice* (Women and Law in Southern Africa Research Project 1993) at 73-74; Gluckman (n 16) at 84.

³³ Gluckman (n 16) at 102.

³⁴ WLSA (n 32) at 189.

³⁵ WLSA (n 32) at 74.

³⁶ WLSA (n 32) at 183-184.

³⁷ Gluckman (n 16) at 145-147.

wife should consult him before selling from it...but woe betide him if he goes to her granary himself to take food.

.....
 The husband in addition to giving each of his wives a [field] (and each wife has a right to claim one), usually keeps one [field] at least for himself. If asked to state the law, the Lozi will say that no wife has any ownership in the produce of this [field], even though every wife helps to work it. However, every wife has the right to demand food for herself and her children from it, and a reasonable amount of [manufactured] goods bought from the proceeds of its crops...Thus though the man is the owner of the granary ...his wives have certain rights to control his use of it.³⁸

Despite women having access to land in their political capacity, their socially determined access is fundamentally gender biased because of their dependence on natal or marital male kin. This is very problematic because of women's role in providing for their families through working the land. They have responsibilities but only some and certainly not enough corresponding or equal ownership powers. Lozi customary law therefore falls short as a system of distributive justice if it does not remedy this aspect given the fundamental difference between the rights held by a wife and the rights of any other person assigned land by a primary or secondary estate administrator or even by a kinsman. The difference is attributable to two things.³⁹ First, there is the father right, and secondly, marriage. It is these institutions and their consequences which give rise to the argument in this paper.

III Distributive justice: Locke and Rawls

For purposes of importing gender justice into the Lozi system of land tenure, the paper has to consider two problems. First – how to change the law. Second – what should the law include? To respond to the two issues effectively, the paper looks to both theories of distributive justice and gender equality. It also looks to both Western and homegrown feminist theories to resolve the problem of incorporating gender justice into the Lozi customary land tenure system. The reason is simple. Women are women wherever they are in the world before they are distinguishable by race, culture or geographical location. Changu Mannathoko dismisses claims that feminism is alien to Africa and locates women's oppression in the traditional, pre, post and neo colonial African state and society; hence she establishes that feminism has its roots in the African Region.⁴⁰

Distributive justice is about principles to guide the just distribution of benefits and burdens in society.⁴¹ What is conceived as justice may vary from society to society and the argument that this paper develops favours liberalism to the extent to which it can fulfill women's rights and needs; it thus attempts where necessary to resolve the contradictions that inevitably arise in applying liberal values both in the gendered and customary law contexts. John Locke, the father of natural rights, constructed a natural rights doctrine out of the

³⁸ Gluckman (n 16) at 101-102.

³⁹ Gluckman (n 16) at 145.

⁴⁰ Mannathoko, 'Feminist Theories and the Study of Gender Issues in Southern Africa' in Meena (ed), *Gender in Southern Africa: Conceptual and Theoretical Issues* (SAPES Books 1992) at 87.

⁴¹ Cohen, 'Where the Action Is: The Site of Distributive Justice' (1997) 26(1) *Philosophy and Public Affairs* (Winter) 3.

social contract, by stating that man gave up the idyllic state of nature in order to secure property rights; impliedly, the purpose of government is to protect human entitlements.⁴² Instructively, Locke excluded only children and those who are mentally ill from the category of all humans whom he clothed with reason and equality of status.⁴³ As Freeman elaborates:

...Locke believed in rights more basic than property, such as the right to physical subsistence...The subtlety of Locke's explanation of property lies in its synthesis of notions of common property and private rights. He accepts it as a truth both of human reason and revelation that the earth belongs to God, who has given it to human beings in common for them to enjoy it. He dismisses the idea that there could be any right to private property...but justifies private right to common heritage through the concept of labour...Locke's ruler was under a duty to use his powers to protect rights which God himself had bestowed on mankind.⁴⁴

The importance of Locke's theory for contemporary human rights particularly those related to women's access to land under customary law are at least three-fold. First women are equally entitled to land on a basis that precedes human society. Secondly, there is a primary level of common ownership making private rights to a resource such as land, something earned by individual exertion which can be compared to what pertains under Lozi customary law. And thirdly (also comparable to Lozi customary law) Locke's defence of physical subsistence even if it undermines property rights, in the claim that '...charity gave every man a title "to so much out of another's plenty, as will keep him from extreme want"...hinged upon God's gift of the world to men in common'.⁴⁵ Locke thus seems to set the tone for an argument that women's entitlement to land precedes any customary or other system of law. However this has yet to be seen from feminist readings of Locke and another philosopher, John Rawls.

There are many contemporary theories of justice that one could use to explain distributive justice under customary law in general even if not Lozi customary law in particular. One could look to utilitarianism with its emphasis on the majority even at the expense of the minority.⁴⁶ One could even look to Marxism's classless communism.⁴⁷ And there are those who find Nozick's historical approach useful.⁴⁸ This paper relies on Rawls' theory of justice in as much as it is possible to do, because Rawls offers the re-visioning of social institutions and affirmative action, both of which are espoused by radical feminism.

Rawls identifies principles of justice using a 'refurbished version of the social contract argument' by claiming what 'free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the terms of their association...'.⁴⁹ Rawls views the

⁴² Freeman (n 12) at 112.

⁴³ Ibid at 113.

⁴⁴ Ibid at 115.

⁴⁵ Ibid at 116.

⁴⁶ Ibid at 524.

⁴⁷ Ibid at 972-979.

⁴⁸ Nozick, (1974) 'Distributive Justice', reprinted in Feinberg and Gross, *Philosophy of Law* (3 ed) (Wadsworth Publishing Company 1980) at 381.

⁴⁹ Freeman (n 12) at 524.

acceptance of inequalities as unjust; he places a premium on respect for liberties and defines benefits in terms of primary goods rather than welfare.⁵⁰ Rawls presents a conception of justice as fairness in which free, equal, mutually disinterested and rational persons in the ‘original position’ and behind a ‘veil of ignorance’, choose the principles to define the fundamental terms of their association.⁵¹ Rawls proposes that the parties would choose two principles; the first requiring equality in the assignment of basic rights and duties; and the second holding that social and economic inequalities, such as those of wealth and authority are just only if they result in compensating benefits for everyone particularly the least advantaged members of society.⁵² In coming to these principles, Rawls elects to nullify ‘the accidents of natural endowment and the contingencies of social circumstance as counters in the quest for political and economic advantage’.⁵³ In other words the assumption is that when people really don’t know where they will be placed vis-a-vis social goods, they will seek a system that tries to advantage everyone. Rawls seems to speak to the problem at hand, but again his seemingly beneficent theory needs to be viewed through a feminist lens.

IV Feminist jurisprudence and distributive justice

The initial reading of Locke provides a strong basis for women’s full entitlement to land. He has however been the subject of feminist criticism that shows that, in fact, he did not eliminate patriarchy with his natural rights theory but simply relocated it from the public to the private through the marriage contract which universally subordinated women.⁵⁴ This criticism is well founded given the principles already presented about Lozi customary law. Rawls’ theory with its early promise also seems to fall into a similar trap. If we examine the institutions in society today, even superficially, we find that they all reflect (or until relatively recently, did reflect) the male bias which is both a result and a source of patriarchy. Much effort has had to be invested in changing state laws, policies and attitudes in order to include women and eliminate gender discrimination in the public domain; the struggle in the private arena continues particularly for African women.

Despite these misgivings, the value of Rawls’ device is undeniable. Thus even as Rawls has been criticised by his contemporaries for relying on a construct that does not reflect reality but professes what Nozick calls ‘time-slice’/ahistorical principles of justice;⁵⁵ feminist theory can provide some defence against the criticism. This is because, the greatest value in Rawls’ theory does not lie in the principles of justice he espouses but in the presupposed neutrality of the persons determining whatever principles of justice are chosen by a given society. In other words what is important is the

⁵⁰ Ibid.

⁵¹ Rawls, (1971) ‘Fairness and Justice’ reprinted in Feinberg and Gross (n 48) at 370.

⁵² Ibid at 271. Note that this is not the actual formulation of the said principles but provides a clearer understanding of what is at stake.

⁵³ Ibid.

⁵⁴ Pateman, ‘The Sexual Contract’ reproduced in Freeman (n 12) at 549.

⁵⁵ Nozick (n 48) at 385.

utility of the device Rawls proposes for determining a society's fundamental system of distributing goods.

Two feminist approaches to distributive justice demonstrate two possible uses of Rawls' device. The first from Susan Moller Okin accepts Rawls' 'original position' and 'veil of ignorance' and uses it to ask what social structures and public policies regarding relations between the sexes would be agreed upon in this original position; the response is a humanist theory of justice which minimises gender.⁵⁶ The second approach from Drucilla Cornell 'rejects the veil of ignorance in favour of an "imaginary domain" or prior moral space in which women can be evaluated as free persons; it provides an opportunity for self-representation and to discover what free and equal persons would demand as a matter of justice'.⁵⁷ Both approaches find the status quo problematic from a conceptual point of view because women's equality necessitates a new social contract fashioned by both women and men.

It is important at this point to clarify the insistence on a revisioning of our social, economic and political institutions. Liberal feminism, despite its long history of fighting for equal opportunities for women, has been criticised for not questioning structural inequities in society.⁵⁸ As a result liberal feminism is accused of compromising women's rights to access productive resources for welfare-oriented services, which are supported by nationalist governments.⁵⁹ Even the more radical equity approach of liberal feminism only requires a transformation of gender relations rather than resolving the structural inequities.⁶⁰ It is radical feminism with its roots in Marxist feminism which locates women's oppression in the institution of gender.⁶¹ Radical feminist jurisprudence in particular provides an analysis of law that demonstrates its male reasoning which compromises its objectivity and neutrality.⁶² As Mannathoko explains:

Radical feminism puts sexuality and reproduction and patriarchy at the centre of the political arena and changes women's political consciousness. Their slogan "the personal is political" empowers women to analyse their lives as part and parcel of common experiences in patriarchal society. They challenge the conventional assumptions with regard to the place of women in society. The demand for women's empowerment might explain why radical feminism has met hostility in the region and has failed to have a significant impact on development strategies...⁶³

That was twenty years ago, towards the end of the 20th Century. Since the beginning of the 21st Century, gender has become a central concept in the analysis and preparation of development agendas even if it is not necessarily well understood by either policy makers or the general populace. The empowerment approach crafted and pursued by African feminists at the turn of the Century has already borne fruit in the radical constitutional reforms in several countries which now categorically recognise gender equality and

⁵⁶ Lim, 'Justice and Rights' in Kramarae and Spender (eds) *Routledge International Encyclopaedia of Women: Global Women's Issues and Knowledge* (Routledge 2004) at 1177.

⁵⁷ *Ibid* at 1177.

⁵⁸ Mannathoko (n 40) at 73.

⁵⁹ Mannathoko (n 40) at 74.

⁶⁰ Mannathoko (n 40) at 75.

⁶¹ *Ibid*.

⁶² Smart, *Feminism and the Power of the Law* (Routledge 2002) at 160-163.

⁶³ Mannathoko (n 40) at 75.

provide for affirmative action.⁶⁴ Consequential reforms in subsidiary laws and the common law have mirrored the constitutional revolutions. As a result, customary law faces strong feminist legal challenges even as it is manipulated by traditionalists to try and resist change.

V The empowerment approach and development of customary law

Zambia's Constitution has not changed despite several attempts to amend it to categorically ban discriminatory customary law. Customary law such as the Lozi land tenure system which is discriminatory is still constitutional. Some understanding of the empowerment approach is therefore relevant: Mannathoko states that:

Within the Southern African context, radical feminists have taken advantage of liberal, radical and Marxist feminism to develop a conceptual framework that provides for the empowerment of women. The approach addresses the practical and strategic needs of women. Practical gender needs refers to assisting women to meet their basic needs and interests (welfare needs), such as the need for food, shelter, health and water. And the strategic needs refers to empowering women to take control over their own needs through providing them with the space and flexibility to make decisions on issues affecting them and society. Further, empowering them to also participate in micro and macro level policy formulations with regard to issues connected to gender and development. Women's groups are empowered to facilitate their participation in the management of their society. These collectives have to find means of seeking alliance in order to meet their strategic needs such as the long term struggle against oppressive gender laws.⁶⁵

The empowerment approach is as valid today as it was two decades ago. Polack has recently pointed to the value of a legal empowerment agenda in protecting customary land rights in the face of 'land grabs' by observing that:

A 'legal empowerment' agenda encapsulates these two arenas – legal reform to increase local control and downward accountability, and collective action for bottom-up checks, balances and agenda-setting... This notion of legal empowerment relies on a range of institutions and institutional strengths and capacities... A holistic concept of legal empowerment placed at the intersection of these pathways is important, because it is clear that, if one mechanism is in place but the others are weak, or if a coordinating actor is not perceived to be legitimate, then justice will not necessarily be achieved.⁶⁶

In relation to gender, Polack further notes that:

...some laws adopted since the 1990s have paid greater attention to gender equity, by embracing the principle of non-discrimination, abrogating customary norms, presuming joint ownership of family land [e.g. registering user rights], outlawing land sales without consent of both spouses, and providing for women's representation in land management bodies... Moreover, while decisions on land adjudication concerning customary rights are to be made according to customary law, decisions denying women access to ownership, occupation or use are null and void... [but]... the implementation of laws protecting women's rights is constrained by entrenched cultural practices, lack of legal awareness, limited access to courts and lack of resources. These implementation problems are generally more severe in rural areas than in urban areas. In these cases, effective interventions to improve women's land rights need to include not only legislative reform but also concrete steps to bridge the gap between law and practice.⁶⁷

⁶⁴ See for instance the current Constitutions of Kenya, Zimbabwe, Namibia and South Africa.

⁶⁵ Mannathoko (n 40) at 778-779.

⁶⁶ Polack et al, *Accountability in Africa's Land Rush; What Role for Legal Empowerment* (International Institute for Environment & Development 2013) at 3.

⁶⁷ *Ibid* at 22-23.

The resistance by customary law to embracing gender equitable values, is well analysed by Women and Law in Southern Africa (WLSA)⁶⁸ in their attempt to use the empowerment approach over twenty years ago. WLSA note that the inheritance practices in the sub-region suggest a re-thinking of customary values and gender constructs.⁶⁹ Further that the values that characterise customary law are ‘female’, and yet the institutions that enforce the values inherent in customary law are male.⁷⁰ Thus customary law values the private sphere – the family and obligations related to it; it values community – group decisions and rights; it emphasises gender divisions and distinctions; and its dispute resolution processes employ negotiation and seek the preservation of peace.⁷¹ However, as society changes, the more egalitarian values are being eroded by individual patriarchal interests.⁷² The original values can only be revived through a process of de-linking them from the very institutions and the male control that administer them.⁷³

WLSA however does not stop there. In addition, they re-think gender as well and questions what is good for women? They ask who constitute ‘women’ as a category. They find that a woman’s location in her life cycle and in her specific relationship to a male relative will give her very different entitlements to those of another woman differently located. Non-material and long-term benefits such as acceptance (termed by WLSA as the need to ‘belong’) by being accorded a place in the family may be of more value to a woman than access to material resources such as property. Finally WLSA note the difficulty of isolating the source of power and how it can be diffused in the complex tangle of relationships and entitlements.⁷⁴

WLSA’s work is helpful in enabling an appreciation of the complexity of women’s rights to land under the customary system of distributive justice but also of women’s continued dependence on customary law to gain access to land. Other feminists have raised similar concerns in responding to development approaches that militate against any consideration of customary land tenure systems. Customary land tenure is considered to be problematic for economic development in Africa because it does not provide clear, documented and enforceable rights to individual ownership of land to facilitate income generation through productive use of land.⁷⁵ The rights-based approach or more specifically, formal pursuit of individual registered title to land ignores the reality ‘...on the ground, where land rights are highly complex, and involve multiple and overlapping uses and claims’.⁷⁶ Hence

⁶⁸ Mannathoko (n 40) at 79.

⁶⁹ Neube and Stewart, *Widowhood, Inheritance Laws, Customs & Practices in Southern Africa* (Women and Law in Southern Africa Research Project, 1995) at 125-135.

⁷⁰ Neube and Stewart (n 69) at 128.

⁷¹ *Ibid* at 128.

⁷² *Ibid* at 129.

⁷³ *Ibid*.

⁷⁴ *Ibid* at 129-135.

⁷⁵ Griffiths, ‘Making Gender Visible in Law: Kwena Women’s Access to Power and Resources’, Hellum et al, *Human Rights, Plural Legalities and Gendered Realities: Paths are Made by Walking* (Southern and Eastern African Regional Centre for Women’s Law, University of Zimbabwe with Weaver Press 2007) at 139.

⁷⁶ *Ibid* at 141.

the importance of understanding the social basis of law, ‘...how...women’s relationships with land are mediated through the gendered networks of family and household in conjunction with the broader economic, political, ideological and social domains of which they form a part’.⁷⁷ This tangle of relationships has implications for any strategy to empower women as autonomous beings in the context of customary law.

Individual autonomy for many African women appears to mean entering into an adversarial relationship with or to the collective community.⁷⁸ Whilst the question that must be asked is, why would the collective community hold values that are not supportive of women’s entitlement to equality particularly over ownership of critical resources such as land? Much of the answer to this question is historical and attributable to patriarchy. It is notable that feminists have long taken issue with the view that individual autonomy in the liberal agenda demands a conflict with or separation from the community.

Nedelsky urges...a view in which the community is viewed as facilitative of individual flourishing and autonomy and the obligations of government do not depend on the pre-identification of discrete individual rights...McClain pursues a similar theme when she explores alternative, non-atomistic definitions of government...which...may co-exist with and include many forms of connection among citizens...For the development of the concept of ‘narrative autonomy’ in which persons connect action and identity through a process of continual interpretation and re-interpretation of their experiences in light of their relational commitments and communities,...Williams...[states that]...Once separation from others is no longer viewed as the central premise of autonomy, the way is cleared for...a...reconceptualisation of autonomy, which views individual rights claims not as claims by an isolated rights bearing individual but [one] who is deeply interconnected with and dependent upon others.⁷⁹

Hence radical feminists refuse to accommodate women’s differences from men and seek ‘to terminate the subordination that results when these differences are manipulated to legitimise and perpetuate male power over women’.⁸⁰ Re-visioning must respond to the reality of where women are in terms of ideological emancipation as well as lived reality at this point in time. If women struggle with a system that gives them, individual rights in theory, which rights cannot be realised in practice, then re-visioning has not achieved its purpose.

It is the complexity of women’s land rights as a whole that cautions against a wholesale resort to legislating of individual title, especially if that individual title to land is not preceded by prior rationalisation of the land tenure system. The individual rights approach does sit easy in women’s lived realities. By linking distributive justice to lived customary law it is possible

⁷⁷ Ibid at 143.

⁷⁸ Bartlett and Harris, (1998) *Gender and Law: Theory, Doctrine, Commentary* (Aspen Law and Business 1998) at 1004.

⁷⁹ Ibid at 1004-1005.

⁸⁰ Ibid at 722. This of course is tempered by the fact that not all women are subordinate to men or always dominated by men. Freeman (n 12) at 1128.

to theorise the gap in land rights for women as a study of how norms and values come together to situate on a gendered basis, individuals and groups claims to resources in differing economic, social and political contexts.⁸¹ The questions that arise stem from the need to identify and engage with ‘who has the power to construct, shape, transform, or contest the terms of reference upon which the negotiation of such claims rests and what implications this has for women’s use of law’, to acquire and claim rights to land.⁸² For instance, under the Lozi land tenure system, the system’s bilateral aspects imply powers flowing through both the maternal and paternal lines however an over-riding imbalance is created by the supremacy of the father right.

The alternative to ‘automatic’ legislation therefore lies in a revisioning of the Lozi customary system of land tenure and the inclusion of a principle that minimises inequality in landholding. In other words some form of affirmative action. More concrete actions recommended by Polack⁸³ and other scholars include challenging a constitutional framework such as Zambia’s which blindly protects patriarchal customary law; seeking greater inclusiveness and versatility in registration of title/usufruct and mandatory disclosure of interests held in trust in any transactions in land thereby preventing a situation in which land registration simply entrenches the superior male rights; strengthening informal social processes and mechanisms that restrict the title holder’s ability to transact without consultation; invoking the community’s own gender sensitive general principles of fairness and justice; changing and simplifying land title to reflect a hybrid of customary and state law features e.g. life tenancy, no annual ground rent for minimal tenure and protection of multiplicity of interests.

VI Conclusion

In this paper, classical, orthodox and radical feminist jurisprudential arguments are raised about the efficacy of a customary distributive justice system. By treating customary law as a distributive justice system, primarily intended to meet the needs of a traditional society (with little participation in the benefits accruing from the formal economy and without the benefit of even a rudimentary welfare system to provide relief), the paper seeks to build a case for customary law. The justification goes beyond customary law’s practical day-to-day relevance for the majority of indigenous African people and focuses on how well customary law fulfills its purpose. The paper therefore looks at distributive justice as it presents under customary law, as is, and without necessarily discounting elements that do not meet the expectations of statutory legal systems. The underpinning assumption is therefore that in the case of a system of customary law which is well developed with its own administrative and enforcement mechanisms, such law is as effective in its own right as any state system of law. Effectiveness is therefore measured by

⁸¹ Griffiths (n 75) at 139-140.

⁸² Griffiths (n 75) at 139.

⁸³ See Polack (n 66) generally.

the extent to which customary law provides for and is able to meet the needs of the people that it applies to.

The questions are considered through a review of customary law principles exemplified by Lozi women's land rights. It is noted that Lozi customary law falls short as a distributive justice system because it emphasises the father right, a difficulty that will need to be remedied as the customary law is re-visioned through and in compliance with women's empowerment strategies. The empowerment approach is presented as an effective way of operationalising Rawls' thesis. Thus two things are important to ensure fairness in Lozi women's rights to land. The first and more important is the need to re-vision the system from a gender sensitive point of view. The second is the need within the re-visioned system to ensure that if inequalities must exist in the system as a whole, the system should aim to minimise them by eliminating their gendered source and recognising women's equal entitlement to land.

THE WESTERN SAHARA CASE: LAND REFORM AND PRE-COLONIAL LAND RIGHTS IN NAMIBIA

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Abstract

Article 16 of the Namibian Constitution guarantees the property rights of property owners at the time of independence. However, it does not refer to the long pre-independence practice of disowning indigenous people, a practice which began with the Herrero>Nama genocide during the German/Herero war in 1904.

Recent developments in the Mabo case in Australia could give Namibians a tool to have indigenous land rights acknowledged despite the constitutional rights of the present land owners.

One may ask what do the small Murray Islands, in the Torres Strait off the Queensland coast, have in common with Namibia? Unlike the bloody German/Herero and Nama wars, no shot was fired when Her Majesty's administration in Queensland declared the Murray Islands a crown colony. Yet, the two peoples had a common history of submission to a colonial power; and although allowed to remain on their ancestral lands, they were not informed that they had been colonised.

The Mabo case, a lawsuit brought by the Meriam people, was instrumental in abandoning one of the oldest justifications for the occupation of inhabited land, the so-called terra nullius rule. The example of the Mabo case provides an opportunity to approach the land reform programme in Namibia from a different perspective, at least in the central and southern regions of the country. The Namibian Constitution guarantees private property rights. The idea that more than one right can exist over land is not unknown to both common law and statutory law in Namibia. The paper will propose a process where several strategies are used to obtain the final goal: a just distribution of land to all the peoples of Namibia in a way that contributes to prosperity and stability.

Keywords: Colonisation, just compensation, land expropriation, land reform, private property rights.

I Introduction

The well-known Western Sahara case¹ is seldom, if ever, mentioned in Namibia. Yet, a reading of the advisory opinion gives the country the opportunity to deal in a new way with land reform in taking cognisance of both Article 16 of the Constitution and International Law.

Article sixteen was a compromise. On the one hand it protects private property rights to ease the fears of white capital and the white farming community² but at the same time it gives the state the right, by law, to expropriate private property in the interest of justice, subject to the payment

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¹ Judgments of the International Court of Justice. 1975. *Advisory Opinion on the Western Sahara*, ICJR 1975, <<http://www.icj-cij.org/docket/index.php?sum=323&p1=3&p2=4&case=61&p3=5>>.

² Art 16(1).

of just compensation in accordance with the requirements and procedures to be determined by Act of Parliament.³

While the Commonwealth courts virtually ignored the radical changes in the international community that started with the formation of the United Nations after World War II, and gained momentum with the independence of the colonies of Africa and Asia in the 1950's and 1960's, international law took the first steps to evaluate the meaning of decolonisation.

The importance of the Sahara case for this paper lies in the light it shed on the effect of colonisation of Namibia on the pre-colonial customary land rights. The Advisory Opinion looked at the acceptable way of occupation in terms of International Law at the time of Spain's occupation of Western Sahara – which coincide roughly with the time of the German occupation of Namibia and concluded:

It is therefore by reference to the law in force at that period that the legal concept of *terra nullius* must be interpreted. In law, "occupation" was a means of peaceably acquiring sovereignty over territory otherwise than by cession or succession; it was a cardinal condition of a valid "occupation" that the territory should be *terra nullius*. According to the State practice of that period, territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*: in their case sovereignty was not generally considered as effected through occupation, but through agreements concluded with local rulers.⁴

There is no doubt that Namibia was not a *terra nullius* in terms of international law as it was developed in the Sahara case.

As noted above, the Namibian Constitution guarantees private property rights. The government has always vowed to abide by the Constitution in any land reform programme.

The debate has, however, not always been conducted on a level of mutual acceptance of bona fides. One of the main reasons is possibly the fact that the government works from a very specific premise that land reform should be aimed at returning land presently in the hands of whites to the original inhabitants of the land. A case in point is the President's interview with Baffour Ankomah, of the New Africa.⁵ Nujoma states that the Constitutional Principles were introduced by the Americans and British to favour the interests of individual white settlers who had, 'by hook or by crook' acquired and occupied Namibian land during the colonial era. The President went on to make it clear that the 'willing seller, willing buyer' clause in the Constitution was never in line with SWAPO's policy plan to address the land issue.⁶ However, the words 'willing seller, willing buyer' is not in the Constitution.⁷ What the President possibly meant to say was that the government policy

³ Art 16(2).

⁴ Ibid.

⁵ Reprinted in New Era.

⁶ Ibid.

⁷ See the wording of the article:

Art 16. The text reads:

(1) All persons shall have the right in any part on Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens;

based on a principle of 'willing buyer, willing seller' was a compromise and never the primary plan of the ruling party.

However, as pointed out, Article 16 did not leave the government without a remedy to speed up land reform if the 'willing buyer, willing seller' did not achieve the desired result i.e. expropriation. The frustration of the founding President was over, among other things, the fact that the expropriation of farms were generally contested in court and often resulted in the courts undoing the expropriation. The courts were seldom satisfied that the Ministry followed the legal requirements of the legislation dealing with expropriation.

In *Kessl v Ministry of Lands Resettlement and Others and Two Similar cases*⁸ the High Court looked at expropriation both from the constitutional limitation on the fundamental right of ownership and the constitutional imperative for administrative action to be fair and reasonable and comply with the requirements imposed. The procedural aspects of the expropriation of the farms of Kessl and two others, who were all German citizens, did not comply with the prescriptions of the Agricultural (Commercial) Land Reform Act. The court rejected the argument of the respondent that violations in the administrative process were constitutionally irrelevant, since Article 16(2) is self-contained and embodies the complete constitutional law of expropriation. The Court pointed out that expropriation, although legal and commanded by the Constitution, is a limitation of the fundamental right to ownership. Therefore administrative prescriptions require strict compliance. The Ministry did not appeal the judgment.

On the other side of the issue, the white farmers have emphasised its Constitutional rights in terms of Article 16. For them the guarantee of their property rights is the sacred heart of the Namibian constitution.

However, none of the parties have thus far attempted to place their points of departure in historical context. For the government, the original inhabitants of the land are synonymous with the previously disadvantaged. The white farmers on the other hand did not yet consider the possibility of other rights that may exist on their farms. This paper is an attempt to break the deadlock by looking at new avenues of looking at land after the Sahara case and to consider a possible application to private property rights in Namibia.

Three issues raised in the advisory opinion are important in addressing land rights in post-independent Namibia:

- The question if Namibia was a terra nullius when the Kaiser's army arrived in Namibia with the German merchants exploring the new world;
- The nature of the 1904 war against and genocide of the Herero people; and
- The possibility that more than one right can exist over a farm is not unknown to both common law and statutory law in Namibia. The rights of a farmer on his or her land can for example be restricted by a lease contract

(2) The State or a competent body or organ authorized by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.

⁸ 2008 (1) NR 167 (HC).

in place at the time of the purchase.⁹ Mining rights is not included in the rights of an agricultural landowner.

II Namibia a terra nullius?

The Advisory Opinion of the International Court of Justice (ICJ) in the Western Sahara case played a decisive role in giving the international community a new understanding of the meaning of a terra nullius. Vice-President Ammoun of the ICJ, affirmatively referred to one of the parties' submission that the essence of the rights of indigenous people to the land lies in the spiritual and ancestral tie between the land, or 'mother nature', and the man who was born therefrom, (sic) remains attached thereto, and must one day return thither to be united with his ancestors.¹⁰ This separate opinion of Vice-President later formed the foundation of the judgments of at least two judges in the *Eddie Mabo case* of the Australian High Court.¹¹

The Vice President went on to say:

This amounts to a denial of the very concept of terra nullius in the sense of a land which is capable of being appropriated by someone who is not born therefrom (sic). It is a condemnation of the modern concept, as defined by Pasquale Fiore, which regards as terrae nullius territories inhabited by populations whose civilization, in the sense of the public law of Europe, is backward, and whose political organization is not conceived according to Western norms.¹²

The importance of the Western Sahara case is that it excludes the possibility to consider inhabitant land as a terra nullius on technical or some test of civilisation. In the Australian case Judge Brennan observed that if the concept of a terra nullius of inhabited land are no longer supported in international law, the doctrines developed by the court to defend it, must also be rejected. The position of the *Rhodesian case*¹³ that native peoples may be 'so low in the scale of social organization' that it is impossible to grant them land title in terms of Western law, is obviously out of line with international law. Consequently, the Australian High Court, in following the Western Sahara case, pointed out that common law is not static, and since it has been kept in step with international law in the past, there is no reason why it cannot correct illogical thinking of the past.¹⁴

Namibia was occupied long before the presence of the German colonial army arrived. The first European to come in contact with the Owambo people in northern Namibia was possibly Andrew Bartels, a Portuguese soldier of British descent, who deserted from the army in Angola and lived with the Owambo people for sixteen months. He wrote the first document of the inhabitants of present day Namibia in 1589.¹⁵ We know from his writings that

⁹ The common law dictum *huur gaat voor koop* – lease takes preference to purchase, is enforced by the Namibian courts on a regular basis.

¹⁰ 1975: ICJ at 85-86.

¹¹ *Eddie Mabo and Others versus The State of Queensland*, decision of the High Court of Australia, FC 92/014, delivered on 2 June 1992. See points 40 and 41 of Judge Brennan and point 19 of Judge Toohey.

¹² 1975: ICJ at 86.

¹³ *In re Southern Rhodesia* (1919) AC at 233-234.

¹⁴ Judgment of Judge Brennan, point 41.

¹⁵ Dierks, K. 200 Namibian Library of Dr. Klaus Dierks, <<http://www.klausdierks.com/FrontpageMain.html>> accessed on 10 April 2014.

The First Ondonga (he referred to the tribe as 'Aandongga') king was King Nembulungo lyNgwedha from the Aakwanekamba.

Several Nama tribes migrated to Namibia and settled in the south in the late 7th, early 8th century, including the Rooinasie (Red Nation, Bondelswarts, Topnaar, Fransman Nama, Veldschoendrager, Swartboois and the Kharo-loan. The Ovaherero settled in central Namibia around 1740 when Ovaherero leader Mutjise settled at Otjikune, east of Okahandja.¹⁶

When the London Missionary Society established the first foreign mission in Blydeverwacht in the south of Namibia in 1805, the land was already occupied by most of the people groups and tribes living in Namibia today.¹⁷ They were followed by the Wesleyan Missionary Society in 1820. From 1840 on, the Rhenish Mission took over the work of the London Missionary Society. The Rhenish missionaries were soon followed by Finnish Lutheran missionaries in the north.

The Catholic and Anglican Churches also started their missions among the Oshiwambo people in the second half of the 19th century. Klaus Dierks, a German who moved to Namibia and became a minister in the first Namibian cabinet, published an extensive history of Namibia on the internet. His description of the early Namibian history is a story of the settlement of Nama tribes in the south, the movement of the Ovahereros in central Namibia and their relationships with the Rhenish missionaries.¹⁸

In conclusion: There is no way that Namibia could be considered to have been a terra nullius when the first German merchants arrived in Angra Pequena at the west coast of Namibia and renamed it as Lüderitzbucht in 1884,¹⁹ less so when Germany officially declared the territory a German colony and renamed it to Deutsch Südwest Afrikan in 1885.²⁰

The High Court of Australia, summarising on the Western Sahara case, made the following comment in determining if the small Murray Islands in the Torres Strait off the Queensland coast was a terra nullius when the British Empire declared it a territory of the Queen:

Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as terrae nullius.²¹

¹⁶ Ibid. Dierks commented: Possibly the Ovaherero came from the north-east because in Otjijherero 'Okunene' could mean 'the right-hand side' or 'that which lies to the right', while 'Okavango' could mean 'the small hip' or 'that which lies to the left'. It is quite possible that other theories on the origin of the two river names exist.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ German South West Africa. *Encyclopaedia Britannica. Encyclopaedia Britannica Online Academic Edition*. Encyclopaedia Britannica Inc, 2014. Available at <<http://www.britannica.com/EBchecked/topic/230970/German-South-West-Africa>> accessed on 31 August 2014.

²⁰ In 1885 at the Berlin Conference of European nations convened by Chancellor Bismarck of the German Reich, known as the scramble for Africa, Namibia was assigned to Germany. See *ibid*.

²¹ See (n 13) at 5, note 12, Point 40.

III Occupation of the land

The advisory opinion of the ICJ in the Western Sahara case made it clear that the nineteenth international law principle of occupation only applied to territories that comply with the definition of a *terra nullius*.

For the purposes of the Advisory Opinion, the “time of colonization by Spain” may be considered as the period beginning in 1884, when Spain proclaimed its protectorate over the Rio de Oro. It is therefore by reference to the law in force at that period that the legal concept of *terra nullius* must be interpreted. In law, “occupation” was a means of peaceably acquiring sovereignty over territory otherwise than by cession or succession; it was a cardinal condition of a valid “occupation” that the territory should be *terra nullius*. According to the State practice of that period, territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*: in their case sovereignty was not generally considered as effected through occupation, but through agreements concluded with local rulers. The information furnished to the Court shows (a) that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them; (b) that Spain did not proceed upon the basis that it was establishing its sovereignty over *terrae nullius*: thus in his Order of 26 December 1884 the King of Spain proclaimed that he was taking the Rio de Oro under his protection on the basis of agreements entered into with the chiefs of local tribes.²²

Since what is today known as Namibia, was not a *terra nullius* when Lüderitz established Lüderitzbucht in south western Namibia, or when the Berlin Conference made it a colony of Germany, it is not legally possible to link the extension of the Deutsch Südwest Afrika borders far beyond the initial harbour area of Lüderitz, to the nineteenth century principle of acquiring power by occupation.

IV The 1904 genocide and the law of occupation

Until 1904 the colonisation of Namibia did not result in major loss of land belonging to the indigenous tribes living in Namibia. During the 1904 – 1908 war Germany waged against the Herero’s, and to a lesser degree some Nama and Damara tribes, not only led to a full scale genocide of the Herero people, but also a mass confiscation of their land. The history of the genocide is well-documented. For the purpose of this paper I will only make a few comments to land.

The nineteenth century references to the Herero’s emphasised their material wealth at the time when the Europeans arrived in Africa.²³ Initially the Herero chief Samuel Maherero was forced into an abusive relationship with the colonial powers. The Herero’s seeking protection against the southern Oorlam tribes and the colonial officials under Theodor Leutwein demanded land in exchange. During an outbreak of a *rinderpest* epidemic in 1896 Maherero was forced to

²² Judgments of the International Court of Justice. 1975. *Advisory Opinion on the Western Sahara*, ICJR 1975, paras 75-83, available at <<http://www.icj-cij.org/docket/index.php?sum=323&p1=3&p2=4&case=61&p3=5>> accessed on 1 July 2011.

²³ See Bollig and Gewalt (eds), *People, Cattle and Land: Transformations of a Pastoral Society in Southwestern Africa* (Rüdiger Köppe Verlag 2009) at 8. See also Lau (ed) *Tagebücher 1837-1860; Diaries Parts I-V, A Missionary in Nama- and Damaraland* (Archives Services Division 1985).

give excessive land to the colonial powers in exchange for vaccination – that seldom worked and for survival.²⁴

The constant abuse by the colonial powers resulted in a popular revolt by the Herero people in 1904, which soon became a full scale war. Leutwein was recalled and replaced by General von Trotha. Von Trotha, determined to destroy the Herero people, issued a warning that he will extinct the Herero people:

The Herero nation must now leave the country. If it refuses, I shall compel it to do so with the “long tube” (cannon). Any Herero found inside the German frontier, with or without a gun or cattle, will be executed. I shall spare neither women nor children. I shall give the order to drive them away and fire on them. Such are my words to the Herero people.

The legal question that needs to be answered is if the Herero’s lost their claim to the land after the genocide. Chinkin explains that the legal regime does not create a permanent status of occupation:

...but rather imposes constraints and obligations upon the occupier in an attempted mitigation of naked military force. Roberts describes occupation law as both permissive (accepting that the occupier can exercise certain powers) and prohibitive (imposing limits on the exercise of powers).²⁵

Referring back to the Western Sahara case, there are clear similarities between the Sahawari and Herero people.²⁶ The occupation of their land was not a short term occupation to resolve an explosive situation but a prolonged military occupation, that only partly ended when South Africa occupied Deutsch Südwest Afrika in 1915. However, the League of Nations mandate given to the United Kingdom and managed by South Africa, after World War I did not restore the property rights of the Herero people in South West Africa.

And like the Western Sahara, the German occupation was never recognised by pre-World War I or the international community as such. Even when the international community started focussing on Namibia when South Africa unilaterally followed a policy of integrating South West Africa into South Africa after World War II, the Herero land issue never came into the international vision. The international focus was on the illegal occupation of Namibia and the unlawful introduction of apartheid in the territory. The Security Council resolutions over the years concentrated on the right to self-determination and on applying pressure on South Africa to grant Namibia independence.

It seems as if the so-called doctrine of historical consolidation applies to the land issue in this case. The doctrine basically accepts that an illegal title can obtain legitimacy, if it appears to have become irreversible and the world

²⁴ Gewald 1999. ‘The Road of the Man Called Love and the Sack of Zero: The Herero-German War and the Export of Herero Labour to the South African Rand’ (1999) 40(1) *Journal of African History* 21-40.

²⁵ Chinkin, *Multi-lateralism and International Law with Western Sahara as a Case Study* (VerLoren van Themaat Centre, Unisa 2010) at 201.

²⁶ *Ibid.*

community's interest in orderliness and stability justify cloaking it with the mantle of legality.²⁷

In this case the proponents of the doctrine can argue that in the early 20th century the occupation and confiscation of Herero property did not constitute illegality on the side of the colonialists and that the international community did not consider any punitive action against Germany. Because of the general acceptance of colonial Germany's conduct, it has become *fait accompli*.

International law authors and tribunals are generally critical of this controversial doctrine.²⁸ Chinkin points out that the doctrine opts for a cynical preference for effectiveness over legality.²⁹ The fate of the Herero's was such that they could not return to their farms and villages once the war was over. The Herero population of 80 000+ before the genocide were reduced to a mere 15 000. The colonial forces confiscated all their land and possessions. They were kept in concentration camps until 1908 and all the Herero men older than eight years were forced to wear a tag with a registration number and an engraved German Imperial crown around their necks.³⁰ And their farms were given to other people.

While the Genocide Convention,³¹ one of the first conventions of the new post World War II human rights documents, was only adopted in 1948, one can make out a strong case that genocide as an international crime is *jus cogens*. The Nuremberg Tribunal was established in 1945 to deal with the Nazi's World War II war crimes and the genocide of the European Jewish communities, three years before the Genocide Convention.

This obviously does not mean that the Herero people have a cause of action under the Convention against Germany. But it says something of the legal rights of the Herero people on the land they owned before the genocide.

The Herero's fought a long battle for compensation from Germany similar to the compensation given to Jewish survivors after World War II. The Namibian government did not support the application, possibly because of the effect such a procedure may have on the Ovambo people in the North who were the major victims of the liberation war against the South African occupation between 1966 and 1989.

If military occupation cannot be permanent, the Herero's should have been allowed to return to their land at the end of the hostilities. But they were not allowed to do so. Genocide cannot be the legal foundation of the historical consolidation of the loss of Herero land. Consequently, the distribution by the Reich amongst the German settlers could not destroy the pre-colonial property

²⁷ The quoted phrase is quoted by Chinkin, at 204 and refers to the justification of Australia for entering into an agreement with Indonesia, the Timor Trip treaty, recognising the legality of Indonesia's illegal occupation of East Timor. See also Le Fonteyne, 'The Portuguese Timor Gap litigation before the International Court of Justice: A brief appraisal of Australia's position' (1991) 45 *Australian Journal of International Affairs* 171.

²⁸ See Enabulele and Bazuaye, *Teachings on Basic Topics in Public International Law* (Ambik Press 2014) at 490 ff.

²⁹ Chinkin, at 204 ff.

³⁰ Bollig and Gewald (n 23) at 19-20.

³¹ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

rights of the Herero people. The genocide could not destroy the pre-colonial property rights of the Herero people.

V Pre-colonial rights in British jurisdictions

One may well ask why the indigenous rights of the Herero people was never discussed or recognised after the genocide, neither by the German Reich, nor by the mandate holder after World War I, the British Crown or its agent, South Africa. It may be because of what Special Rapporteur and chair of the Working Group on Indigenous Populations, Miguel Alfonso Martinez, calls the domestication of the indigenous question:

...that is to say, the process by which the entire problematique was removed from the sphere of international law and placed squarely under the exclusive competence of the internal jurisdiction of the non-indigenous states. In particular, although not exclusively, this applied to everything related to juridical documents already agreed to (or negotiated later) by the original colonizer States and/or their successors and indigenous peoples.³²

Applying this to the position of the Herero people after 1908, their property rights was at worst ignored and at best looked upon through the prism of colonialism and the interests of first the German colonial occupiers, and after 1919 the ideology of the white South African administration.

However, a comparison with the British approach to the rights of indigenous communities after colonisation indicates that the British colonial forces, much like the Germans in Namibia before the genocide, generally accepted and recognised the rights of the traditional communities after establishing control and sovereignty.

In the well-known Privy Council case of *In re Southern Rhodesia*,³³ the court stated that only express confiscation or specific expropriation statutory law will be an indication that the Crown diminished or modified pre-colonial indigenous rights.

In the wake of decolonisation in Africa in 1957 the Privy Council not only confirmed the principle that pre-colonial rights will be respected but added that whenever the Crown obtain land for public purposes:

....it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law...³⁴

The *Oyekan* judgment did away with the earlier rigid approach of the nineteenth century where all the land in a colony became crown land immediately after colonisation,³⁵ as well as the more liberal, yet limited approach of *Tijani v Secretary, Southern Nigeria*, where the court limited the recognition of Native title only if it be consistent with the common law.³⁶

³² Martinez, 'Study on treaties, agreements and other constructive arrangements between States and Indigenous populations', 22 June 1999, Geneva: UN Doc E/CN.4/sub.2/1999/20.

³³ 1919 AC 211 at 233.

³⁴ *Oyekan v Adele* 1957 2 All E.R. 785 at 788.

³⁵ See *Attorney-General v Brown* (1847) 1 Legge 312; *R. v Kidman* (1915) 20 CLR 425; *Liquidators of Maritime Bank of Canada v Receiver-General* (New Brunswick) (1892) AC 437; *The Commonwealth v New South Wales* (1923) 33 CLR 1.

³⁶ 1921 2 AC 399.

Namibia had a long relationship with the United Kingdom. Although it was never under the colonial rule of the British Crown, the important coastal town of Walvis Bay was a British colonial territory and considered to be part of South Africa. It was only handed over to Namibia after independence. The United Kingdom recognised that relationship by inviting Namibia to join the Commonwealth after independence. Consequently the development of indigenous land title in the Commonwealth is important not only as a comparative study, but also to understand the position of the Commonwealth when considering the rights of the disenfranchised Namibians.

VI Eddie Mabo: The final chapter in indigenous land rights

The Australian High Court case of *Eddie Mabo*³⁷ relied on the Commonwealth acknowledgement of indigenous land rights, but even more so on the *Western Sahara* advisory opinion.

In 1878 Queen Victoria signed Letters Patent to include the Murray Islands (with others in the Torres Strait) to annex the Murray Islands and include it in the colony of Queensland. The inhabitants were informed of their new status as British subjects in September 1879. Her Majesty acquired the absolute ownership of all land in the islands. Only the Crown could thereafter grant possession or ownership to anyone.³⁸

The High Court of Australia took cognoscente of the international law, and especially of the advisory opinion of the International Court of Justice on *Western Sahara*³⁹ and agreed with the majority judgment defining a terra nullius as a territory not belonging to anyone.⁴⁰ Only then, the court stated, can a legal occupation take place other than by cession or succession.⁴¹

The High Court bench of seven ruled with one dissenting voice in favour of the plaintiffs. Eddie Mabo passed away before the judgment, but the other two plaintiffs were granted, as part of the Meriam people, a right to Murray Islands, while their specific entitlements were to be determined by reference to traditional law or custom.⁴²

³⁷ *Eddie Mabo* (n 11), note 1 at 1.

³⁸ This principle was confirmed by the Crown courts for more than a hundred years, beginning with the case of *Attorney-General v Brown* (1847) 1 Legge 312 and confirmed on a regular basis over the years. See *R v Kidman* (1915) 20 CLR 425; *Liquidators of Maritime Bank of Canada v Receiver-General (New Brunswick)* (1892) AC 437; *The Commonwealth v New South Wales* (1923) 33 CLR 1.

³⁹ See (n 1).

⁴⁰ See also *Legal Status of Eastern Greenland*, P.C.I.J., Series A/B, No.53 at 44f and 63f.

⁴¹ See (n 1) at 39.

⁴² The full text of the judgment reads as follows:

- (1) that the land in the Murray Islands is not Crown land within the meaning of that term in s.5 of the Land Act 1962-1988 (Q.);
- (2) that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Meriam except for that parcel of land leased to the Trustees of the Australian Board of Missions and those parcels of land (if any) which have been validly appropriated for use for administrative purposes the use of which is inconsistent with the continued enjoyment of the rights and privileges of Meriam people under native title;
- (3) that the title of the Meriam people is subject to the power of the Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers, provided any exercise of those powers is not inconsistent with the laws of the Commonwealth.

It is not important for the purpose of this paper to go into all the detail of the judgment. The essence of the judgment entails the acknowledgement of the High Court of Australia that pre-colonial land rights of the aboriginal people did not only survive colonialism, but that they are enforceable by law. And while Judge Brennan, who wrote the majority judgment, relied strongly on developments in international law, the judgment was clear that these rights are enforceable in the municipal courts of Australia.

Referring to the *Southern Rhodesian* case, it pointed to the fact that even in conservative Commonwealth jurisprudence there are indications that at least some property rights of the native people were not only recognised, but also protected by the new colonial powers.⁴³

While these were never a full acknowledgement of the right to title, and often in the form of usufructuary occupation, the Crown nevertheless respected it. In *Adeyinka Oyekan v Musendiku Adele*⁴⁴ the Privy Council stated that the courts in the colonies operate with the assumption that the Crown will respect indigenous property rights and pay compensation for land expropriated.

While the court discussed certain limitations to what it called native title, it is not necessary for this paper to go into that detail. However, these rights vested in the indigenous people in British colonies, meant little since it was practically impossible for them to defend their rights in courts of law.⁴⁵

Deane and Gaudron evaluate what they call the Dispossession of the Original Inhabitants.⁴⁶ The judges, after looking at the historical dispossession of the aborigines, their exclusion from the Commonwealth Parliament was based on the theory that legally New South Wales was a terra nullius when occupied in 1788 and unaffected by native title.

The *Mabo* case is an important judgment for dispossessed native inhabitants of former European colonies all over the world. For one, the High Court of Australia not only acknowledged the important leaps in favour of justice taken by international law, it actually changed Australian common law to bring it in line with international principles of justice. In the process one of the oldest justifications for the occupation of inhabited land, the so-called terra nullius rule, was abandoned.

Further, it does not only recognise the existence of pre-colonial land rights, but makes it possible for the dispossessed to defend their rights in courts of law. Consequently, the racist theories that introduced Western legal questions e.g. do they fall within the category of 'rights of private property'?, or that natives are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society⁴⁷ can no longer be justification for not recognising pre-colonial rights.

⁴³ Point IV of the judgment.

⁴⁴ (1957) 1 WLR 876 at 880.

⁴⁵ Judges Deane and Gaudron in *Eddie Mabo and Others versus The State of Queensland*, decision of the High Court of Australia, FC 92/014, delivered on 2 June 1992, point IV.

⁴⁶ Point X, *supra*.

⁴⁷ See (n 11).

VII Namibia and indigenous land rights

The examples above provide an opportunity to approach the land reform programme at least in the central and south of the country from a different perspective. For the purposes of this paper it is adequate to accept that Namibia, like Western Sahara, did not constitute a *terra nullius* at the time of the German occupation. I shall further accept at this stage *prima facie* that there is evidence to confirm the property rights of the Herero⁴⁸ people at the time of the German occupation.⁴⁹

If the rights of the Herero and Nama people can be substantiated at least for certain parts of the land, the debate can be lifted to a new level. Those people who suffered under colonial rule can then be identified.

They can become known to both the white farmers presently owning the land and the government that will ultimately decide the future of the land as the people who have, in the words of Vice President Ammoun of the International Court of Justice, ancestral ties with the land, or 'mother nature', and the people who were born therefrom, remains attached thereto, and must one day return thither to be united with their ancestors.⁵⁰

A tribunal can be set up to hear the claims of people or peoples to specific land claims. The Land Reform Act already provides for a tribunal. Small amendments to the Act will make it possible for the tribunal to deal with claims emanating from the 1904 wars. The South African Lands Claim Court has been in operation for several years and can also serve as a helpful example.

Once a claim has been proved, the government can take the process over and deal with it in terms of a pre-determined programme, while simultaneously acknowledging the Constitutional rights of the present owners. It must be emphasised that the pre-colonial rights, while surviving colonialism, can nevertheless not destroy the present property rights guaranteed by the Constitution, just as colonisation could not destroy the property rights of the indigenous people.

However, the proof of indigenous land rights is not without meaning. government (or even the tribunal) can begin to negotiate with the present owner on the basis of 'willing-buyer, willing-seller'.

If government and the present owner can reach an agreement, the only issue will be the money to pay for the farm. Since the claims will be of an individual or sometimes tribal nature, it will possibly fall outside the present budget provisions of government (N\$50 million for the last financial years).

However, several donor countries and even the European Union can be requested to assist in the financing of this part of the process. Both the European Union and Germany have in the past expressed its willingness to assist Namibia with its land reform programme.

⁴⁸ While I concentrated on the Herero people, the principles apply *mutatis mutandis* to the Nama tribes and to a lesser extend to the then landless Damara tribes.

⁴⁹ The presumptions are based on preliminary discussions with traditional authorities from the Nama and Herero people at workshops in Windhoek and Keetmanshoop (2004).

⁵⁰ See p.6 above.

It is granted that the process may not go as smooth as it may look on paper. What if the present owner is no longer a white person, but someone from a previously disadvantaged group? What will the government do if the present owner refuses to negotiate, or after negotiations refuses to sell his or her farm? What will be the consequences when more than one group lays claim to the same land?

It is not possible to go into detail discussions on each of the above questions, Suffice to say that under certain circumstances the government may be convinced that expropriation is in the best national interest, while aggrieved parties will always have the right to take the matter to a court of law. The legislator may want to establish an appeal or higher tribunal or simply determines the High or Supreme Court as the body to hear appeals. If no donor can be found, government may decide to divert some of the money budgeted for land reform to this project.

VIII Conclusion

The principles of the Western Sahara case and developments in the Commonwealth are not the only issues that will take land reform forward. The acknowledgement of pre-colonial rights will have several advantages. It will create a mechanism to deal with one of the saddest pages in the history of Namibia. It will also bring justice to people who almost suffered extinction at the hands of European colonialism. And it will restore the land rights of second and third generation descendants of the pre-colonial owners of the land.

Obviously, no programme can restore all injustice of the past. Opponents of restoration of pre-colonial land rights may object to the fact that it will not treat all the people of the country who have suffered under South African occupation and apartheid equally.⁵¹ Unfortunately this programme does not deal with apartheid and South African occupation, the second big injustice committed against the people of Namibia. But it does negate the fact that it can deal with the injustice of 1904 in an effective manner.

Others will complain that it does not deal with the injustices of the pre-colonial wars between the different groups in the south and central parts of the country. Yet others would want to know how a tribunal could deal with the injustices committed before, during and after colonisation against the nomadic groups such as the San and the Himbas.

But it is not the intention of this paper to recommend a restoration of pre-colonial rights as the only possible or even the best option for land reform in Namibia. I would rather propose a process where several strategies are used to obtain the final goal: A just distribution of land to all the peoples of Namibia in such a way that it contributes to peace, prosperity and stability.

Consequently, the 'willing buyer, willing seller' programme can go on, while the government simultaneously proceeds with its programmes to

⁵¹ Sarkin, 'The Coming of Age of Claims for Reparations for Human Rights Abuses Committed in the South', in (2004) *SUR International Journal on Human Rights* 67-126.

expropriate farms of foreign absentee farmers and other farms in the national interest.⁵² But a land tribunal on rights lost through German colonisation can assist in bringing a new dimension to land reform.

⁵² Since the programme is still in a planning stage, one will have to wait until government has either defined national interest or start with the process before commenting on the pros and cons thereof.

FACING REALITY: REGIONAL INTEGRATION, THE UNITARY STATE AND PROSPECTS FOR THE ACTUALISATION OF THE SADC CHARTER OF FUNDAMENTAL SOCIAL RIGHTS

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Abstract

The transformation of the Southern African Co-ordination Conference (SADCC) into the Southern African Development Community (SADC) in 1992 heralded the birth of theories, theses and postulations about the benefits accruable via co-operation and regional integration. These were in addition to the variants of harmonisation suggested even in the face of diverse, implacable and therefore conflictual socio-political and economic policies of the component States. Included in this menu were commentaries on Economic Communities, Customs Unions, Common Market the European Economic Community, regional blocs such as the European Union and even the African Union.

The multiplier effects of benefits amidst diversity and even the desirability of exploring the international environment for models, best practices and normative benchmarks were all actively advocated and robustly debated.

Two decades later, the euphoria seems to have evaporated to be replaced by the realities of obsessive territoriality, clear historical and socio-economic disparities, symbolic overtures to regional integration, internal statist proclivities and emerging re-prioritisation of state-driven individualistic imperatives. These developments, to some, may appear natural, but to others however, their potentially deleterious effects on the general citizenry of the Southern African sub-region need closer observation.

The question which is a logical corollary then becomes one of whether adequate preparatory work was done before this grand scheme was foisted on the gullible public. If so, why has the equally grand objective of socio-economic co-operation and integration become so elusive? The answer lies in a candid examination of the socio-political, economic and historical origins of the member states. This must be coupled with an evaluation of the perceptions and expectations that informed the inception of this inter-governmental organisation.

To do this, the paper uses the Charter of Fundamental Social Rights as both an illustration and a measuring tool. The paper contends that the lofty ideals encapsulated in the Charter are out of tune with the demonstrated concerns of the members and the modalities they adopt in achieving their individualised objectives. This is with particular regard to labour formations and issues related to them.

The paper thus asserts that should this trend continue, the SADC could well become a shifting mirage in the political, social and economic terrain of Southern Africa.

Keywords: Charter of Fundamental Social Rights, economic policies, regional integration, socio-economic disparities, socio-political policies, territoriality.

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I Introduction

The SADC was conceived as an engine of regional growth and development within the context of a conscious harmonisation of divergent state institutions and policies. Towards this end, twenty six (26) legally binding protocols were arrived at including those on Development, Defence, Free Trade and Free Movement of People.¹

Currently, SADC is made up of fifteen (15) member states. The 1992 Treaty made specific provision for socio-economic, political and security co-operation among others. The SADC Free Trade Area (FTA) was initiated in 2000 followed by a common market for East and Southern Africa in 2008. This was to be known as the African Free Trade Zone (AFTZ) ultimately spanning the whole continent from Cape to Cairo.²

Among the more ambitious of its protocols was the Charter of Fundamental Social Rights. Initiated by the Southern African Trade Unions Co-ordination Council (SATUCC), the draft document was adopted by the Employment and Labour Sector (ELS) of SADC in 2001 and then recommended to the Council of Ministers. In 2003, the Charter was signed by the Heads of member states into a legally binding document. Given its scope and implications, it forms a major plank in the paper's focus of attention.

II Structure of the paper

The first part of the paper deals with conceptual themes regarding the state, its functionality and centrality. This is placed within the context of regionalism with political will as the driving force. Part two attempts a re-visit of the terrain of ideas recently advanced around the goal of harmonisation and the journey toward regional integration and ponders over their applicability and subsequent efficacy. In part three, the paper examines the substantive issues raised in the Charter of Fundamental Social Rights and their implications.

The fourth part throws the searchlight on individual member states and how their actions have succeeded in promoting or impeding the realisation of the objectives of the SADC exemplified by the Charter. On the basis of the foregoing, there should be obvious deductions and derivatives that can help assuage the anxieties of the observer. In default, other observable trends may suggest some inevitable conclusions that might not augur well for the future of the SADC in general and the Social Charter in particular.

III The analytical framework, terms and themes

This study is driven by a desire to better understand the institutional mechanisms underpinning the SADC and the socio-political context within which they function. Though there is an umbilical connectivity between law and society the concern however is that, for far too long, legal ideology has

¹ SADC Protocols <<http://www.sadc.inf/aboutsadc/overview/sa-protocols->> accessed on 9 August 2013.

² See <<http://wikipedia.org/wik/Southern-African-Development-Community>> accessed on 26 August 2013.

tended to posit legal theory as the focus and society as a context for law.³ On the other hand, other disciplines have, over the same period, come to see the need to understand society or the social formations within which the law functions as more primary than law itself.

Thus, law should be seen as intended to elaborate and facilitate the understanding of society because, empirically, extra-legal factors have become critical in the shaping and allocating of roles to law. To this extent, some traditions of legal scholarship which recognise the importance of the inter-disciplinary debate and the role of economic, social and political contexts in the study of law have informed the study in diverse ways. These are summarised below.

(a) Law in context

The law in context approach could be attributed to pioneers such as Weber, Durkheim, Erlich and later, Weidenfeld and Nicolson who, through their works sought to contextualise legal study by addressing issues beyond the exposition of legal doctrine, to consider critically the law in its social and economic context. This approach requires the treatment of legal issues from a broader perspective and in a more living, dynamic way than the staid rigidity of legal rules.⁴

More importantly, were the law to be treated in isolation, it can only have a relationship with the total social order through correlation and is thus rendered tangential rather than integral to knowledge of the total social order. Where law is not part of a general social theory derived from thought and research, it tends to obscure its own theoretical postulations.⁵

Law in context is grounded in a methodological approach which sees the need to construct an object for further inquiry that is integrally related to existing theory such as knowledge of society or social structures. The “new” concept, for example, the theory of a common, basic floor of fundamental human rights becomes public and open to testing. In effect, law cannot hold investigative primacy over social contexts as it is rather social empiricism that legitimises and functionalises the law. Problems, such as state strangulation of labour freedom, need to be grounded in sociological theory rather than in abstraction or “inductive idealism” because the phenomenon of worker rights is not pre-eminent or self-existing outside social forces at work.⁶

Developing countries such as Botswana, Lesotho, Swaziland and South Africa have demonstrated, to varying degrees, both institutional incapacity and, at times, instability. These lapses enable extra-legal factors to impact significantly on law and public administration. Therefore, while formulation and implementation of policy may be weak, slow or totally unsatisfactory, the legitimacy and autonomy of law become more evident. A contextualised

³ Kurcewski, ‘Dispute and Settlement’ in Cain and Kulcsar (eds), *The Study of Disputes* (Pergamon).

⁴ Sugarman (ed), *Legality, Ideology and The State* (Academic Press 1983).

⁵ Weber, Shils and Rheinstein, *Max Weber on Law in Economy and Society* (Harvard University Press 1954).

⁶ See Cain and Kulcsar (n 3).

study of the law, such as labour law and labour rights are best undertaken using the “law in context” approach.

(b) Law and development

It may be that the leading proponents of the theory of law and development surfaced decades ago before the Law and Economics theorists gained ascendancy. Their works are indubitably still relevant to our study. Law and Development seeks to describe a relationship between law and development particularly in developing countries. It was considered at one time as merely a corollary of the Law and Society school by Friedman.⁷

The Law and Development school tried to relocate law within the realm of mere rules as enacted defining it as a “set of norms of social behaviour as sanctioned by government”.⁸ That is, law must be understood beyond the formal legal system and its structures. In consequence, law came to be regarded by them as a process comprising policy formation, rule-making, implementation and dispute resolution within both customary and contractual spheres. This was also seen as falling both within and outside enacted, adjudicative law.⁹

What is “development” in the context of SADC’s goal of economic development is also considered within this framework. Economic development encompasses the result of all the forces and energies in a country which collectively raise its per capita output. Together with this is political development as in viable and transparent public institutions, equitable allocation of resources and accountability in governance.

In sum, the essence of this approach and its attraction lay then, and still does, one might say, in the fact that, while developing countries are not in competition with the West or wish necessarily to become globalised junior partners, ‘Africans demand better education, better health standards, better roads, water and electricity, better houses, more and better food and clothing, automobiles and bicycles, radio and television... In short, Africans demand development’.¹⁰

The Law and Development movement, under Trubek and Galanter, initiated an introspection which enabled a clearer perception of its contribution today.¹¹ They argued that ‘the formal neutrality of the legal system is not incompatible with the use of law as a tool to further domination by elite groups’.¹² Furthermore, many legal “reforms” can deepen inequality, curb participation, restrict individual freedom and hamper efforts to increase material well-being.¹³ Law is thus acknowledged as capable of fomenting labour agitation

⁷ Friedman, ‘On Legal Development’ (1969) 24 *Rutgers Law Review* 1153. See (1977) 25(3) *American Journal of Comparative Law* 496.

⁸ Rheinstein, *Problems of Law in the New Nations of Africa* (1963).

⁹ *Ibid* at 502.

¹⁰ Seidman, ‘Law and Economic Development in Independent English Speaking Sub-Saharan Africa’ (1966) *Wisconsin Law Review* 999, 1016.

¹¹ Trubek and Galanter, ‘Scholars in Self-Enstrangement: Some Reflections on the Crisis in Law and Development in the United States’ (1974) *Wisconsin Law Review* 1062.

¹² *Ibid* at 1083.

¹³ *Ibid* at 1080.

and disputes *in tandem* with attempts at mediating these by institutions created by law. Developments in both Law in Context and Law and Development can indicate the fact that, while not subscribing to any particulars of these legal and philosophical schools, the paper draws on their conceptual strengths where they help to accentuate and elucidate aspects of its concerns which are embedded in these discourses.

(c) Socio- legal studies

This paper is also a socio-legal one. It could also be termed a contextual study of aspects of legal history. Socio-legal studies deals with the function of law in society and attempts to deal with issues such as ascertaining the objectives of legislation, defining regulation and de-regulation and the impact of law on society at large.¹⁴ Socio-legal research is therefore research which takes all forms of law and legal institutions, broadly defined, and attempts to further our understanding of why and how they are constructed, organised and operated in their social, cultural, political and economic contexts.¹⁵

Although socio-legal studies appears marginal to some, its strength lies in the desire to question and challenge the orthodoxy in approaches to law and legal research. In particular, it seeks to ‘move away from the seemingly meaningless searches for coherence and consistency in law as laid down by the judiciary or the legislature’.¹⁶

From the foregoing, the emphasis is therefore not so much on the substance as the processes of the law. It might appear then that socio-legal studies focuses on the instrumentality of law, for example in reformulating the relationship between workers and employers as envisaged in the Social Charter. However, this contention is challenged by, among others, Thompson, when he says that the identification of reality is in what a direct empiricism reveals with a shift from ‘the external concern with coherence, determinacy and non-contradiction to an external critique of the rules in terms of their practical effects and efficiency in realising policy objectives’.¹⁷ In this context, one can refer to the impact of the SADC multi-layered legal regimes on its collectively enunciated objectives.

Impliedly, socio-legal research is supposed to enable the examination of law in action from a detached, objective level as an observer. For example, a study could be conducted around how the voice of workers is regulated or how the law mediates labour disputes. Concepts such as “regressive modernisation” could be examined without being actors. This concept is defined as ‘the attempt to “educate” and discipline the society into a particularly regressive version of modernity by, paradoxically, dragging it backwards through an equally

¹⁴ Fosh and Littler, *Industrial Relations and the Law in the 1980's: Issues and Future Trends* (Gower 1985).

¹⁵ Hilly and Sim, ‘The Political Economy of Socio-Legal Research’ in Thomas, *Socio-Legal Studies* (Dartmouth Publishing 1997) at 45.

¹⁶ Thomas, *Socio-Legal Studies* (Dartmouth Publishing 1997) at 83.

¹⁷ Thompson, ‘Critical Legal Education in Britain’ in Fitzpatrick and Hunt, *Critical Legal Studies* (Blackwell 1987).

regressive version of the past'.¹⁸ In other words, for example, an examination of whether the trajectory of labour policy and legislation is "retrogressive" relative to the goals of the "modern" SADC Social Charter can be possible. The outcome could then be that the present regimes of labour legislation are stultifying, "incremental", reactive or simply "path-dependent".¹⁹

How the dialectics of the hypothesis is done and empirically confirmed would attest to the "freedom of investigation" inherent in socio-legal studies without intra-organisational and structural constraints. Again, taking "deregulation" in the context of integration as an example, one could examine the conceptual implications of "regulation" which may be defined as the setting of limits on private conduct using formal institutions as agents of form and nature. Thus the "ethos of the state" could be used to explain the political decisions informing regulation and the reluctance of a dominant state to subordinate itself to the collective wish implied in regional alliances. It could then be concluded (falsely or otherwise, but experientially) that de-regulation is like removing formal controls and allowing common law controls to operate.²⁰

Furthermore, "reforms", properly studied, can confirm the direction of the interface between law and society, for example, whether there is greater subjugation of the poor and a relaxation of holds on the rich stratum of society. This could be done through a study of the property laws, public order and security and labour market legislation.²¹ In sum, this paper seeks to draw from the objective strengths of socio-legal observation and analysis in various ways. One of these is the expectation that the discovery and dissemination of observed summations would help in the cultivation of the "science" of multi-disciplinary social science research in areas like employee relations and the cultivation of expertise in how to respond to demands for social science research as policy tools for state agencies.²²

(d) Comparability, labour law and the SADC Charter of Fundamental Social Rights

The focus of the paper is to draw conclusions on the basis of observation of industrial relations systems in action in different countries. This introduces an element of asserting a comparability basis. Comparative labour law aims at identifying the ways in which power relationships are set up in the employment environment, how power is distributed and how the balance of power is achieved and sustained within the societal microcosm of the workplace and the wider society in different legal systems.²³ It also seeks theoretical foundations for resolving fundamental questions regarding, among others, the long-term eradication, prevention and management of antagonistic labour

¹⁸ Hall, 'The Hard Road to Renewal' in Francis, *The Politics of Regulation: A Comparative Perspective* (Blackwell 1993) at 47.

¹⁹ Matei, Antonioli and Rossato, 'Comparative Law and Economics' *Universita Degli Studi di Trento* 505 at 521.

²⁰ *Ibid.*

²¹ *Ibid.*

²² Fosh et al (n 14).

²³ Veneziani, 'Labour Law and Social Security', 1st European Regional Conference.

relations. It is also concerned with a framework of legal rules and procedures and how fractious labour issues originate and the impact thereof. Also to be examined are the methods invariably adopted to harness the synergic forces of the stakeholders.

The social and political costs of any governance decisions have to be accounted for. This process must take into consideration the reality of worker participation within the machinery of state-structured labour relations discourse, containment, management and resolution of disputes. The dilemma of whether to relax labour laws while still retaining its protective elements suggest the importance of analysing the impact of government intervention in all forms on both the labour market and labour relations. This transcends territorial boundaries particularly with regard to the SADC.

In the context of this paper, comparative labour law therefore implies the comparative approach to labour legislation and policy, similarities and differences among the comparator countries and how these variations impact on the suggested commonality of purpose expected to drive the SADC Social Charter. There is the recognised need to identify the social phenomena, examine the legal systems and their operative scope bearing in mind the socio-political dynamics of the various states.

It is argued that functional labour law ought to transcend the boundaries of employment per se because it deals with work in a manner in which work is and will be organised in today's world and the work world of the future.²⁴ The issue becomes one of a comparative distinction between what the law is, what it does or should do and how it has functioned in terms of the interrelationships between the power holders in member states and the power addressees such as workers. To compare should therefore be seen more as an examination of the law in action in relation to social change in different societies which may be worth emulating rather than a dogmatic preservation of the status quo.

In this regard, the concept of legal formants also comes into play. Watson dealt with the concept of legal transplants where societies borrow models or domesticate foreign legal rules that are considered relevant to local needs.²⁵ In this context, the SADC could have crossed the mental block of historical differences in favour of pragmatic approaches to achieving carefully defined goals. Teubner however is somehow pessimistic about transplantation as if it were a simple removal of a machine part from one to the other.²⁶ Rather he suggested the import of legal rules as the deliberate introduction of legal irritants whose objective is to trigger change within a given local legal system.²⁷ Both writers thus provide a justification for looking beyond territorial confines for jurisprudential advice. Given the attitude towards international labour standards, this paper contends that SADC in its collective is yet to reach beyond its immediate confines in the search for developmental change.

²⁴ Industrial Relations Association Series, Proceedings of the 47th Annual Meeting. Vol.1; Vos, *Akadémiai Kiado*, (Budapest 1987) at 181-282.

²⁵ Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1974).

²⁶ Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *MLR* 11.

²⁷ *Ibid.*

The true function of labour law, according to Davis, is the ‘preservation of the social and economic structures prevailing in society at any given moment for restraining the conflicting relationship between employers and employees’²⁸ within a country and how this is translated and superimposed on transnational demands. However, it could also function debatably as a liberator of the creative energies of workers and employers in their search for mutual advantages, looking at other systems in action particularly in a sub-regional context.

In this context, labour mass action can therefore become a tool, both for rejection of an unpopular system and as a pressure on policy formulation and legislation. Thus, disputes between business and labour can have multi-layered origins and purposes. Business, rather than allowing state interference and also in order to counter organised labour’s influence on government, could strategically become an accommodating partner in social dialogue. In retrospect however, what has been the contribution, covert or overt, in any shape or form of private capital to the aspirations of the SADC vis-a-vis the Charter on Fundamental Social Rights is a question to be answered.

The paper concludes here that, state-led legal regimes and their implementing bureaucratic agents could overlook these critical undercurrents and having done so, they would be reluctant to be drawn back into the same whirlpool which an unprejudiced implementation of the Social Charter would expect. This paper asserts therefore that, *ex facie*, adequate attention was not accorded to these multi-faceted issues before the fanfare of regional integration via protocols and treaties was initiated in the SADC.

(e) Labour market regulation

It is posited that labour market regulation is intended to secure stability, neutralise radicalism and by so doing promote investment for economic development. The concept itself throws up basic problematic issues such as work and labour, labour rights, employment and the market. Work is perceived as rounded activity, combining creative, conceptual and analytical thinking and use of manual aptitudes.²⁹ It involves individual interaction with fellow man and nature without boundaries, being activity, a series of linked actions, using a conscious effort, mental, physical or both to achieve a predetermined objective.³⁰

In this sense, Cato’s supposed definition of work as the primary human activity of reflection and contemplation needs revisiting. As attributed to him, in reference to man, ‘Never is he more active than when he does nothing’.³¹ Labour, as now known, connotes an activity pursued under constraint, utilising capacity for labour, competencies, knowledge and physical attributes collectively referred to as ‘labour power’. Work, under normal circumstances,

²⁸ Davis, ‘The Functions of Labour Law’ (1980) *CILSA* 212 at 217.

²⁹ Standing, *Global Labour Flexibility: Seeking Distributive Justice* (Palgrave Macmillan 1999) at 3.

³⁰ Grint, *The Sociology of Work: An Introduction* (Polity Press 1991).

³¹ *Ibid* at 3.

should generate and enhance secure subsistence, free and unconditional intellectual, physical and spiritual growth.³²

Work should also promote individual creativity within a social context and be compatible with worker aptitude and skills. Furthermore, work must facilitate enjoyment of the process and its results. This paper believes that this forms part of the philosophical and ethical premise of the Charter of Fundamental Social Rights in the SADC.

The labour market therefore is intended to provide the environment for these permutations to be actualised. The labour market as a construct is the locale of conscious, explicit and implicit contracting around transactional reciprocities. These transactions include matters of control, status, contextual and temporal allocation of entitlement in cases of, for example, job titles and content, with a constant mix of incentives, trade-offs and sanctions. Apart from being a social and public sphere, the labour market is also a primary means of socialisation. It is thus unique and unconventional. In addition, it is an institutional framework for the allocation of jobs and regulations. Within this market, contests and exploitation also do occur on indeterminate scales.³³

A direct consequence is the issue of what free movement, migrant labour or trans-territorial labour market regulation suggest in the context of the Social Charter. Reform or control suggests a state intervention in private spheres of activity to meet its perceived public goals particularly with regard to the labour process. In attempting to mediate this whirlpool of social exchange, an active state may utilise the legal framework of rule-making and adjudication. The next issue then is whether the SADC member states exhibit the same or even similar tendencies. Assuming they do, the other concern would then be whether these could militate against the very foundations of the Social Charter?

As observed, this state capacity to mediate without the collateral capacity to conceptualise and appreciate social forces in dynamic interface could be one facet of the phenomenon of labour disputes. Thus, the state, as custodian of public interests through the instrumentality of the legal framework, may be interested in only specific regulatory objectives. These could include, among others, labour docility and acquiescence and by inverse deduction, stability. This state of affairs could be desired as a pre-requisite for foreign investment. The pre-occupation with achieving this end could then become an endemic factor in the gap between the prescribed law and ground operational realities as observed by Cooney et al in East Asia.³⁴ Inferentially, such procedural requirements, regulatory rigidities, instrumental calculations, inherent socialised perceptions and conditioning tend to normalise extra-legal transactions. These may be in the area of employment conditions, rewards or the processing of disputes. The other concern is whether the real import of regionalism has been captured by SADC.

³² Grint (n 30).

³³ Standing (n 29).

³⁴ Cooney, Lindsay, Mitchell and Zhu (eds), *Law and Labour Market Regulation in East Asia* (Routledge 2002).

(f) Regionalism

Regionalism presupposes a conscious agreement between contiguous or coterminous territories or countries to come together in collaboration for the achievement of certain common developmental goals. It also presupposes that these countries, mindful of their internal political persuasions and conscious of their sovereign primacy, nevertheless undertake to commit themselves to a common end. Ordinarily, this would suggest an acceptance of the need to subordinate the machinery of state power, notions of sovereignty and the political inclinations of the elite to the greater common good of the members of the regional grouping. This is possible only if the psychological orientation and ideological basis of the state do not result in extreme forms of statism.

(g) Statism

Clinging to notions of sovereignty and socio-economic superiority would thus constitute an aberration and an obstacle to regional integration. To this extent, the notion of statism in contradistinction from the State, assumes contextual relevance. Statism is a process-oriented concept which also examines the political state in action, its institutional mechanisms and failures. As a prime mover, the state defines and dictates socio-economic occurrences and its relations with other social formations such as Labour.³⁵

In other words, statism is not an accident of history because it is a multi-faceted construct in which the delineation between the state and a government becomes blurred. It connotes a coalition of peak social groups who wrest control of the state apparatus, sustain its supremacy and centrality and maintenance of the status quo. To such a constellation of property owners, the threat of an externally directed intervention to their status would be challenged. This can become an impediment to actual regionalisation if they control the levers of political and economic power. Statism also implies patterns of institutionalisation, structures of dominance, administrative rule-making, implementation and enforcement, distribution of resources and the generation of the coercive social instruments needed to facilitate the realisation of selective goals.³⁶

Its natural antecedent is path dependency.³⁷ This occurs where states are unable to shake off the effects of the past because, along the historical continuum, certain episodes and how they were resolved have lent credence to certain specific choices that ensured equilibrium and social order and stability. Entrapped in such an *ex ante* value system, it becomes either difficult or undesirable to make *ex post facto* changes that might threaten the status quo even if they are in tune with socio-economic and political dynamics. This is done through the procurement and sustenance of a subjectively defined form of order and security. Therefore, such an interventionist state is not likely to

³⁵ Parkin, *Class, Inequality and Political Order* (MacGibbon and Kee 1971).

³⁶ Ntuny, "The State, Labour Related Policy and the Worker: A Historical Perspective" (2001-2004) 14(2) *Lesotho Law Journal* 238-261.

³⁷ Mattei et al, 'Comparative law and Economics' (1999) *Journal of Electronic law* (JEL) 521.

subordinate its jealously guarded primacy to perceived external influences given that it is often motivated by self-preservation and maintenance of the status quo.³⁸

Within the Southern African Development Community (SADC), one has witnessed various timbres of rhetoric regarding unequal levels of historical antecedents, socio-economic and political development and therefore various forms of justifiable restrictions on basic social rights. It is postulated that Nation-States in Africa, as a result of their colonial antecedents, often find themselves in a path-dependent trap that manifests itself in their attitude towards internationally accepted norms and practices, thus rendering them statist in the process and reluctant partners in regionalism.³⁹

This paper asserts further that, as long as SADC member states cling to antiquated notions of sovereignty and state-centrism, the philosophy and ideals that informed the formation of the SADC will remain illusory. Certainly, statist priorities do not and cannot include the harmonisation of internal centrality with some “nebulous” concepts in the name of externally engineered co-operation, collaboration or integration.

(h) Revisiting the harmonisation debate

The characteristics of regionalism would include a sustainable interdependence among countries particularly where some have become increasingly marginalised. This is in recognition of transnationalism in trade and economic power. At the least, nationalistic and internally structured economic relationships would need to give way to a broader coalition of interests regionally. An example is the New Partnership For Africa’s Development (NEPAD) which is a well-intentioned African attempt at forging a functional relationship with the Group of Eight Industrialised Countries (G.8) and the Bretton-Woods financial institutions being the International Monetary Fund (IMF) and the World Bank.⁴⁰

(i) Models of integration

A few years ago, regional integration as a considered, pragmatic response to the vulnerability of individual African countries was on the ascendancy. This subsection therefore is an effort directed at the said innovations, looking at a wider regional socio-economic theatre with accompanying political structures and processes that could have facilitated the formulation, implementation, review and sustenance of viable policies within a regional context.⁴¹

³⁸ Chazan et al *Politics and Society in Contemporary Africa* (Lynne Rienner Publishers 1992) at 21.

³⁹ Ntuny, ‘Statism, Labour and Labour Policy in Southern Africa: (1984 – 2004)’ (2005) 15 *Lesotho Law Journal*.

⁴⁰ NEPAD is The New Partnership for African Development that seeks to forge a collaborator framework with the G.7 or the Seven Industrialised and Developed Countries in a North/South Co-operation. The Bretton Woods institutions are the International Monetary Fund (IMF) and the World Bank.

⁴¹ Clarke, Feys and Kalula, (1999) *Labour Standards and Regional Integration In Sothern Africa: Prospects For Harmonisation*, IDDL Labour Law Monographs 2/99 UCT SA.

Regional integration is seen as the commencement of a mechanism whose ultimate goal is different from regional co-operation where one-off or mono-dimensional forms of collaborative activity may be initiated and undertaken, such as the defunct Air Afrique or Tanzam Rail in East Africa.⁴² On the other hand, integration foresees a merger economically, politically or as may be decided. This may proceed in phases from Free Trade, a Customs Union, a Common Market to an Economic Community level. A Free Trade Area removes barriers among trading partners only, for example the North American Free Trade Area (NAFTA).

A Customs Union enlarges on the free trade concept among members by providing a common external barrier to trade, for example the Southern African Customs Union (SACU). A Common Market then may emerge characterised by the free mobility of both capital and labour. The Economic Union is the ultimate goal where common fiscal and monetary policies are pursued.⁴³ As the purpose of this exercise is not to debate the dynamics of economic unification, the paper only examines some structural innovations in terms of how they provide a comparative framework for labour law harmonisation in the light of the SADC Charter.

(j) Harmonisation of labour law regimes in the context of regional integration

Woolfrey provided what one might call an all-embracing definition of harmonisation. Used interchangeably with approximation and co-ordination, it refers to the 'endeavour to give more equal content to provisions laid down by law, regulation or administrative action'.⁴⁴ These all suggest a process that may culminate in the creation of a uniform rule but generally stops short of such a result.⁴⁵ It connotes conscious attempts at fashioning similarities and commonalities from hitherto diverse and diffuse sources so as to give same or similar interpretation and effect.

There is the academic argument that countries with different history, ideology, socio-political and economic levels should not be expected to harmonise their social policies as there can be no 'fit'. Approximation of laws implies relinquishing the hold on sovereignty over certain areas at the domestic level as a trade-off for other benefits. It is not a derogation from national sovereignty but a strategic partnership which, granting that migrant workers come from anywhere, could be just as protective of one's nationals

⁴² (TANZAM) The Tanzania-Zambia Rail Co-operation. Air Afrique was run by the Francophone Sub-Saharan countries.

⁴³ Clarke et al (n 41).

⁴⁴ SADC Amendment Protocol on Trade.

⁴⁵ Woolfrey, 'Harmonization of Southern Africa's Labour Laws In The Context of Regional Integration (1991) 12 Part 4-6 *Industrial Law Journal* 710.

Woolfrey acknowledges that his sources for the definition included

a) Vogelaar, 'The Approximation of the Laws of Member states Under the Treaty of Rome'(1975) 12 *Common Market Law Review* 211 at 2R.

b) Stein, 'Harmonization of Law in the European Economic Community' (1963) 628 ICLQ Supplement. Watson, 'Labour Law in the European Economic Community' (1981) 4 *Comparative Labour law* 227 at 228.

elsewhere as others within. The economic cost of a progressive, relaxed social policy is also not a sufficient argument.

It was suggested that in a situation where harmonisation is unsuccessful, the most immediate socio-economic consequence would be ‘social dumping’; a situation where the sharks of globalisation would relocate to areas of lower production cost while workers migrate to areas of higher returns. This in turn would accelerate supply and result in the devaluation of labour.⁴⁶ The inability to adopt relative common social measures could thus wreck the social balance. It is in this regard that a harmonisation of those legal measures away from debilitating disparities in the area of work, relations and restrictive labour markets become important. A march towards economic integration presumes a corresponding evolution of a progressive and accommodating social policy and the implementation structures.

There is a timely caution against the impediments posed by the ground effects of structural and legislative differentiation at various levels.⁴⁷ Disparities between national labour law systems create an uneven playing field for employers; progressive labour laws or prescribing certain minimum health and safety standards raise production costs for employers and place them at a disadvantage in relation to their competitors operating under more permissive labour law regimes. In a region where capital is highly mobile, this may have the consequence that business is attracted to those areas where labour standards are low or non-existent.⁴⁸

In response, it would appear that the question of whether harmonisation should be restricted to only economic and financial policies has been, one might say, convincingly tackled by the European Union. It is quite beyond the pale of debate that social measures must go hand in hand with other forms of regulatory transformation. In the EU, the approximation of laws has been seen as essential for the full realisation of the economic potential of EU member states. For example, the EU Directive on Worker Protection presumes that safety and security in the workplace is paramount for effective production. Thus, selective protection and disparities in protection would again be leading to disparities in socio-economic opportunity and growth as envisaged under the Treaty.⁴⁹ Competitive neutrality can only be ensured if common sets of labour standards prevail.⁵⁰

Disparities in labour laws, income, wages and conditions of service do exist in Southern Africa but are not yet very pronounced. However, the situation could be exacerbated by the thrust of anti-union sentiments at both state and business levels and the threat of closure and relocation. Given a common standard however, business may be unable to threaten, pick and choose investment locations.⁵¹ The state would also have to reassess its relationship

⁴⁶ Ibid at 704.

⁴⁷ Ibid at 709.

⁴⁸ Ibid at 714.

⁴⁹ Woolfrey (n 47) at 718.

⁵⁰ See General Social Provisions (05.2005) and Protection of Workers (05.20.30.20) Directory of Legislation in Force.

⁵¹ Ibid.

with the productive elements of the society. The recent Marikana (Lonmin) mines episode in South Africa is a case in point, coupled with the strikes across the whole labour front between August and September, 2013. Above all, the discernible direction of the privacy of contract debate can be reversed to safeguard trade unions whose importance can be located within the scheme of social partnering and dialogue.

If it be accepted that economic development has social objectives, trade unions will always have a proper role to play in it. There is no substitute for trade unions as the workers' own instrument for obtaining a more equitable share of the fruits of economic progress. Social discontent is perhaps inevitable in any society and there may be no possibility of entirely eliminating it. The real problem is to prevent it from leading to serious social unrest and grave labour troubles which can threaten the political order or the stability of government and cause enormous economic losses. The paper contends that the recent history of the SADC sub-region does not suggest that these home truths have been internalised.

So long as workers can believe that their trade unions are doing a creditable job of defending and promoting their interests, they will depend on the unions for airing their desires, aspirations and grievances and for obtaining satisfaction, justice or redress through normal trade union methods. In this way, trade unions can be said to perform a vital role in preventing the danger of serious social unrest and in contributing to stable development and sustained progress.⁵²

(k) Possible forms of harmonisation

In acknowledgement of Woolfrey's thesis and the contributions of Clarke et al harmonisation as a goal would include harmonisation by directive, the adoption of a Regional Social Charter, international and regional Codes of Practice, adoption, ratification and integration of core ILO standards and regional collective bargaining. These are examined briefly.

(i) *Harmonisation by directive*

With the European Union as a viable example, Directives are determined by the Parliament and Council and member states are obligated through the same medium to approximate their domestic laws to the principles enunciated in the Directives. It is a result-oriented approach that leaves the member states the room to decide modalities and form for incorporating the principles as long as this is done. Thus, overtime, these standards would become both qualitatively and quantitatively an integral part of domestic laws. Already, the European Court of Justice had provided a juridical framework for determining the antecedence of Directives.

In relation to Southern Africa, the successful application of this model would require supranational legislative institutions and an enforcement

⁵² Ibid.

structure. Neither of these exist under the SADC Treaty at the moment and the protocol on intra and interstate disputes has been rendered irrelevant by recent events.⁵³

(ii) A regional social charter

The adoption of a Social Charter to underpin bilateral and multilateral trade agreements could provide a framework of basic human and worker rights. It is arguable that, given the scope of the SADC Social Charter, such could cater for freedom of movement, residence, employment, migration and citizen rights for all workers in the sub-region. The basic referent point is the ILO Constitution, Principles and Conventions. While isolated references have been made to the concept of a punitive social clause, in fact, a normative social charter capable of integration into domestic laws is preferable. By 1980, there was an international consensus regarding what constituted fair labour standards. While the debate continued, developing countries were expressing the desire to domesticate the issue first and internationalise it later.

(iii) International and regional codes of practice

Clarke et al identify the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy as the basic referent point because it operates at an international level.⁵⁴ Also, the principles in the Declaration are intended as guides to governments, employers' and employee organisations and the multi-national enterprises. This is to enable them to adopt social policies and measures whose legitimising constituency should include the approximation of principles from the ILO Constitution, Conventions and Recommendations which are considered relevant.

Though such approximation is voluntary, there is the normative and moral persuasive authority because the areas of concern form the bedrock of work relations. These include employment promotion, equality of opportunity and treatment, security of employment, safety and health, training and conditions of work and industrial relations. Triennial compliance inspections are undertaken and the actors encouraged to constantly seek clarifications. They link the binding and non-binding elements of the ILO Conventions. As usual implementation does have its problems as some States seek to circumvent these principles.

(l) Adoption, ratification and integration of ILO core standards (ILS)

As Rubin commented at the height of the debates, there is a self-imposed modesty about the ILO which belies its importance, influence and its significance in Southern Africa. The tenacity and global influence of the ILO attest to its position as a valid bastion of normative labour standards. Since 1919, the ILO had never been dissolved but only grows in relevance

⁵³ Protocol on Tribunal And Rules Of Procedure Thereof.

⁵⁴ Clarke et al (n 41).

and authority.⁵⁵ Nonetheless, as a bureaucratic organisation, it has its own shortcomings.

Most African countries have accepted that ratified ILS become applicable when assimilated into domestic law rather than seen as a secondary referent point of only persuasive value. As such, though the courts may not make direct reference to them from a dualist perspective, its constitutional provisions have proved persuasive in some judicial interpretations. Article 213(4) of the 1995 Constitution of South Africa accords it recognition and some senior courts have relied on them. The Lesotho Labour Code provides in s 4(c) that provisions should be interpreted so as to give effect to ILS.⁵⁶ They have also functioned as sources of equity. The Industrial Court of Botswana articulates the benchmarking role of ILS in the determination of lawfulness and fairness.⁵⁷ The ratified Convention; Termination of Employment (158/1982) has been instrumental as a basis for determining rules of fairness in cases of dismissal and retrenchment.

For Tajgman, the position of ILS in Southern Africa is unique. He lamented however that 'more than in any other sub-region of the continent, international labour standards in Southern Africa are relevant and stand a chance of implementation, yet practice indicates a certain reticence in the use made of the international systems of labour standards'.⁵⁸ Kalula echoed the same sentiment by pointing out that 'in the regional context, although the countries of the region are members of the ILO and formally committed to its ideals, most governments lack the will to ratify, and more important, implement international standards'.⁵⁹ In addition, the supervisory mechanism available for the implementation of ILS is hardly ever used to seek clarification and assistance from the Committees of Experts.⁶⁰

IV The Charter of Fundamental Social Rights in perspective

In attempting to address these primary focal issues identified above, it was felt that one way would be to use the framework of the SADC Charter of Fundamental Social Rights as a benchmark, first by providing an overview of the Charter in principle and then measure certain domestic episodes against some of its stated intentions.

The SADC Charter of Fundamental Social Rights forms part of the broad spectrum of the compendium of key human rights documents of the African Union. It is part of the African Human Rights Law Reports and also emanates

⁵⁵ Rubin, (1998) 'International Labour Law and the Law of the New South Africa' No.20, 25 March, New Series, UCT Inaugural Lecture.

⁵⁶ Kooijmans, (2000) 'The Role of International Labour Standards in Southern African Courts', Occasional Paper 1, IDDL, UCT, Cape Town.

⁵⁷ Ibid at 25; *Motsetsa v Mondial*, IC/33/97 of 14/9/1998, Botswana.

⁵⁸ Tajgman, 'International Labour Standards in Southern Africa' (1995) 5(2/3) *Industrial Relations Journal of South Africa* 31-49.

⁵⁹ Clarke et al (n 41) at 28, 48. Also Kalula, 'In Search of Southern African Comparative Law Perspectives' (1993) 14 *ILJ (SA)* 322 at 331.

⁶⁰ Mitchell, (1995) 'A New Scope and New Task For Labour Law? Redefining Labour Law: New Perspectives on the Future of Teaching and Research' Centre For Employment and Labour Relations Law, Occasional Monograph Series, University of Melbourne at xiv.

from the African Charter on Human and People's Rights. It is in fact modelled on the draft Charter of Fundamental Social Rights of the Southern African Trade Unions Co-ordination Council (SATUCC).

As said earlier, the founding SADC Conference was held in Windhoek, Namibia between February and March 2001. At this conference, a social charter of fundamental rights in the SADC region was adopted and recommended to the SADC Council for approval and subsequent submission for signing by the Heads of State. It was signed in August 2003 by all the member countries or their accredited representatives and referred to from then as the SADC Charter of Fundamental Social Rights. The enforcement date was 26 August 2003.

The stated aim and objectives were 'to facilitate, through close and active consultations among social partners and in a spirit conducive to harmonious labour relations', a recognition of the universality and indivisibility of basic human rights, through the positions adopted by the United Nations, the International Labour Organisation (ILO), the African Union (AU) and other such international institutions. The charter therefore incorporates, among others, core ILO Conventions on the abolition of forced labour (29, 105), freedom of association, organisation and collective bargaining (87, 98), discrimination in employment (100, 111) and minimum age of employment (138).

In Article 11, the African Charter (Article 4 of SADC Charter) states that every individual shall have the right to assemble freely with others and the exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, safety, health, ethics and the rights and freedoms of others. Furthermore, Article 12 of the aforementioned African Charter provides a framework for freedom of movement and residence within the borders of a state provided the individual abides by the domestic law.

It also makes reference to restrictions provided for by law for the protection of national security, law and order, public health and morality. In effect therefore, member states appear to have been given the latitude to define national security, law and order and public morality, among others as already evidenced by the provisos to the constitutional chapters on Fundamental Rights which, in reality, are derogations from those purported constitutionally enshrined and inalienable rights.

Thus, it would appear that the Charter itself either by an act of commission or omission placed individual States beyond the reach of normal comprehension of law and human rights and in the process, transformed these objectives into victims of subjective and selective interpretations. This is in conflict with the preamble which states *inter alia*: 'evolution of common political values, systems and institutions ensuring to governments, employers and workers organizations promotion of labour policies, and practices and measures in member states which facilitate labour mobility, remove distortions in labour markets as well as enhancing industrial harmony'. It also enjoins the provision of a 'framework for regional co-operation in the collection and dissemination of labour market information'.

Article 1 of the SADC Charter is intended to promote freedom of association and collective bargaining as per ILO Conventions 87 and 98. In furtherance of this, organisational rights of representative unions shall include the following; the right to access of employer premises for union purposes subject to agreed procedures, the right to a check-off system, election of trade union representatives, right to choose and appoint trade union officials, the right to have education and training leave, and the right to disclosure of information. A cursory observation of the ground realities in member states indicates a progressive assault on labour formations and the utilisation of legislation as a tool for the emasculation of worker organisations, at times by denying recognition using threshold requirements.

For example in Lesotho, public officers are not allowed to do anything whatsoever that 'the public may reasonably be induced to associate or identify [the officer] with an organization or movement of a political nature'.⁶¹ By its very nature, associating in groups or making observations about topical issues is essentially political in as much as the purchase of a luxury jet in a poverty stricken country like Swaziland is a matter of public concern.

In addition, appropriate and easily accessible machinery for quick resolution of disputes in essential services should be put in place by governments, employers and trade unions, and these shall apply to all areas of industrial activity including export processing zones (EPZ). Under Article 2, SADC member states shall take appropriate action to ratify and implement relevant ILO instruments and as a priority, the aforementioned ILO Conventions. As an example, the implied ministerial authority over what constitutes 'essential service' as is currently the tendency in Botswana, runs counter to what the ILO stipulates.⁶²

Further, SADC member states shall establish regional mechanisms to assist them in complying with the ILO reporting system. Article 6 deals with equality of treatment for men and women consistent with the relevant ILO conventions, among others, with regard to access to employment, remuneration, working conditions, vocational training and career development. Article 9 focuses on protection of health, safety and environment in line with ILO Convention 155 in tandem with the provision of social security benefits and protection under Article 7. These should be understood to imply access to information on workplace hazards, training, work stoppage in the face of risks and threats to life, compensation for illness and injury and rehabilitation.

The most direct way of assessing the impact of the ILO model on domestic legislation is the monist versus dualist debate. Even the judiciary in some states see the ILO Conventions only as moral referent points despite the other argument which contends that ratification confers compliance obligations even without the incorporation of these Conventions into the domestic legislative regime.⁶³

⁶¹ Section 144, Legal Notice of 2008, Public Service Regulations (2008) per PSA [2005] as amended by Act of 2007.

⁶² Section 49, Trade disputes Act [Cap 48:02].

⁶³ BOPEU, BTU, BOSETU and NALCGPWU and The Minister of Labour and Home Affairs, AG (HC) No. MAHLB-000674-11.

Article 10 enjoins member states to create an enabling environment for industrial and workplace democracy, information, consultation and participation by all parties in restructuring and organisational social responsibility. Article 11 deals with improvement of working conditions including paid leave, compensation for overtime and shift work among others. While Article 14 deals with decent standards of wages and living, Article 16 emphasises that the onus of the implementation of the SADC Social Charter lies with the national tripartite institutions and other existing regional structures.

Given the post-colonial path dependency and inclination towards state-centrism, the ethos of the state does not appear to accommodate social dialogue in partnership, not even in South Africa where the Confederation of South African Trade Unions (COSATU) was so instrumental in the electoral victories of the ANC-led government. Its imminent fragmentation as symbolised by the emergence of Association of Mine Workers and Construction Union (AMCU) out of NUMSA and the collision between the National Union of Mineworkers of South Africa (NUMSA) and the present COSATU leadership, suggest a government sponsorship.⁶⁴ Strategic fragmentation through proliferation of weak splinter groups of workers is a typical containment strategy evident also in Botswana.

Most importantly, as per the Social Charter, member states shall bear responsibility for the adoption of social legislations preventing non-implementation and which also prevent regional inequitable growth resulting in “social-dumping”. However, as noted with regard to both versions of the Charter, there is no mention of ratification, tied to mandatory domestication within any existing legal framework nor are there any specific enforcement mechanisms. The Protocol on Tribunal is equally silent on any penalties for non-compliance with decisions.⁶⁵ It only states in Article 24(3) that its decisions shall be final and binding and that SADC institutions and member states of the locale of the decision shall take appropriate steps to implement it and that failure to comply will be reported to the Tribunal for onward transmission to the Summit.⁶⁶ There is an apparent departure from one of the tenets of natural justice which is *nemo iudex in causa sua* if the culprit should sit on the judicial panel as the Protocol appears to suggest and as manifested in the recent case with Zimbabwe. One wonders if there is indeed a *modus operandi*.

This paper uses two countries, Botswana and Swaziland, as case studies. The reason is that, their internal dynamics, socially, historically and in terms of their political economy, can help in understanding why the SADC as a collective is making little impact. The paper posits that culture, tradition and politics form an amalgam that creates a constellation of social groups that see their mutual survival as paramount and pitted against other social forces that may pose a threat to that hegemony. Having inherited or assumed positions of

⁶⁴ Pithouse, ‘Promise and Peril at the Turn of The Tide’ (2013) 30(125) *Mmegi* (South Africa) 125.

⁶⁵ Art 24.

⁶⁶ Art 32.

authority, power and largess, it then becomes a duty to ensure that the coterie is not infiltrated by any competing group, whether in the quest to assuage the thirst for democratic participation or a legitimate claim to a re-distribution of national resources.

The intention of the paper is to examine factually, certain events that did unfold and attempt to understand them in the context of a Social Charter that was agreed upon and collectively identified with at the time of its inception. The following section deals first with Swaziland.

V Understanding the Swaziland factor

Swaziland has a Constitution (2005) which has been systematically vandalised by decrees, with a semi-feudal *tinkhundla* system based on chiefly power. The Parliamentary system or *libadla* is bicameral. The King appoints 20 members of the Senate and the other 10 come via the House of Assembly. The House of Assembly has 55 members elected and the King appoints ten (10) members.

(a) The functional state

The genesis of the dominance of the state in all spheres of socio-economic and political life in Swaziland is traceable to the Proclamation of 12 April 1973 in which the then King repealed the 1968 Constitution as being too foreign-oriented. A survey of the rationale, scope and ramifications of this singular act provides a window into the Swazi state. In pursuit of the prerogative of statism, the 1973 Decree (No. 6(a)) vested all land and rights in and to land in the King rather than the government. In effect, the state, the traditional elite and the accompanying cultural and ideological institutions became the most potent opponents of acceptable labour law norms and practices as envisaged by the SADC Charter.

As per Decree No. 2, the King-in-Council may, whenever it is deemed in the public interest, order the detention of any person for a period not exceeding sixty days in respect of any one order. Consecutive orders may be issued as necessary and no court shall have the power to enquire into such an order or any detention. At this juncture, one can say that by this royal act, freedom of association and the right to organise were dealt a pre-emptive mortal blow.

Decrees No. 11 and 12 proceeded to curb processions, demonstrations and meetings unless police permission is sought. The government expressed its intention in 1994 to amend relevant legislation including the Industrial Relations Act (1980), ostensibly to comply with the ILO Conventions. A tripartite forum including the Swaziland Federation of Trade Unions (SFTU) provided a protocol to avoid many of the restrictions imposed in the proposed Bill. The Bill ultimately ignored many of the sixty five proposed amendments and was rushed through and assented to in January 1996. In spite of the vociferous opposition of the SFTU, a new Act was passed in 1998.⁶⁷

⁶⁷ Case No.1884 ILO Governing Body Interim Report.

With regard to historical antecedence and path dependency, it must be recalled that even before the conception of the Charter of Fundamental Social Rights, the 1963 workers strikes were crushed by the Gordon Highlanders from Kenya. The state had then been so rattled that it strategically ratified several ILO Conventions thereafter but later systematically diluted them. In tandem, it also then predictably set out to impose an indigenous form of industrial relations structures rather than invite the ILO to assist. It established workers representatives *or Ndunas* and later *Ndabazabantus*. These were appointees of the Swazi National Council sent to major enterprises as liaison officers on the payroll of these enterprises. The structures and the philosophy energising them failed. They were suspected, and perhaps correctly, as spies rather than advocates of good workplace relations. These were appointees of the Swazi National Council sent to major enterprises as liaison officers on the payroll of these enterprises. The structures and the philosophy energising them failed. They were suspected, and perhaps correctly, as spies rather than advocates of good workplace relations.⁶⁸

From the foregoing, it is natural for the Swazi state embodied by the King to assume supreme power and vest in himself all legislative and executive powers (s 3). Since then, all laws except the Constitution may be re-enforced, subject to modifications, adaptations, qualifications and exceptions not so as to conform with international standards but with ensuing Decrees (s 3(b)). Precisely because of this absolutism, subordination of the state to external interference and direction becomes undesirable in reality.

(b) The labour law regime

The ILO has consistently criticised the regime for violating trade union rights including the incessant detentions of the Swaziland Federation of Trade Union (SFTU) officials in particular the General Secretary. Though the SFTU has, over the years, sought a platform for social dialogue, the government appears to prefer confrontation, selective austerity and a generally unstable socio-economic environment in which it can reward loyalty through accommodation, co-optation and selective allocation of state resources. Of course, the recalcitrant social elements suffer exclusion, marginalisation, deprivation, privation and *in extremis*, persecutions.

While the state engages in its strategic emasculatory programme, it seems workers generally feel that ILO standards are crucial for stability implied in a fundamental floor of rights across the sub-region as earlier mooted by the SATUCC. For example, the ILO Committee on Enforcement and Application of Conventions and Regulations (CEACR) noted that IRA No.8 (2000) modified ss 29, 40 and 52 of the IRA (2000) and promulgated a Decree (No. 2 Proclamation of 2001) and thus changed the provisions of Convention 87. To accommodate these concerns, the state simply promulgated Decree No. 3 (2001) to repeal No. 2 in its entirety.

⁶⁸ Akinnusi, 'Industrial Relations and the Development of Swaziland' (1996) 20(4) *SAJLR* 22-35 at 24.

This change aside, the Committee further expressed concern over the lengthy procedure and excessive balloting requirements for holding peaceful protests under s 40 (IRA 2000) and the withdrawal of immunity from civil liability for malicious, criminal and delictual acts by unions and federations of workers.⁶⁹ In addition, the Committee argued for prison services to be de-listed from defence forces and although this was done, they were immediately exempted under the definition of employees in the Employment Act (s 5) of 2001. This is similar to the situation in Botswana. The sum total of all these protracted play was a clear demonstration of the reluctance of the state to give meaning to the wording and the letter of the relevant ILO Conventions such as was clear from ss 70, 82, 85 and 86 of the Industrial Relations Act (IRA) (2000).

Inferentially, the Swazi state did not and apparently does not see the need for adhering to the stated principles of the SADC Charter on fundamental social rights such as freedom of expression, association, democratic governance and free, robust, open discourse on any issue of national interest and by extension the need for regional integration. It can be concluded that the persecution of trade unionists is considered a normal state of affairs in Swaziland, a situation quite anomalous to the avowed principles of the SADC Charter.

(c) The state and employment relations

The case of the *Swaziland Government v The Swaziland Federation of Trade Unions (SFTU)* is a clear pointer.⁷⁰ In the instant case, the Swazi government had filed an application seeking an order to declare the protest action called in Notices of 21/12/2002 by the SFTU as unlawful and to interdict and restrain the Federation from embarking on, supporting or participating in the aforesaid action on 23 and 24 January 2003.

Further, the government sought to have the Federation interdicted and restrained from calling their affiliates and members to participate or otherwise be involved in the said protest action and also to have it interdicted and restrained from any conduct in furtherance of the said protest action. Finally, to complete its quest for absolute dominance, the Swazi state wanted the court to declare that any person or organisation or Federation which took part in the protest action of 19 and 20 December 2002 and intended to take part in the protest action scheduled for 23 and 24 January 2003 will not enjoy the protection conferred by the IRA (No.1 of 2000).

In their answering affidavit, the SFTU as the respondents raised the following points *in limine*; that the government as the applicant was abusing the judicial process as the matter was substantially the same as the earlier case of *the Swaziland Government versus the Swaziland Federation of Trade Unions (SFTU) and the Swaziland Federation of Labour*⁷¹ as co-defendants which had been dismissed with costs. The application was therefore *ipso injure, res judicata*. The SFTU contended further that the state's attorneys

⁶⁹ CEACR ILOLEX Fe 7/2002.

⁷⁰ Case No. IC 349/02.

⁷¹ (SFL) (Case No. 347/02).

had no legal rights as they were not duly registered as per s 30 of the Legal Practitioners Act (No. 5 of 1954), neither were the grounds for interdiction justified as contemplated by s 40 of IRA (2000) (which had, in any case, been fully complied with). It was also proffered that he who comes to equity must do so with clean hands, which was not the case in the instance.

In its ruling of 1 January 2003, the court held that the state could not be said to have acted in contempt of the court in issuing a statement read by the Prime Minister. The court was however of the opinion that the socio-economic relevance of the two matters held in contention fell within the ambit of s 40 of IRA (2001). These concerned the conscious assault by the government and the misuse of taxpayers' money to purchase an expensive jet plane for the personal use of the King and his coterie of beneficiaries in these lean times; there was thus no merit in an application for an interdict.

The Swaziland Federation of Trade Unions (SFTU) called a 48-hour general strike in December 2002 in protest at the anti-union and undemocratic policies of the government. This course of action was prompted by the worsening ruthlessness of the government, the serious unemployment problem and the refusal of the King's palace to abide by two key Court of Appeal rulings. This resulted in the resignation of six Appeal Court judges.

The implications of this and other decisions include the fact that such blatant abuses of authority and misuse of power were what the Charter had been intended to discourage. The question to be answered therefore is whether the Charter as agreed upon was only for cosmetic purposes or a genuine desire for societal emancipation through robust, unfettered discourse and the creation of avenues for such social debate without resort to forms of intimidation of aspiring participants in the process.

It is on record that in other cases, hearings by the courts instituted by the state were convened at 9.00pm with only the Court President in attendance even though no certificates of urgency were required, ordered or issued. In fact, various parts of the IRA have been interpreted to favour the state.⁷² In sum, between 1997 and April 2011, there have been several cases of intimidation and police brutality and repression, particularly against labour formations.⁷³ Therefore, given this psychological make-up and cultural orientation, the question is whether the Swaziland state as a signatory to the SADC Charter of Fundamental Social Rights is really prepared to accept and assume the implied responsibilities and obligations of the Charter.

To a large extent therefore, the attitude of the Swazi state towards labour formations and labour relations has been antagonistic and at best paternalistic. Some leaders have been forced to retire and enter into conventional opposition politics. The mediating institution of the Department of Labour, being an agent of the state finds itself in the position of a dubious arbiter between the entrenched positions of the employer and employee and the often politically motivated machinations of the state.

⁷² *Swaziland Government v SFTU, SFL* (Case No. 347/02); *Swaziland Hotel and catering Workers Union v Swaziland SPA Holdings Ltd* (Case No. IC 1/90).

⁷³ AR/55/003/1997, AFR 55/003/2002, Act 30/001/2011, AFR 55/005/2010, Africafocus (110325).

For this purpose, workers would strongly disagree with the notion that domestic labour laws are tools for the state and employers to control and regulate workers' potential for demonstrating their collective countervailing power.⁷⁴ Given that in its pronouncements and attitude the Swazi state views trade unions as political organisations and posturing rather than negotiation and consensus-building have created a disempowering environment within which labour law as envisaged by the ILO and the SADC itself, cannot flourish or perhaps may not be intended to flourish.

In the light of the current social stratification, the political economy and the tight control over social formations, Swaziland cannot be said to be an exemplary environment for the actualisation of the SADC Charter on Fundamental Social Rights. The paper now looks at the second case study which is Botswana.

VI The Botswana situation

(a) The Botswana state

Botswana, the second case study, has a multi-party democratic system which, given the dismal performance of the opposition parties over the years, can best be described as a de facto one party state. It has a Constitution crafted at independence in 1966 and which has remained largely untouched till recently. Even then, this has been due mainly to the furore over the powers of the President who, among other things, is both the Head of State and Head of government, a situation that remains unchanged.

The National Assembly comprises 57 directly elected members, 4 co-opted or specially elected members and 2 ex-officio members being the President and the Attorney-General. The Botswana state presides over a free market economy in tandem with a historically structured rural dependence on remittances from wage labour in the urban areas. The state, factually, is the largest employer and this, one might say, has precipitated a preoccupation with an interventionist labour legislation framework.

Botswana is a study in the constellation of peak social formations such as political, traditional and the bureaucratic elite. Economically, there is state-driven developmental policy formulation. It could be said also that there is a perception of institutionalised privilege, socio-economic disparities and resultant poverty (if one accepts the standard academic definition) in the midst of pockets of affluence. The political machinery of state may not perceive this, inured over time to this mode of defining the normal and the real.⁷⁵ Along this continuum however, legislation as a dominant activity of the state has become instrumental in the further polarisation and dislocation of social formations.

⁷⁴ Ibid at 26; SATUCC Draft Charter of Fundamental Social Rights in SADC.

⁷⁵ Tsie, 'The Political Context of Botswana's Development Performance' Department of Political and Administrative Studies, University of Botswana, Unpublished Paper 1966.

(b) Labour law and employment relations

From 1968, labour legislation was intended to ‘provide for the control and regulation of trade unions, lay down procedures for settling labour disputes and for enquiries into trade disputes and industrial conditions and permit the regulation of wages and conditions of employment in the industry’.⁷⁶ Then in passing the motion on “Legal Action Against Unjustified Strikes” the declared objective was a perceived need for “legislative action to prevent workers in both public and private sectors of the economy from the coming out on and remaining on sudden ill-considered and unjustified strikes”.⁷⁷

Subsequently, the labour agitations in 1972, 1974, 1975 and 1991 made the state overly “suspicious” of “liberal” labour legislation and therefore wary of internationalisation of standards. Much later, the months of October and November 2002 saw an upsurge in labour agitation driven largely by demands over pay structures, unfulfilled promises and protracted implementation of policies. The amalgam of teachers unions and associations undertook intermittent demonstrations and industrial action.

This could explain why the state even now appears to exhibit what could be described as a “cautiousness” with ILO demands for greater flexibility in labour legislation as opposed to liberalisation. There is thus a justification for saying the state manifests the trappings of path-dependency. This observation should be understood against the premise that historical antecedents have a tendency of creating a path dependency syndrome with which statism could be closely associated.

The paper therefore suggests that the Botswana situation offers a study along the continuum of legislative rule-making driven by reminiscences of a past characterised by external repression and emasculation of domestic efforts at changing the status quo. The result of this could be summarised in the caveat; *festina lente* or hasten slowly. The corollary is that, while desirous of not being seen as swimming against the tide of international opinion and practices as is the case in Swaziland, there appears an unintended commonality in result.

With regard to the provisions of the SADC Charter, this paper wishes to test the Botswana position with regard to Article I which specifically provides for the freedom to form and join or not to join any association or trade union of the employees’ choice for the promotion of their collective welfare. First, it is noted that, the Trade Disputes Act of Botswana (Cap 48:02) stipulates that no one in “management” as defined under the Act may join a trade union except if such a union is intended to cater for their own restricted interests.

In this context, it is critical to examine the role of the courts outside the precincts of the workplace in Botswana. A seminal case is that of *Botswana Power Corporation Workers Union and Botswana Power Corporation*.⁷⁸ The question at issue was whether certain categories of employees of the

⁷⁶ Sir Seretse Khama, see Hansard 9/12/68, BNB 1523, National Archive, Gaborone.

⁷⁷ Hansard 9/12/68, BNB 1523, National Archive, Gaborone.

⁷⁸ Civil Appeal No. 42 of 1998, Industrial Court Case No.IC136 of 1996.

Corporation could be excluded from unionisation. Since the appeal was dismissed, the paper only deals with the ruling of the Industrial Court.

Briefly, the relief sought was that since those categories of workers declared as being part of “management” as defined in the then s 60 of the Employment Act could not be members of the appellant union in employer-employee matters and relations, that since such workers must join their own union of management staff, therefore s 60 is not only contrary to Article 3 clause (b) and Article 13(1) of the Constitution of Botswana but that s 60 must be narrowly construed in terms of those actually engaged in jobs that are managerial in character.

In its ruling, the court, in its obiter dicta said that challenging the validity of an Act of Parliament under the Constitution is a serious matter, as it challenges the collective wisdom of Parliament and such challenge, if successful would unsettle and disrupt settled arrangements and processes nationwide. The court therefore ruled that since those excluded by the provisions have not complained, the union cannot do so on their behalf, and that though Article 12(1) of the Constitution appears to grant absolute protection, such is derogated from by Article 13(2), specifically clauses (b) and (d). Further, and most importantly, restriction of membership under (b) is necessary to safeguard the rights of the employer, while collective bargaining involves two parties with different aims, objectives, goals and strategies and that their expectations from the bargaining process are therefore not necessarily the same.

The court also concluded that s 60(2)(a) and (b) should be read together and (c) separately, and furthermore, the relationship between unions and employers, including the collective bargaining process is governed not by a corporate law but by the Trade Unions and Employers Organizations Act including Botswana Power Corporation (BPC) staff. Therefore, “management” is not determined by corporate structure but by legislative definition. The Constitution intended that Parliament should have certain powers as in s 60 of the Act to impose certain restrictions. Article 13 of the Constitution in its totality is thus not inconsistent with s 60 of the Trade Unions and Employers Organizations Act.

Section 13(1) of the Constitution of Botswana guarantees the protection of freedom of assembly and association and, by extension, the right to organise and collectively bargain. To this extent, it provides, inter alia, that except with his own consent, ostensibly voluntarily given, no one shall be hindered in the enjoyment of these freedoms. Superficially therefore, this provision captures the spirit of all the international instruments hitherto cited. To that extent therefore, there is nothing iniquitous about it. Of the foregoing, the same subsection of s 13 of the Constitution of Botswana could be said to be within the expectations of Article 9 of ILO Convention 87 but not in agreement with the United Nations’ Universal Declaration of Human Rights.⁷⁹ Similarly, it is in conflict with the International Covenant on Economic, Social and Cultural Rights of 1966.

⁷⁹ 1948 Arts 20(2), 23(4).

This is so because, translated further, the provision in the Constitution means the right to assemble freely and associate with others, to form or to belong to trade unions or other associations for the protection of their interests. However, taken even further, it also implies these rights can be curtailed or withdrawn. The restrictions in this context mean those regarding assembly and association. Subsection 2 of s 13 of the Constitution stipulates that nothing contained or effected under the authority of any law or the various statutes spawned by the Constitution considered as duly enacted, shall be held to be inconsistent with or in contravention of the Constitution if the purpose includes defence, safety, public order, health or morality as shall be so defined.

The same subsection also condones and legitimises restrictions (without form or content) upon public officers and others.⁸⁰ It is thus apparent that, in Botswana, these restrictions are specifically in relation to formation and joining of trade unions as they could emanate from anything subjectively related to law, order, security and other perceived threats. A prison officer in Botswana is not only excluded from membership of trade unions but associations not established exclusively for members of the Service alone.⁸¹ With regard to the Police Service, the restrictions expressly include anybody or association that wishes to control or influence work terms and conditions within the Service.⁸²

Similar restrictions apply to equally to members of the Botswana Defence Force. Within these contexts, it has been assumed that acceding to the terms and conditions of employment imply voluntary consent to have one's constitutional rights restricted. This, the study contends, raises again the question about the fallacy of the freedom of contract which supposedly underpins employment relations. The legislative and practical effects given to the subjective and unrestricted interpretation of restrictions has so far yielded the following results that transcend the issue of trade unions. The question with respect to the Constitution is whether any statutory body should be visited with the consequence of being absolutely hamstrung by a prejudicial exclusion from the enjoyment of the freedom of association and assembly.

In South Africa, the NDF, NIA and SASS⁸³ are excluded from the scope of the Labour Relations Act (LRA) and the Basic Conditions of Employment Act (BCEA).⁸⁴ The SANDF has been given the right to form and join trade unions. This was the position of the Constitutional Court in *SA National Defence Union v Minister of Defence and Another*.⁸⁵ Naturally, soldiers in the SANDF are not permitted to strike but that has not diminished their rights to associate, not as a union in the conventional sense, but to be able to collectively fight for their common welfare.

⁸⁰ Section 13(2)(a), (c).

⁸¹ Section 35, Prisons Act (Cap 21:03).

⁸² Section 24(1), Police Service Act (Cap 21:01).

⁸³ National Defence Force (NDF), National Intelligence Agency (NIA), South African Secret service (SASS)).

⁸⁴ Labour Relations Act (LRA), Basic Conditions of Employment Act (BCEA).

⁸⁵ *SA National Defence Union v Minister of Defence & Another* (1999) 20 ILJ 2265 (CC).

It must be noted that it has taken the Botswana Legislature almost four decades after independence to include all public sector workers, tribal administration staff and teachers under the ambit of “employee” so as to enable them to form and join unions. Hitherto, this large but extremely fragmented category of workers, had, as per the Constitution, been excluded from forming and joining trade unions of their choice. The relaxation of the restrictions under subsequent amendments to the Trade Unions and Employers Organizations Act (TUAEOA) could be interpreted as either the latent intention of the Constitution or in its prescient wisdom, the Constitution had anticipated such developments for the future that has come.⁸⁶ Given that the said Constitution affirms its parental responsibility for derivative statutory enactments, it also therefore must assume vicarious liability for any excesses of these individual laws, both substantively, doctrinally and in application.

The Convention on Freedom of Association is generally coupled with the Right to Organize and Collectively Bargain Convention. The Labour Relations (Public Service) Convention deals with the right to organise in the public service. Its provisions expand on Convention 98 which, unlike 87, does not cover public servants engaged in the administration of the state. The United Nation’s Universal Declaration of Human Rights provides that ‘everyone has the right to form and join trade unions for the protection of his interests’. It also recognises that ‘no one may be compelled to belong to any association’. By extension also, no one should be compelled not to join any association of his/her choice. In reality, to join or not to join a union is not a laxity but a pragmatic dictate. In effect, the right to form, to join a union or not may be a conferred constitutional right but the question of which union one wants to associate with and the reasons thereof are issues of statutory conferment, which, by implication, can be withdrawn as per that law.

It is important to note that it is untenable to selectively assimilate the substance of a legal regime and subject it to a novel interpretation and effect. In so doing, both the causes and the effects are distorted. The paper notes that the legal environment of industrial relations in Botswana is very complicated. This complication is all the more glaring because of the fact that most of the laws are not rooted in the realities of the Botswana situation. This reality is informed by an absence of industrial exposure, cognition of the laws and their *modus operandi* coupled with a subjective view of the actual purpose of law.

Regarding purposiveness, since the recent amendments to the labour laws, there has been a multiplicity and fragmentation of worker formations. This is remarkable because, hitherto, the Registrar of unions had been vigilant in exercising the discretion not to register or de-register unions to avoid this very situation of proliferation, dissipation of resources and of worker collective capacity that is now prevalent.

⁸⁶ See s 13(2)(c) of the Botswana Constitution.

(i) The dilemma of “essential” (service) in the context of the charter

This discourse forms the conceptual basis of the issues that need resolution regarding the degree of authority to derogate from fundamental rights such as that of the freedom of association which has been provided for by the Constitution of Botswana. These rights, as encapsulated in ILO Conventions 87 and 98 should have been clearly reflected in the relevant statutes of Botswana, considering that these have been ratified by Botswana.⁸⁷

However, it is noted that the Conventions also recognise the primacy of domestic legislation as contained in laws, awards, custom and agreements over which the Convention may claim but cannot assert an oversight in order to safeguard the guarantees subsumed in the Convention.⁸⁸ Convention 98 accepts the right of the state to restrict the police and armed forces with regard to the formation of and joining trade unions of their choice. These apparently contradictory statements raise important issues which the paper briefly tables below.

The first is the sheer moral and persuasive authority of ILO Conventions and standards. The second is the need to integrate these into domestic legislation via assimilation or transplantation or selective incorporation of these international labour standards.⁸⁹ Thirdly, as part of international law, these Conventions as ratified, do not carry the enforcement or coercive authority in relation to municipal legislation. Comparatively therefore, their role requires unambiguous clarification whether from a “monist” or “dualist” perspective.⁹⁰ A case in point is the *GCHQ* case in the UK. Here, the European Court of Human Rights (ECHR) rejected a complaint by members of the General Communications Headquarters in the UK that restrictions on their union membership had breached Article 11 of the European Convention. The court said the measures were not arbitrary and thus did not violate any rights simply because restrictions on grounds of state security or public safety were permissible.⁹¹

This is similar to the philosophy informing essential services determination. Both the Human Rights Act and the pronouncements of the courts in the UK would suggest an unwillingness to question whether there is a primary duty owed by the employee to their contractual obligations rather than to a post-contractual creature such as a trade union. Neither does the Act prevent derogation from the rights of individual workers regarding disclosure of information and parameters of business and commercial transactions even after the termination of the contract. Once more, the primacy of the common law notion of contract is extolled, forgetting that the employment contract is not a basis for any normal exchange of rights and obligations.

With regard to essential services in Botswana, the relevant Schedule of the Trade Disputes Act identifies the following as “essential services”: Air traffic

⁸⁷ Art 3(3) Part 1 Convention 87, Freedom of Association.

⁸⁸ Art 9(2) Part 1 Convention 87.

⁸⁹ *Moatsi & Another v Fencing Enterprises (Pty) Ltd* 2002 1 BLR 286 per Ibrahim Carstens J.

⁹⁰ *Botswana Land Boards and Local Authorities Union v The Director (DPSM)* CA 24/2004.

⁹¹ *Council of Civil Service Unions v UK* (1998) 10 EHRR 269.

control, Botswana Vaccine Laboratory, electricity, fire, and water services, transport and telecommunications services as deemed necessary, operational services of the railways, health services and the Bank of Botswana.

Compared to the ILO understanding of core essential services, some of those in the Schedule immediately appear superfluous.⁹² In furtherance of the Minister's discretionary powers, he may invoke s 49 of the Act to amend the list of essential services.

It is however noteworthy that in a recent ruling by the High Court of Botswana, the state was taken to task over its hitherto unchallenged manipulation of legislative and administrative authority. In this case, the central issue was whether the Minister can, invoking statutory instruments (SI) that ostensibly empower him, add to or subtract from the list of "essential services" having regard to capacity to embark on industrial action.

The court found that the statutory instrument was *ultra vires* the Constitution and clearly in contravention of ILO Conventions 87 and 98 which had been ratified by the government of Botswana. It went on to say that although the Conventions were not incorporated into the domestic law, they nevertheless imposed an obligation on the state in the area of executive action. By implication, they also give rise to a corresponding legitimate expectation by the employee that his interests and rights would be safeguarded by the employer.

The Court therefore ordered that the promulgation of SI 57 was unlawful and invalid, a nullity and that therefore s 49 of the Trade Disputes Act (2003) is incompatible with the Constitution of Botswana and therefore equally invalid. Further, the court ruled that the Trade Disputes (Amendment of Schedules Order 2011) contained in Statutory Instrument No. 57 of 2011 is equally invalid and of no force and effect.

In effect, a democratic determination of functional essential services as envisaged by the ILO is not possible under the oversight of a Minister as a political appointee, an employee, a manager and also a supervisor. Normally, an Essential Services Committee should exercise the power to designate essential services and its composition should be from the Ministry of Labour and Home Affairs, parties to the Bargaining Council and the Directorate of Public of Public Services Management (DPSM). The first objective should be a Minimum Service Level Framework Agreement as part of any Bargaining Council function. The functions of the Committee should include the ratification of Essential Service Agreements and the enforcing of Minimum Agreements. Also to be included should be ways of identifying problems, resolving them, including guarantees not to engage in unnecessarily disruptive industrial action. At this juncture, the key concern should be whether in this lacuna, the state can possibly transform itself into an advocate of a transnational basic floor of rights for workers in the SADC sub-region.

It could be concluded that the courts could not have been a vehicle for playing the role of persuading and encouraging the state on a path towards

⁹² Art 120, ss 2 and 49.

regional integration. Therefore, like in Swaziland, much as the courts in Botswana are generally not averse to ruling against employers in routine, mundane matters, they appear to be, unlike in Swaziland, disinclined to being seen at loggerheads with the state machinery. This attitude could not have been an effective platform for promoting an advocacy for a Social Charter for the SADC.

Meanwhile, at another level, private capital has entrenched its own hierarchical and monist values in their organisational ethos coupled with a strategically astute sensitivity to government policy directions. It utilises heavy handedness, dismissals, demotions, transfers and retrenchments to intimidate and control the workforce. Unions only function after work hours. Trade union officers use up their unpaid leave to attend to union business and operate under the constant threat of ever changing rules for disciplinary action.

Furthermore, despite the concerns expressed by the ILO in its Committee of Experts Report on the Application of Conventions and Recommendations (CEACR) since 2003, subsequent amendments have done little to change the status quo. For example, the current Trade Unions and Employers Organizations Act of Botswana simply shunted s 60 to s 48 dealing with "Recognition of Registered Trade Unions as Negotiating Bodies" thus retaining the restrictive threshold prerequisite of one third (1/3) of the total workforce of any enterprise. It has also maintained the restriction on member of "management" which it defines broadly as 'an employee who has authority, on behalf of his employer to employ, transfer, suspend, lay off, reward, recall, promote, terminate the employment of, promote, discipline, or deal with the grievances of any fellow employees and among others, any action requiring the use of his discretion'.

The conclusion that can be drawn is that the state strategically undermines trade unions by encouraging their fragmentation through the registration of splinter groups. They are then incapacitated by the threshold requirements for recognition. Finally, by selectively excluding the better informed, educated and more articulate as "management", it renders the unions incapable of negotiating and bargaining effectively with the employer which in this case, includes the state.

This foregoing account was intended to provide a picture of the statutory environment relative to what is essentially the terrain of discord between one, the employer, including the state and two, the employee. It provides evidence of the interventionist role of the state in an ostensibly private relationship between two parties. This section has indicated the trajectory of labour legislation in Botswana over the years. It has also attempted to illustrate the socio-economic effects of legislation on workers by intentionally shifting from abstract labour law polemics and historical development.

In the context of the provisions on free movement of people, Botswana in 2006, became the eighth SADC member to accede to the Protocol on free movement. However, in explaining the rationale for the decision, the Minister of Labour and Home Affairs indicated that Botswana would first have to align national statutes with the Protocol. He further explained that free movement

is not the same as facilitation of free movement and that visa and other requirements would still be needed. The relevance of this may be tangential but it is indicative of a reluctance to lead the way, a cautiousness about the potential of the “jewel of SADC” being swamped by the less endowed. In fact, the former President (F. Mogae) expressed deep reservations about the advisability of free movement in a hurry.

This context does not lend credence to the notion that a system of separate employment legislation in each SADC country is necessary for and because of their separate economic, and historical antecedents. This notion carries a worrying corollary that SADC states should therefore not see regional integration in terms of urgent harmonisation of labour laws or by extension, free movement of labour.

It can be concluded that the Botswana state conveys the impression of being torn between acquisition of an international image of symbolic value and a rapprochement with investors and local capital. The critical implication is that, such a situation may translate into either lesser interventionist policies in favour of labour formations or the enforcement of restrictive labour laws to emasculate unions while liberalising the labour market. The tactical but covert penetration of union leaderships along party lines so as to de-radicalise labour has also been noted. There is also the policy of wage leadership by the state. In effect, since the state is unwilling to relinquish its central hold on the levers of economic activity, the alternative is to placate capital through manipulative labour legislation. This cannot create a conducive environment for a common floor of basic human and social rights in the SADC to thrive.

VII Concluding remarks

The argument that approximation of domestic legislation to ILO Conventions is a difficult and expensive process requiring external specialist input is untenable. The issue should preferably concern the absence of the political will rather than resources. The countries under observation are, as at now, not yet proto-types of a sub-region that accepts and enshrines a common Charter of Fundamental Social Rights into their various domestic legal regimes.

A Charter of Fundamental Social Rights, alongside a Bill of Rights, would have been the common subsets of legislation from which protective mechanisms may emanate. The make-up and ideological orientation the state in these countries do not lend credence to any visible tendency to formulate policies and enact legislation whose focal point is the democratisation of social debate and the ultimate achievement of meaningful and mutually beneficial industrial relations. This has absolutely nothing to do with dictatorship or ballot box democracy but perhaps a historically imbued insecurity and suspicion.

The question to be answered now is how effectively the domestication of the SADC Charter together with international best practices can be undertaken within the SADC. That there is a preliminary role for labour law in the ultimate integration of the SADC sub-region is beyond debate. A key issue however is the methodology for the attainment of this objective. Formulating

and imposing a common framework law such as the Charter envisages, perhaps as the *Loi Cadre* that applied in Francophone West Africa prior to decolonisation, presupposes a sub-region subject to the same or similar political, administrative and enforcement apparatus.

Possibly, the adoption of the Charter of Fundamental Social Rights by the SADC may not have been in recognition of an immediate need to harmonise divergent labour laws. Its functional importance as a tool for achieving closer affinity of the legal frameworks may therefore appear accidental to some and a threat to some other members of the SADC. It is however, a welcome development that could facilitate the engineering role of labour legislation.

This is because it suggests a functional approach to repositioning social policy at the centre of labour legislation and reprioritising it at the top of the growth and development policy ladder. By so doing, it also seeks to elevate social rights to the protective embrace of the Constitution within a Bill of Rights framework as part of the basket of entrenched rights. This presupposes the existence of an enabling socio-political environment where rights are guaranteed within a constitutional framework that defines the ultimate source of legitimate authority.

Thus, were the Social Charter to be really enforceable, the next hurdle should desirably be to agree collectively to elevate it to and integrate it into the constitutional framework either by incorporating it in the Bill of Rights or by recognising its pre-eminence as the singular embodiment of the people's aspirations. Ideally, this should not be a domestic issue but should be seen as the benchmark for good governance and peer review within SADC, once its primacy is established within the collegiality of nations at the conclave of the Heads of State. One could say that local referenda should be held but the conclusions are obvious unless coerced from the society at large.

The next step would then be to determine how its various elements could be addressed either as domestic incorporation into the legal framework or as multi-sectoral and supranational Codes of Practice that are enforceable within the basket of rights available to citizens under a given Constitution. This would then obviate the issue of oversight structures such as a SADC Court of Justice (Tribunal) as the Charter becomes subsumed within the domestic legal system. What is beyond debate is that the evolution of the SADC Social Charter mirrors the direction of current sociology of work and workplace relations. It also seeks to make a statement regarding the necessity for institutional transformation to drive the Social Charter. This implies a new ethos of governance, social partnership, political accountability and a more responsive and inclusive state.

It is needless to say that this paper is premised on the philosophy that fundamental freedoms include those of association and organisation which are therefore inalienable. Practically, the legislative and policy evidence such as there is appears to seriously undermine and qualify the freedoms to the extent of rendering them discretionary privileges accorded by the state. Therefore, regarding Botswana and Swaziland, while there may be the perception that their legal regimes reflect International Labour Standards, reality however suggests that the state philosophy in its actual depth, content and ethos needs

closer scrutiny. The results of such enquiry may then assist in indicating whether, given the domestic picture, regional integration using harmonisation of labour legislation as one plank could result in greater emancipation of workers and actualisation of their aspirations.

Within the SADC framework, labour legislation cannot play a conservative, reactionary role. Such orientation would only steer it away from the essential harmonisation and transformation of the basic floor of rights which ought to result in a viable, sustainable pillar of social policy legislation as envisaged in the SADC Social Charter. In comparing the labour law regimes of Botswana and Swaziland therefore, there is no presumption that they are the key proponents of anti-integration.

The paper only intended to examine, analyse and appreciate the dynamics, differences and similarities engendered, nurtured or tolerated within these states. This could be a more meaningful approach to understanding the potent undercurrents at play within SADC member states which can impact on the SADC in different ways.

By so doing, while one examines the theoretical applicability of harmonisation, one also becomes informed about the functions of labour law in these countries. From the foregoing, the paper concludes that the SADC Charter of Fundamental Social Rights faces a long, hard road to actualisation.

‘LEGAL HOSTILITY’ TOWARDS STREET VENDORS IN TANZANIA: A CONSTITUTIONAL QUANDARY?

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Abstract

Although the Constitution of the United Republic of Tanzania, 1977, categorically provides for the right to own property, this right is a distant reality in respect of one unique social group. An already politically, economically and socially marginalised group, street vendors find themselves on the wrong side of the law too often with fairly harsh consequences. These include evictions from their working stations often without sufficient notice, confiscation of goods, arrests, fines and imprisonment. If it is indeed true, that the Constitution guarantees the right to own property, how and why are street vendors seemingly beyond the horizon of the legal protection openly enjoyed by other sections of the community? This article identifies and examines the pertinent laws at the heart of this ‘legal hostility’ towards street vendors, but also offers suggestions how this situation may be reversed. It is argued that if Tanzania’s Development Vision 2025 and the Millennium Development Goal (MDG) No. 1 are to be realised, a conducive, legally articulated working environment for street vendors is an absolute, inescapable requirement.

Keywords: marginalisation, street vendors, property ownership, legal hostility

I Introduction

Street vendors are a distinct category of people working in the informal sector which widely accommodates all activities done outside the regulatory framework, including hawking, undeclared domestic work, bartering, petty trade and subsistence farming.¹ Although the name connotes the use of ‘street’ as the main place of vending and therefore earning income, street vendors, as the International Labour Organisation (ILO) correctly observes, are vendors who operate from a wide variety of locations and space, most notably, street corners, railway stations, bus stops, lorry stations, construction sites, road side, sidewalks, public parks, outside any enclosed premise or covered workspace.²

Street vendors are not a homogeneous social or economic group. Often, vendors are classified in accordance with the items they sale, the place at which they trade, the specific premises, and their employment status, whether street

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¹ For more information on the concept of informal sector see ILO ‘Women and Men in the Informal Economy: A Statistical Picture’ (2002 ILO) available at: <<http://wiego.org>> (accessed on 30 September 2013). See also Bernabe ‘Informal Employment in Countries in Transition: A Conceptual Framework’ (April 2002 CASE paper 56 Centre for Analysis of Social Exclusion, London School of Economics) available at: <<http://euroscience.org>> accessed on 30 October 2013.

² ILO Women and Men in the Informal Economy: A Statistical Picture (n 1) at 49.

vending is a full-time primary work or secondary part-time work.³ Vendors also tend to engage in the sale of a fairly rich variety of wares. The items traded by the street vendors include fruit, vegetables, cooked food, snacks, soft drinks, candies, sweets, ice cream, cigarettes, matches, newspapers, magazines, manufactured goods and second-hand goods.⁴ Street vendors use kiosks, folding tables, crates, wheeled pushcarts, bicycles, walk the street or on cloth/plastic sheets.⁵ Street vendors may be self-employed, employees of the self-employed or other traders, or work on commission for the sales made.⁶

The common characteristics of urban based street vendors include the fact that they guarantee easy accessibility to supplies, provide affordable goods and services, have low costs of entry, and flexible working hours.⁷ Irrespective of the social and economic vitality of the street vendors, they are considered as illegal traders in that they operate their businesses without permits or licences demanded of traders and therefore widely perceived as a 'nuisance or obstruction to other commerce and the free flow of traffic'.⁸ The problems facing street vendors have been concisely listed in the Bellagio International Declaration on Street Vendors 1995. Most notably are the following: have no clearly defined legal status; lack of appropriate space or poor location; face inordinate restrictions on licensing and high costs of regulation; subject to frequent acts of harassment, bribes, confiscation and evictions; lack of suitable services and infrastructure; and lack of representation in decision-making bodies. Despite these predicaments, street vending continues to grow in Tanzania and elsewhere in the world partly because, as the ILO argues, 'street vending may be the only option for many poor people'.⁹ As regards numbers, street vendors in Tanzania account for about 20 percent of all those found in the informal sector embracing all categories of people from the unemployed youth, women, and men, women being arguably over-represented in the sector.¹⁰

This paper focuses on the laws governing street vending in Tanzania and how they affect street vendors taking into account that the 'right to vend – within reasonable limits or constraints – should be considered a basic economic right'.¹¹

³ ILO Women and Men in the Informal Economy: A Statistical Picture (n 1) at 50.

⁴ ILO Women and Men in the Informal Economy: A Statistical Picture (n 1).

⁵ ILO Women and Men in the Informal Economy: A Statistical Picture (n 1).

⁶ ILO Women and Men in the Informal Economy: A Statistical Picture (n 1).

⁷ See <<http://wiego.org>> (accessed on 30 September 2013). See also CLEP and UNDP Making the Law Work for Everyone (Vol. II 2008 Commission on Legal Empowerment of the Poor and United Nations Development Programme) and the case of *Khathang Tema Baitokoli and Another v Maseru City Council and Others* 2004 AHRLR 195 (LeCA 2004).

⁸ ILO Women and Men in the Informal Economy: A Statistical Picture (n 1) at 49.

⁹ Ibid. See also Ogawa, 'Earning among Friends: Business Practices and Creeds among Petty Traders in Tanzania' (2006) 9 Issues 1 & 2, *Fall African Studies Quarterly* 23-38.

¹⁰ Information available at: <<http://wiego.org/informal-economy>> (accessed on 30 September 2013) where it is stated that in African cities, street traders account for between 15% and 25% of total informal employment, and that women, in countries such as Kenya, Madagascar, Senegal and South Africa are more than half of street vendors. Tanzania being no exception to the mentioned countries, particularly neighbouring Kenya, it can be argued that similar estimates are valid. Also, the ILO notes that in many cases, women earn less than their male counterparts, ILO Women and Men in the Informal Economy: A Statistical Picture (n 1) at 51.

¹¹ ILO Women and Men in the Informal Economy: A Statistical Picture (n 1) at 49.

II The legal framework governing street vending in Tanzania

Provisions relating to street vending in Tanzania are found in a variety of autonomous statutes, regulations and by-laws. The legal regime by and large affects street vendors negatively. Ironically, acts of harassment, evictions, confiscation of goods and arrests of street vendors are sanctioned by laws, which the Constitution of the United Republic of Tanzania, 1977, (Constitution) enjoins street vendors to observe and respect.¹² The Constitution is unequivocal as regards the duty to respect the laws of the land, including, as is presently the case, laws of questionable legitimacy and those which rob street vendors the full enjoyment of the right to own property.¹³ This means that principal legislation as well as subsidiary legislation in the form of rules, regulations, by-laws, promulgations, notice, order, or instrument made under the legislation or any lawful authority must be adhered to by street vendors.¹⁴

Invariably, the street vendors' rights as enshrined in the Constitution, are violated by the laws governing specific areas from which street vendors vend and more so by the law enforcers. As rightly argued by WIEGO:

[t]he policy environment for street traders in any given locality is a function of both the legal context and the political environment. In terms of the legal context, many countries have constitutional provisions related to the individual rights to work and to private property, and the collective rights to public space and economic association, that impinge on street vendors ... More commonly, provincial and local level by-laws and ordinances govern street trade. These laws and ordinances change frequently, and commonly result from urban planning processes that exclude street traders and their organizations.¹⁵

III The Constitution of the United Republic of Tanzania, 1977

Street vendors, are undoubtedly entitled to the protection of their person, dignity, and property and guaranteed the right to life, right to work and other related rights such as those relating to livelihood and general wellbeing. Article 24 of the Constitution provides for the right to own both landed and personal properties and guarantees protection of such properties. The issue is, do street vendors enjoy this right?

The Constitution recognises the existence of other laws which may deprive a person's right to own property or the protection of such property. Article 24(2) states in part that '*it shall be unlawful for any person to be deprived of his property for the purposes of nationalization or any other purposes without the authority of law which makes provision for fair and adequate compensation*'. (Emphasis supplied). This means that the right to property is neither absolute nor conditional, because the Constitution explicitly recognises the prospect of property deprivation. Given the highly detrimental consequences of deprivation for a property owner, it would appear to be sound policy if the deprivation satisfied at least two basic requirements. First, the

¹² See art 26 of the Constitution.

¹³ See art 26 of the Constitution.

¹⁴ See s 2 of the Interpretation of Laws Act, Cap 1, R.E. 2002.

¹⁵ See (n 10).

law must be precise in defining the nature and quantum of the property being subjected to deprivation. The second condition is that, deprivation should be accompanied by fair and adequate compensation as a matter of law.¹⁶ What then, is the position of the Constitution in respect to these two preconditions to deprivation?

Two provisions of the Constitution are particularly pertinent. On the one hand is the provision regarding the right to work which essentially facilitates one's acquisition of necessities of life, and forms the foundation for one to earn a living.¹⁷ On the other is the provision which imposes a duty to work to acquire material wealth, well-being and human dignity.¹⁸ The right to work can only make sense if accompanied by a corresponding obligation to ensure that there is work for every able bodied person including street vendors, and, that the latter to avail themselves for work opportunities. Further, and ideally, failure of the government to provide such work, should amount to a failure to meet one's constitutional duties, and therefore, be sufficient grounds for petitioning courts of law. Here one is confronted with another tragic irony confronting street vendors. The phenomenon of street vendors is in large part a response to government inability to meet labour demands of its citizens. And yet, when these very individuals do, through individual and private effort, raise capital and engage in vending government authorities descend on them with naked brutality, and often, by evictions and confiscation of their merchandise and tools of trade, in other words, their sources of livelihood.

Besides infringing the right to work, evictions and confiscation also jeopardise the well-being of street vendors and members of their families and thus, threaten their right to life as guaranteed by the Constitution which states that 'every person has the right to live and to the protection of his life by the society in accordance with the law'.¹⁹ As Peter puts it, 'the right to work is important as it relates to the very survival of the individual and the society in general. It is close to the right to life itself and thus requires legal protection'.²⁰ Thus, street vendors' right to work, and their duty to engage in lawful and productive activities to earn a living, are directly linked to their survival. The issue is whether the laws in place take into account the fact that the Constitution guarantees street vendors the right to life, right to work, and places a duty on them to engage in productive activities and stewardship over public properties albeit with no corresponding explicit right to use such public properties.²¹

Provisions of the Constitution relevant to street vendors also include those relating to the right to protection of one's person, privacy and residence which

¹⁶ See also the case of *Attorney General Versus Lohay Acoonay and Joseph Lohay* 1995 TLR 80 (CA), where it was stated that fair compensation should depend on the circumstances under consideration and could take the form of re-allocation in case of land or payment where necessary.

¹⁷ See art 22(1) of the Constitution.

¹⁸ See art 25(1) of the Constitution.

¹⁹ See art 14 of the Constitution.

²⁰ Peter, *Human Rights in Tanzania: Selected Cases and Materials* (Rüdiger Köpppe 1997) at 169.

²¹ See art 25 and 27 of the Constitution.

are directly linked to protecting them against unlawful arrests in that arrests must be under the circumstances and procedures prescribed by law.²² Finally, street vendors are also protected from discrimination based on, among other things, station in life and political opinion.²³

Thus, a street vendor may claim any of the listed rights in court. However, these provisions are yet to be invoked in courts of law to test the constitutionality of a number of laws, hostile to street vendors. Once the Constitution is invoked to test the validity of the principal legislation that is averse of the rights of the street vendors then one may clearly state whether the constitutional provisions are promoting the rights of the street vendors. This is due to the fact that the Constitution is the supreme law of the land and any law that is inconsistent with the Constitution may be declared null and void to the extent of the inconsistency.²⁴

IV The Law governing street vending in Tanzania

(a) Land Act 1999

Matters relating to land are regulated, primarily, by two pieces of legislation, the Land Act 1999 and the Village Land Act 1999. The Land Act 1999 categorises land into three main groups: general land, village land and reserved land.²⁵ In turn, 'reserved land' includes the land designated or set aside under the Urban Planning Act 2007, the Highways Act Cap 167, the Public Recreation Grounds Act Cap 320, and land reserved for the public utilities.²⁶ The relevancy of the Land Act 1999, arises from the fact that vending invariably takes place on land, the subject of regulation of the Land Act and related statutes. The Land Act 1999 requires land to be utilised sustainably.²⁷ Sustainable development requires street vendors to comply with issues of licences, permits and to conduct their business in permitted areas or formal markets for orderly urban development.

Under the Land Act 1999 individuals can own land through grants of right of occupancy. These are accompanied by conditions that must be adhered to by every owner of land. One of these conditions is the requirement to obtain planning consent and building permits.²⁸ The process of obtaining these consents and permits is costly and fairly bureaucratic therefore unduly complicating access to land and general compliance with the law by street vendors. As such, street vendors find themselves on the periphery of land

²² See art 15(2)(a) and 16(1) of the Constitution.

²³ See art 13 of the Constitution.

²⁴ See art 64(5) of the Constitution.

²⁵ S 4(4) of Cap 113, R.E. 2002. For more details see Fimbo, *Land Law Reforms in Tanzania* (Dar es Salaam University Press 2004); Josefsson, *An Evaluation of the Land Laws in Tanzania*, Masters Thesis, (Lulea University of Technology 2005), and Pedersen, 'Tanzania's Land Law Reform: The Implementation Challenge' DHS Working Papers No. 37 (Danish Institute of International Studies 2010). The Village Land Act 1999 is not discussed in detail on account that the paper analyses street vending in urban areas in which the said law does not apply.

²⁶ See s 6(1)(a) and (c) of the Land Act 1999.

²⁷ S 3(e) of Cap 113 R.E. 2002.

²⁸ S 34(2) of the Land Act 1999.

ownership and left with no option except to invade land designated for other specific uses like road reserves and public utilities.

According to s 4(1) of the Land Act 1999, all land in Tanzania is public land entrusted to the President for the benefit of all the citizens. Under the 'Public Trust Doctrine', all citizens should have easy and guaranteed access to land.²⁹ However, one finds that land in urban areas is not accessible to all sects of the society particularly street vendors, among whom, women, children, youth, the poor and other marginalised communities, are dominant. In summary, the Land Act 1999 impinges on street vendors' capacity to fully enjoy the right to own property, a right guaranteed under the Constitution, and this occurs through the imposition of costly procedures of acquiring licences and permits to use land, the Land Act 1999, imposes.

(b) Land Use Planning Act 2007

Sustainable use of land has necessitated the enactment of the Land Use Planning Act 2007 and the Urban Planning Act 2007. The Land Use Planning Act 2007 was enacted to provide for the preparation, administration and enforcement of land use plans. Among the many objectives this Act was set to achieve, those that are relevant to street vendors include the fact that the law is set to 'facilitate the creation of employment opportunities and eradication of poverty'.³⁰ Related to the foregoing objective is that the Act is obliged to 'ensure planning legislation, building regulations, standards and other controls which are consistent with the capabilities, needs and aspirations of the various sections of the population'.³¹ This means that planning authorities are required to ensure that in their planning activities they facilitate, and not hamper, creation of employment opportunities and eradicate rather than perpetuate poverty. This statutory obligation is consistent with the provisions of the Constitution as well as the Tanzania Development Vision 2025.³² Despite all these constitutional, statutory and policy prescriptions, the reality for street vendors is quite different.

Land use plans do not consider street vendors as a social category with distinct and unique needs. A ready illustration is the absence of dedicated space for street vendors, in land use plans as developed by city and municipal authorities. It is common therefore, to find that the space left in the land use plans between the houses, by the road side and the actual road is very narrow and unable to accommodate street vendors. Even in cases where such space is wide enough to accommodate street vendors, such space would not be designated for street vending and street vendors vending from such areas risk

²⁹ For more details on the public trust doctrine see Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 *Michigan Law Review* 471-566.

³⁰ See s 3(c) of Land Use Planning Act 2007.

³¹ See s 3(d) of Land Use Planning Act 2007.

³² United Republic of Tanzania *The Tanzania Development Vision 2025*, Planning Commission (Dar es Salaam 1999).

being arrested, their goods confiscated, or depleting their capital and income through payments made to law enforcers who constantly demand bribes.³³

As such, and paradoxically, enforcement of the Land Use Planning Act 2007 perpetuates unemployment contrary to the statute's declared aims. Also, the constant demands of bribes, and confiscation of goods increases poverty on account of the fact that considerable resources are directed away from wealth creation. This would not be the case if the Land Use Planning Act 2007 was implemented in such a manner, that street vendors were able to carry out their activities lawfully, in particular, consistent with s 3(d) which requires 'needs and aspirations of the various sections of the population' to be taken into account in all land use plans. Street vendors' needs and aspirations ought to be accommodated in the whole process of land use planning.

Further, s 28(1) lists matters to be included in all land use plans, among them is the preservation of open space and defined paths on the land. Similarly, par 4 to the Second Schedule of the Act provides for matters to be included in the regional and district land use framework and include employment, income distribution, the labour force, potential of the informal sector and their locations. At the other extreme is par 9 which stresses on strategies for livelihood with respect to land related resources. Read together, the Schedule seemingly adequately takes into account the needs of the informal sector, most notably, street vendors. Apparently, the law does seem to recognise that those in the informal sector need and deserve space and that therefore, appropriate strategies should be put in place. However, street vendors, as is the case with other social groups associated with the informal sector, are not designated any space for vending and end up occupying public space, road sides and paths, thus exposing themselves to arrests, evictions and confiscation of their merchandise by law enforcers.

Additionally, the Act gives powers to planning authorities to restrict certain uses of land in order to ensure orderly development and to reserve and maintain all the land planned for open spaces, parks, wetlands, urban forests, and green belts in accordance with the approved plans.³⁴ Anyone who violates these provisions commits an offence and may be liable to a fine not exceeding two million shillings (approximately USD1,200) or three years' custodial sentence or both. The court may additionally order that person to comply with terms and conditions of the plan which he or she has violated; and restore to the original state any land which has been damaged as a result of such violation. It is submitted that the prescribed penalties are, for a street vendor, exceptionally high and punitive to the extreme. A three year custodial sentence in particular, will not only ruin the street vendor economically, but robs his already poor family of the only bread winner.

³³ See (n 10) where WIEGO states that '[i]ncome and earnings risks are also common to many street vendors. Harassment on the part of local authorities – including evictions, confiscation of merchandise, and demands for bribes – is a common source of income risk for street vendors'.

³⁴ See s 46 of the Land Use Planning Act 2007.

(c) Urban Planning Act 2007

The Urban Planning Act 2007 essentially provides for a comprehensive planning system for urban areas. It restricts doing unlicensed business. Section 2 defines the term street to include 'any road, square, footway or passage, whether a thoroughfare or not, over which the public has right of way, and also has the way over any public bridge...' while a 'public street' means any street over which the public has a right of way and which is or has been usually repaired and maintained by the government or local government authority (LGA).

The Urban Planning Act 2007 provides for a number of fundamental principles of urban planning such as job creation and eradication of poverty.³⁵ Its broad goals include the efficient and orderly management of land use and promoting sustainable land use and practices. As indicated earlier, rather than facilitate creation of employment opportunities (through accommodating and encouraging street vendors to do business), the implementation of the Act fuels unemployment through evictions, thereby perpetuating poverty.³⁶ Ironically, the Act's enforcers justify their questionable interventions as dictated by the necessity to ensure orderly management and sustainable land use and practices.

The Act designates municipal councils as planning authorities in their respective areas of jurisdiction.³⁷ Planning authorities are tasked to conserve buildings, premises or land, open spaces, recreational areas, hazardous land and parks with powers to reserve and maintain all land planned for industrial and commercial purposes as well as open space in accordance with the approved planning schemes.³⁸ They also have a duty to ensure that development activities conform to the requirement, intent and purposes of such schemes.³⁹ Critically, the law empowers urban authorities to control and manage areas, including open spaces, often occupied by street vendors, despite possessing no explicitly stated right of either access, or occupancy of such land.

Evidently, street-vending should be a key strategic concern in any land planning scheme. The role of street vending in job creation and reduction of poverty cannot be overemphasised. Focusing only on the markets established by LGAs would appear to be an unjustifiably narrow approach to implementing the Land Use Planning Act 2007 and the Urban Planning Act 2007. This restrictive approach and focus also flies in the face of the Millennium Development Goals (MDGs) particularly MDG No.1 on

³⁵ See s 3(c) of the Urban Planning Act 2007.

³⁶ See Lyons, *Micro-trading in urban Mainland Tanzania: the way forward*, Final Report (2007) at 19 where, writing in the context of street vending in urban Tanzania, it is stated that '[e]viction is also closely associated with profitability, and significant numbers of those interviewed had directly experienced eviction.... traders who had experienced eviction were significantly more likely to earn under 6,000 Tsh per day than traders who had not experienced eviction... and very much more likely to earn under 3,000 Tsh per day...'

³⁷ See s 7(1) of the Urban Planning Act 2007.

³⁸ See s 28 of the Urban Planning Act 2007.

³⁹ See s 42 of the Urban Planning Act 2007.

eradication of extreme poverty and hunger, but also two key additional national policy documents: the Tanzania Vision 2025 with its focus on high quality livelihood and eradication of abject poverty; and the National Strategy for Growth and Reduction of Poverty (famously known by its Kiswahili acronym – MKUKUTA). The latter is the country's strategy on how to reduce poverty in the context of the MDGs and Vision 2025.

Although laws relating to land and planning take cognisance of the commercial aspects in land planning, they do not expressly provide for issues pertaining to street vendors. Land designated for commercial purposes surprisingly confines itself to markets which are established and managed by the LGAs. Falling within their jurisdiction, LGAs are able to easily collect charges and fees at these markets. While this arrangement is attractive to the LGAs, it leaves street vendors on the periphery of the protection given by law and the Constitution, and as a consequence, face evictions, arrests, confiscation of merchandise sanctioned by law.

To appreciate how draconian the law can be, one has to consider s 29 the Urban Planning Act 2007. It prohibits any development in land without the prior consent of the planning authority. It further states that 'planning consent' is a condition precedent for the licencing authorities to issue licences. And yet, every reasonable person knows that it is the often spontaneous gathering and concentration of persons which spurs street vendors into action. Given this logic, it appears utterly unreasonable to demand that street vendors obtain prior consent, in the forms of 'planning consent', ahead of going into business. It is the operation of this very logic that compels street vendors to operate on land designated for purposes of a different nature, including power plants, road reserves and other open areas. As repeatedly pointed out earlier, evictions are one of the most common interventions by national and local authorities, in confronting street vendors. The following three examples of evictions in Tanzania illustrate the point:

The first involved evictions in April 2012 involving street vendors trading adjacent to the Tanzania Electricity Supply Company (TANESCO) power plant at Ubungo along Mandela Express Highway, and Morogoro Road in Dar es Salaam. The justification was couched in terms of concerns for the personal safety of the street vendors and public health. Another reason for eviction was that the activities of the street vendors were dangerously inhibiting TANESCO to have easy passages to electricity generation powers plants particularly in the case of emergencies such as eruption of fire. By remaining under the high voltage electricity wires for long hours, street vendors risked exposing themselves to health hazards such as cancer and fire.

Legitimate as they might sound, these arguments do not confront the factors which attract street vendors to this area, not to mention the more fundamental question of livelihoods and income for the street vendors and their families. Not surprisingly, the rhetorical response from some vendors was whether they shouldn't be left to choose between living longer but die poor and go hungry, or live alongside the risks associated with high tension wires but have three meals a day? As in most cases of this nature, the eviction was characterised by excessive use of force by police and city militia, including the use of tear gas, coupled with harassment, arrests, assault of the street

vendors, and confiscation/destruction of the street vendors' merchandise.⁴⁰ It follows therefore that the evicted street vendors' rights to work and own property categorically protected by the Constitution were affected thereby impinging on their right to life, which in essence is in tandem with protecting one's means of livelihood.

The second example is that of eviction of street vendors and destruction of all structures belonging to them along Morogoro Road, from Kimara to Magomeni in Dar es Salaam in the first quarter of 2011. The evictions were based on the fact that the street vendors had been vending on land constituting the 'road reserve' and that the said road reserve was being put to use for the Dar es Salaam Rapid Transit (DART) Project.⁴¹ In a largely similar fashion to the TANESCO eviction described a while ago, the process was effected without sufficient notice, and accompanied by the loss or destruction of considerable amounts of merchandise and related property belonging to street vendors. Even if not on the scale witnessed at Ubungo TANESCO, the use of excessive force was another prominent characteristic.

The third example is that of street vendors in Tanzania's second most populated urban area, the city of Mwanza, on 15 November 2012. Street vendors were evicted from the junction of Pamba Road, Miti Mirefu Road and Tanganyika Bus Stand, smack in the Central Business District (CBD).⁴² Apart from destruction of property triggered by acts of violence on the part of city militia in the course of the evictions, one person was shot dead and several sustained injuries of all manner.

These incidences go to show the nature and intensity of conflict between planning authorities, and street vendors, over the use of land. The ever present prospect of eviction, denies street vendors the sense of security essential to productivity, wealth creation, poverty eradication, and improved standard of living. And once more, paradoxically, this draconian approach, has behind it, the force of law.

(d) Highways Act Cap 167

The Highways Act also affects street vendors as it justifies their evictions in areas that the law governs. The Act restricts people to do certain acts that may cause obstruction along the highways including trading activities. Section 39, among other things, stipulates explicitly acts that may amount to a commission of an offence thus making it illegal, namely: any act which:

...

- (i) encroaches on any public highway by making or causing to be made on a public highway without proper authority, any building, platform, hedge, ditch or fence or other obstruction;
- (ii) in any manner, wilfully prevents any person or any vehicle from passing along any public highway;
- (iii) obstructs the free passage on a public highway by exposing goods or merchandise of any description; and

⁴⁰ See Peter, 'Dar vendors, MP give TANESCO, DCC ultimatum' (5 April 2012) *The Guardian* (Tanzania), available at: <<http://www.ippmedia.com>> accessed on 13 October 2012.

⁴¹ 'People to protest evictions in Ubungo' *Mwananchi* 6 March 2011.

⁴² 'More News emerge amid the death of a street vendor' *Tanzania Daima* 17 November 2012.

(iv) in any other manner obstructs the safe or convenient passage along a public highway.

As such, street vending, particularly actions relating to display of goods or merchandise along the road or in the adjoining lands which are not designated for that purpose and putting in place any kind of structure to allow the display of merchandise or goods to be sold, is an offence punishable by fine of five hundred shillings or a jail term not exceeding three months.⁴³ The Highways Act provides for what should not be done on the highways and does not provide how reserves can be used for different activities such as small businesses. As a result, street vendors find themselves in trouble when trying to display their goods near the road/on the road reserves for marketing. Under this Act, evictions of street vendors are done on account that the street vendors may have obstructed free passage of people or vehicles along the highway or may have encroached the highway. The above second example of evictions on Morogoro Road was effected under this law.

(e) Local Government (Urban Authorities) Act 1982

The Local Governments (Urban Authorities) Act 1982 governs townships, municipalities, or cities, where the majority of street vendors are found.⁴⁴ Among the statutory duties of the urban authorities is regulating matters relating to hygiene and markets. On this the authority have a duty to inspect all food stuffs and liquids intended for human consumption exposed for sale or not and seize and destroy all such foodstuffs unfit for human consumption; prevent and abate public nuisances which may be injurious to the public health or to the good order of the area of the authority; regulate any trade or business that may be noxious or injurious to the public health or a source of public danger, or which otherwise it is in the public interest expedient to regulate; provide for the issues of licences or permits to facilitate the regulation of any such trade or business, and for the imposition of fees in respect of such licences or permits; and to prohibit or regulate the establishment and conduct of markets other than public markets established by the authority.⁴⁵

Also, s 62(2) and the Schedule to the Act provides a list of functions which may be performed by urban authorities. These include establish, regulate and control markets, regulate and control trade therein, construct market buildings, and let stands or plots in such matters; prohibit, regulate or control trade otherwise than at established markets; and prohibit or regulate the use of streets in the area.⁴⁶

Powers of urban authorities have a direct impact to street vending, especially the prohibition or regulation of the use of streets and trade done outside markets. Urban authorities have been using these provisions to promulgate by-laws which affect street vendors as they constantly arrest, evict and confiscate their goods all the time. Street vending, since it takes place in areas

⁴³ See s 51 of Cap 167.

⁴⁴ The Act empowers the minister responsible for local government, by order published in a Gazette, to establish an urban authority in form of a township, municipality or city as per s 5 of the Act.

⁴⁵ See s 62(1)(e), (i) and (m) of the Local Government (Urban Authorities) Act 1982.

⁴⁶ See s 62(2) and items 34, 35, 36 and 86 of the schedule.

other than those designated as public markets, is considered as a major cause of nuisance and therefore categorised as illegal by the respective authorities. These areas include open spaces, recreational grounds and streets, along the road, bus terminals, bus stops or other public utilities areas. Additionally, the illegality of street vending is caused by lack of licences and permits.⁴⁷

Further, urban authorities are charged with functions to maintain peace, order and good governance within their area of jurisdiction; to promote the social welfare and economic well-being of all persons within its area of jurisdiction; and to further the social and economic development of its area of jurisdiction.⁴⁸ The authorities are tasked therefore to promote the well-being of the persons within their jurisdictions including street vendors' livelihoods.

Irrespective of the foregoing responsibilities of the authorities, the other laws that we have discussed have a number of provisions which impinge on the rights of the street-vendors guaranteed by the Constitution, including the right to own property and protection of such property by the State and the right to work, to mention a few. The laws restrict the street vendors to conduct their activities freely in the street where there are reliable markets for them than established markets such as the *Machinga* Complex. The street vendors, particularly petty traders, prefer vending on the streets such as Mchikichini area, Ubungo junction of Morogoro Road and Mandela Express Highway, and Karume areas in Dar es Salaam City and Pamba Road, Miti Mirefu Road and Tanganyika bus stand in Mwanza where a number of them display their merchandise/goods to consumers than Machinga Complex in Dar es Salaam which is an organised formal building and does not have a constant flow of customers as on the street. The order that street vendors should sell their items in the organised markets and not on the street, to most street vendors, imply losing customers and thus reducing possibilities of making profit and affecting their livelihoods as consumption of their capital follows suit as poverty ensnares them.⁴⁹

The Local Governments (Urban Authorities) Act 1982 also provides for offences and penalties for non-compliance of its provisions or by-laws made

⁴⁷ See the case of *Jean De Dieu Bizimana and Nymbona Vecent v eThekwini Municipality* 2005 ZAKZHC 22 where eviction and confiscation of a street vendor's tent structure was justified even by the court on account that the street vendor did not have a licence to trade in the area.

⁴⁸ See s 60(1)(a), (b) and (c) of the Local Government (Urban Authorities) Act 1982.

⁴⁹ See Lyons (n 36) at 23 where it is stated that '[t]he impacts of eviction and relocation policies have been profound and far-reaching, affecting the vendors themselves, their livelihoods, their direct dependents and anyone dependent on them for business'. See also for instance, 'MPs want Mchikichini traders in Machinga Complex' *Daily News* 13 October 2012; 'New Plan to transform Machinga Complex' *Daily News* 8 June 2012 available at: <<http://dailynews.co.tz>> accessed on 13 October 2013. See also *Khathang Tema Baitsokoli and Another v Maseru City Council and Others* (n 7) at 4 where the street vendors stated that 'vendor business becomes profitable only if their goods and other various wares are easily accessible to prospective buyers and that if the street vendors "scatter themselves down the Kingsway and busy streets" the consumers can easily choose from whom to buy. In confining [street vendors] to the old Local Government area ... destroys their prospect of maintaining a meaningful and gainful employment thus limiting their right to life and to making a living. During the days of sitting in ... confined places [street vendors] make no money at all or very little to sustain life'.

under it, the general penalty being TZS50,000.⁵⁰ This means that all offences that street vendors are charged with may not be fined more than the prescribed penalty.

As such, evictions of street vendors from their vending stations have a legal backing in Tanzania particularly with regards to laws relating to land, planning, roads related laws and local government laws which restrict the use of streets, open space, and public areas for business. These laws prohibit conducting business in areas which are not designated by planning authorities for street vending; vending in areas planned for other things such as public utilities; vending without licences or permits in planned areas; obstruction of free passage of persons and vehicles along the highway; and causing nuisance to others.⁵¹ Street vendors therefore, are prohibited from all these places which in essence, limit their ability to earn a living thereby affecting their livelihood and general well-being and in turn, vitiating their constitutionally protected right to own property, right to protection of their acquired property, right to work and their right to life.

V Challenging actions against street vendors

Street vendors have been subjects of forceful removal and evictions from their vending station, at times, without notice. This part looks at the legality of evictions of street vendors. The evictions of street vendors, as earlier indicated, are based on different laws in Tanzania which impinge the rights of street vendors. Since independence, Tanzania has had a number of legal instruments that have been inhibitive against street vendors. For instance, in mid 1970's the government rounded up street traders operating in Dar es Salaam and forcibly took them to villages where they were required to join forces with the villagers in Ujamaa villages for communal production of agricultural goods, among other things.⁵² In 1983 the Penal Code Cap 16 branded all self-employed people and street vendors as 'unproductive, idle and disorderly'. These actions were justified on the basis that street trading was a subversive activity that challenged socialist principles.⁵³

In recent years, although street vendors are not forcibly taken to Ujamaa villages, their conditions in cities are full of challenges, including being considered as disorderly, nuisances and that they obstruct orderly management and sustainable land use. These challenges are exacerbated by the existing laws and regulations which are used to control and discourage the street vendors:

The legal process requires that one must be tried fairly prior to conviction and eventual sentencing in which community service, a custodial sentence or

⁵⁰ TZS50,000 is equivalent to USD32. See also ss 98 and 103 of the Local Government (Urban Authorities) Act 1982.

⁵¹ See also *Jean De Dieu Bizimana and Nymbona Vecent v eThekweni Municipality* (n 47) and *Khathang Tema Baitsokoli and Another v Maseru City Council and Others* (n 7).

⁵² For more information on villagisation in Tanzania see Osafo-Kwaako, *Long-run Effects of Villagisation in Tanzania*, 2011 available at: <<http://www.evn.yale.edu>> accessed on 3 September 2013.

⁵³ Skinner, 'Street Trade in Africa: A Review' 2008 *University of Kwazulu Natal School of Development Studies Working Paper* No. 51 at 14.

fine may be imposed against the accused. Under the Constitution, the judiciary is the organ that is vested with the final authority in the administration of justice.⁵⁴ This means that every person who defaults the law must be brought before a court of competent jurisdiction. Basic human rights contained under the Bill of Rights in the Constitution must be observed in the whole process of arresting, prosecuting and sentencing.

Specifically, article 13(6)(b) of the Constitution of URT is very clear in that 'no person charged with criminal offence shall be treated as guilty of an offence until proved guilty of that offence'. This presumption of innocence is reflected in the Criminal Procedural Act 1985 which governs all criminal proceedings before courts of law in Tanzania. Thus, street vendors who are in conflict with law are entitled to a fair hearing in course of prosecution of their cases in courts of law as per article 13(6)(a) of the Constitution. However, it is possible to fine a person without charging him or her in a court of law where the Executive Director of LGA or his or her subordinates compound offences and impose the fine instantly to the defaulter upon the latter admitting commission of an offence prohibited by the municipal by-laws in writing and an official receipt is issued in respect of the fine paid.⁵⁵ Also, there are incidences where the local government prosecuting withdraws the case; bond by the accused person is forfeited for failing to appear in court; confiscation or destruction of street vendor's goods or community service as ordered by the court.⁵⁶

Irrespectively, on account of the analysed laws above, it is submitted that the evictions of street vendors abrogate a number of basic rights of the individuals involved particularly the right to life, right to work, right to own property, right to protection of the acquired property and the presumption of innocence.

On the right to life, which is protected by the Constitution, street vendors are 'condemned to death' when they are evicted from their vending stations. Street vendors' livelihoods are abrogated as eviction cuts their only means of survival thereby affecting their right to life. Even in cases of relocation to organised markets, as is the case with the previously noted Machinga Complex, street vendors are no better, as they are unable to yield the proceeds they would get if they were in places where they are evicted from which usually have a heavy flow of customers. The lamentation of a street vendor in Lesotho in the case of *Baitsokoli* is evidently shared by street vendors who are victims of evictions and forced into organised markets in Tanzania; 'I hardly make anything per day because of being out of convenient reach of the public who would buy my goods. As a result of my removal from my long-term place of business I have been unable to meet my basic needs ... I am not able to purchase food and clothing for my dependants, and we are

⁵⁴ See art 107A of the Constitution.

⁵⁵ A number of cases filed by LGA before the courts are compounded and the accused persons, prosecuted for violation of the City Regulations or Municipal by-laws, pay the fines and are set free.

⁵⁶ See *R v Charles Phidelis* Resident Magistrate Court of Dar es Salaam at Sokoine Drive, Criminal Case No. 295 of 2010 (Unreported); *R v Selemani Yasin* Resident Magistrate Court of Dar es Salaam at Sokoine Drive, Criminal Case No. 122 of 2010 (Unreported); and *R v Deo Paul*, Criminal Case No. 545 of 2010 (Unreported).

slowly starving to death'.⁵⁷ It is submitted that condescending street vendor's livelihood executed by the state authorities is no lesser to deprivation of one's life, which is protected by the Constitution. This is succinctly put in the case of *Olga Tellis & Ors v Bombay Municipal Council* [1985] 2 Supp SCR 51:

The sweep of the right to life ... is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life ... So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live.⁵⁸

The denigration of the right to life is even more worrisome where a street vendor is not only evicted but also arrested, goods confiscated, and faces prosecution, practically left with nothing. In some cases, as earlier indicated, law enforcers using unjustifiably excessive force, have actually caused deaths of street vendors objecting evictions, like what happened in Mwanza in 2011 where two people were killed and in 2012 where one person was shot dead.

Linked to the right to life is the right to work which is also protected by the Constitution. It is submitted that evictions affect the right to work in that the street vendor will not have a place to vend from and therefore will not be able to work since vending is work for street vendors. As the Supreme Court of India puts it '[t]he right to live and the right to work are integrated and inter-dependant and, therefore, if a person is deprived of his job as a result of his eviction from a slum or pavement, his very right to life is put in jeopardy'.⁵⁹ Evictions therefore, as they deprive a street vendor's right to work, directly affects their right to life, both categorically protected by the Constitution. The indivisibility of the right to life, right to work and livelihood was well established in the Indian case of *Bheshar Nath v The Commissioner of Income Tax Delhi* [1959] Supp 1 SCR 528 where it is stated:

If there is an obligation upon the state to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The state may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But any person who is deprived of this right to livelihood, except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life....⁶⁰

⁵⁷ See *Khathang Tema Baitsokoli and Another v Maseru City Council and Others* (n 7) at 2.

⁵⁸ *Olga Tellis & Ors v Bombay Municipal Council* [1985] 2 Supp SCR 51 at 21.

⁵⁹ *Olga Tellis & Ors v Bombay Municipal Council* (n 58) at 17. See also *Baksey v Board of Regents* [1954] 347 MD 442 where it is stated that '[t]he right to work is the most precious liberty that man possesses. Man has indeed, as much right to work as he has to live, to be free and to own property. To work means to eat and it also means to live'.

⁶⁰ *Bheshar Nath v The Commissioner of Income Tax Delhi* [1959] Supp 1 SCR 528 at 80G-H, 81A. See also *Khathang Tema Baitsokoli and Another v Maseru City Council and Others* (n 7) above at 22.

The right to work is further affected by the fact that offences with which street vendors are charged are no lesser criminal, which means if a street vendor admits the offence and the LGA compounds the offence or is prosecuted and convicted, his or her character will be tainted with a criminal record which will affect their eligibility for other jobs pegged on no criminal record, or at times, they may not be able to access loans in financial institutions which would have created jobs for the street vendor. For instance, in the case of *R v John Michael* the accused, a street vendor, was arraigned for selling drinking water at Ubungo Bus Terminal area within Kinondoni District contrary to regulations 13 and 16 of the Dar es Salaam City Council (Hawking and Street Trading) By-Law 1991.⁶¹ The accused was prosecuted, convicted and sentenced to three months in jail. After serving the sentence, if the accused would want to engage financial institutions for credit the latter would have difficulties in trusting him on account of the criminal record. It is advised that there should be de-criminalisation of street vending offences so that they are considered civil in nature.

Evidently, since the constitution guarantees the right to work which ensures material wealth and one's wellbeing, it is imperative that street vendors' efforts to earn a living are respected and protected in a similar manner with which the right to life is guarded. More so, on account that the state has not been able to provide work for its citizenry although obligated by the Constitution. When the street vendors create work and fend for themselves, if anything, they should be applauded and not victimised to the extent of denigrating their right to life by denying them their right to work through curtailing their means to earn a living. As the court made it clear in the case of *Baitsokoli*, 'human life is meaningless if ... it does not enjoy other socio-economic rights... For example, right to food (or to earn a living) is by *raison d'être*, a right indispensable to the right to life...The worth of human life depends upon its access to these essential commodities'.⁶²

As for the right to own property and protection of such property, evictions do affect the street vendors' constitutionally protected property rights. As rightly put by Lyons:

The evictions have involved loss of physical capital such as kiosks, loss of operating capital through fines and stock confiscations, loss of customers through relocations, loss of supply lines through increased distance to suppliers, loss of trading time through jail sentences or time taken outside the business to rebuild starting capital.⁶³

This is particularly the case where the evictions are associated with confiscation of street vendors' merchandise. Even in cases where the merchandise is not

⁶¹ Criminal Case No. 506 of 2010 (Unreported). Other cases decided under the same law include *R v Selemani Yasin* (n 56); *R v Charles Phidelis* (n 56); *R v Ramadhani Abdully*, Criminal Case No. 506 of 2010 (Unreported); *R v Selia Julian Patrick*, Criminal Case No. 572 of 2010 (Unreported); *R v Gidion John Augustino*, Criminal Case 2010; *R v Seul Joseph* Criminal Case No. 273 of 2010 (Unreported); *R v Deo Paul* (n 56); *R v. Halfan Nassoro*, Criminal Case No. 549 of 2011 (Unreported); *R v. Matatizo Sinjo*, Criminal Case No. 121 of 2010 (Unreported);

⁶² *Khathang Tema Baitsokoli and Another v Maseru City Council and Others* (n 7) at 11 and 16. Notably, Tanzania ratified the *International Covenant on Economic, Social and Cultural Rights* 1966 on 11 June 1976.

⁶³ Lyons (n 36) at 24.

confiscated, the property rights are still affected in that street vendors would not be able to earn income which is equally considered as property since they will not be allowed to vend from the places that they have been evicted from. As indicated earlier on, street vendors earn a living in places where there are adequate customers, not necessarily organised places. Eviction from places where there is a flow of customers means insufficient income thereby affecting street vendors' right to property. As such, the state, instead of facilitating one's acquisition of property, denies street vendors' right to own property and relegates its constitutional duty to protect the property acquired by this group.

Moreover, evictions of street vendors abrogate their right to be presumed innocent until proven guilty. As earlier indicated, the law governing businesses of street vendors take a penal approach in which case all evictions by law enforcers are required to consider street vendors as innocent until proved otherwise. The actual practice is that the street vendors are condemned as guilty until proven otherwise in that during evictions, street vendors' merchandise are confiscated and structures destroyed by law enforcers, before the cases are even brought to court. The 'presumption of guilty' and use of the wide powers bestowed upon the urban authorities may be exemplified by the case of *Republic v Iddi Mtegele* where the trial Magistrate released the accused who was charged with selling buns (maandazi) in disobedience of the order by an Area Commissioner who had banned the sale and/or consumption of edibles in public places in a bid to prevent the spread of cholera in the District.⁶⁴ Buns were not among the prohibited items in the order of the Area Commissioner. The Area Commissioner of Dodoma demanded explanation from the Primary Court Magistrate as to why the accused person was released and blamed the Magistrate for being biased and deliberately thwarting the efforts to stamp out cholera and threatened to take stern action against him. The Magistrate retorted immediately and informed the Area Commissioner that what he was doing was to interfere with the independence of the judiciary.⁶⁵ This case shows how urban authorities, without regard to the letter of law, may harass, arrest and 'convict' street vendors who may have not have actually breached any law. As such, actions of law enforcers abrogate street vendors' right to be presumed innocent as confiscation of goods and destruction of their vending structures should be ordered by the court and not acted upon by law enforcers during evictions. At times, as indicated earlier on, law enforcers abuse, beat and kill street vendors thereby violating their protected human rights.

Therefore, the manner in which evictions are done is highly questionable as to the observance of human rights enshrined in the Constitution. Beatings of the street vendors, confiscation of their properties without proper procedures or destruction of their properties are the order of the day in urban areas in

⁶⁴ High Court of Tanzania at Dodoma (PC), Criminal Session No. 1 of 1979 (Unreported). See also the cases of *Bizimana and eThekwini Municipality v eThekwini Municipality* (n 47) above at 13 and *Bulawayo Upcoming Traders Association v Officer Commanding Bulawayo Province* 2005 ZWBHC 65 at 9 both indicating that there is no need for a court order before eviction and confiscation of goods for a street vendor trading unlawfully meaning the street vendors who follow the flow of traffic and customers may not be protected even by the courts.

⁶⁵ See Peter, *Human Rights in Tanzania: Selected Cases and Materials* (n 20) above at 488.

Tanzania. Evidently, street vendors' recourse is derived from the Constitution which guarantees protection of their property which they are entitled to own, their right to work which all have a bearing on their livelihoods and general well-being. Street vendors can therefore take the local authorities to court by using the provisions of the Constitution rather than the laws which the local authorities use to prosecute them because as shown in the preceding parts, are not explicit on the rights of street vendors.

VI Conclusion

Tanzania is still lagging behind in respect of ensuring that the rights of the street vendors are articulated and protected by law. There are a number of complexities brought about by the existing legal framework and institutional arrangements. The existing laws are inhibitive towards street vendors thus making it hard to play a role towards reduction of poverty which is one of the aims of planning laws. The laws make preference to the orderly urban development that caters for established markets. They limit greatly the role of street vending and informal/natural markets. The laws and regulations tend not be pro-poor thus impacting much on the livelihood of the populace especially in urban areas where employment in the formal sector is a reserve for few and even shrinking.⁶⁶ As rightly pointed out by the court in *Baitsokoli*, '[i]f the State cannot within means available provide sufficient jobs to the majority of ... people thereby reducing the poverty levels, adequate opportunities and infrastructure must at least be availed to these people for them to eke out a living'.⁶⁷

As is the case elsewhere in the world, the laws governing street vending in Tanzania restrict businesses of street vendors particularly their access to land from where they can vend from.⁶⁸ Deriving the authority from the Local Governments (Urban Authorities) Act 1982, LGAs inhibit street-vending by imposition of the requirement of permits and licences; prohibitions against conducting business activities in areas not designated for that purpose and proscribing interferences with passage rights of vehicles and persons on the roadsides and streets within their respective areas of jurisdiction.⁶⁹

⁶⁶ Meru, 'The role of VET in national development' (paper presented at the IVETA Annual Conference on Improving VET System, Montego Bay, Jamaica W.I., 31 July –2 August 2001) at 4. See also C Gaya, 'Pension matters: why extension of social security coverage to be excluded' *Business Times* 23 November 2012, available at: <<http://www.businesstimes.co.tz>> (accessed on 7 October 2013).

⁶⁷ *Khathang Tema Baitsokoli and Another v Maseru City Council and Others* (n 7) above at 24.

⁶⁸ For examples of the plight of street of street vendors elsewhere, see Mackie, Swanson and Goode, 'Revanchist urbanism, informal trading and the limits of a post-revanchist turn in Latin America' (paper presented at the Expert Seminar on Making Space for the Poor: Law, Rights and Regulation for Street Trade in the 21st Century, Cardiff University, Wales UK, 20 – 22 June 2013) and Mahadevia and Vyas, 'Claiming Urban Space through Judicial Activism – Street Vendors of Ahmedabad' (paper presented at the Expert Seminar on Making Space for the Poor: Law, Rights and Regulation for Street Trade in the 21st Century, Cardiff University, Wales UK, 20 – 22 June 2013).

⁶⁹ Examples of such by-laws from Dar es Salaam City include Ilala Municipal Council (Market Levies) By-laws, GN No.107, 2011; Ilala Municipal Council (Road Use) By-laws, GN No.108 of 2011; Ilala Municipal Council (Environmental Cleanliness) By-laws GN No. 111, 2011; Temeke Municipal (Road Usage/Traffic Control) By-Laws, GN 311, 2010; Temeke Municipal (Environmental Pollution Control) By-laws, GN 310, 2010; Temeke Municipal (Markets Levies) By-laws, GN 309, 2010; Kinondoni Municipal Council (Waste Management and Refuse Collection Fees) By-laws 2000; Kinondoni Municipal Council

The limitations which street vendors face in Tanzania may be compounded by the fact that Tanzania does not have a single unified legal framework that directly addresses the issue of street vendors, as evidenced by three municipalities in Dar es Salaam City, each having a different set of laws affecting street vending. Considering the situation of street vendors in the country, it means each of about 156 local authorities out of 25 regions have a different set of laws to govern street vending thereby subjecting street vendors to different kinds of treatment depending on their location. The problem is even compounded by the fact that there is no national street vending policy to inform the local authorities on the national direction on street vending which causes differential treatment of street vendors from one place to another. Thus, lack of policy on street vendors and the impact of the existing legal framework on street vendors defy the provisions of the Constitution which protect the right to work, the right to own property and guarantees the protection of such property. Differences in laws governing street vending that exist between one municipality and another subject street vendors to different treatment which should not be the case since all the laws derive their legitimacy from the Constitution which guarantees equal treatment to all people in Tanzania.

Another challenge that the by-laws pose on the street vendors is that they have all taken a penal approach in which street vending is considered a criminal offence. They regard such activities as nuisance and against the orderly management of the municipalities. This affects street vendors whose conviction of an offence amounts to a criminal record, thereby limiting their credibility for any future credit advancements in the event criminal record is one of the aspects that the lender looks at.

Further, the law shows that the right to occupation and access to land is more theoretical than practical. While the Land Act 1999 advocates for the importance of giving right to access land to all citizens, municipal regulations provide to the contrary; access to land is inhibited by permits and licences required for any person to use land thereby limiting street vendors' ability to acquire the permits and licences to access and use land.

Also, there is no legal provision which articulates on how street vendors can access justice like in respect of claiming their right to have access to land. The only avenue is through a constitutional petition where street vendors can claim enforcement of their rights. The laws do not give space rights to street vendors. For instance, the Highways Act does prohibit doing business on the road reserves or raising any structures on the sidewalk. No exception is provided for street vendors. The laws do not compel urban authorities to accommodate street vendors in their plans. As a result street vendors find themselves in informal areas and their businesses end up being considered illegal.

Therefore, the law does not accommodate the global phenomenon that street vendors play an important role in the economy and that in cities and towns throughout the world millions of people earn their living by selling a wide

(Environmental Management) By-laws 2002; and Kinondoni Municipal Council (Fees and Charges) By-laws 2004.

range of goods and services on streets. Evidently, the aversive legislation does not support poverty reduction thereby affecting the realisation of Vision 2025 and MDG No. 1 in Tanzania as it negatively affects the activities of street vendors in disregard of their potential in reducing poverty at an individual and sectoral level.⁷⁰ The High Court of Lesotho puts this more succinctly:

... the concerns of the street vendors must seriously be addressed with the empathy they deserve. Most of these people are poor and their street vending may be their only means towards a meaningful livelihood. Just like a supermarket located way out in the wilderness may liquidate and perish, so will these hawkers languish if no suitable structures are put in place at convenient places in town for their and public's convenience. Confrontational and forcible tactics are nothing but a recipe for a worse disaster.⁷¹

⁷⁰ Economic and Social Research Foundation, *'Trade, Development and Poverty in Tanzania: When does trade reduce poverty, when doesn't it and why? Key Messages on Trade and Poverty Linkages in Tanzania'* (2006 Economic and Social Research Foundation and Consumer Unit Trust Society) at 20, available at <<http://www.cuts-citee.org>> accessed on 9 October 2013. See also MKURABITA Property Formalization Reform Outlines and Packages for Tanzania Mainland. (Vol. II 2008 Property and Business Formalization Programme Reform Proposals) and MKURABITA Business Formalization Outlines and Packages for Tanzania Mainland. (Vol. IV 2008 Property and Business Formalization Programme Reform Proposals).

⁷¹ *Khathang Tema Baitsokoli and Another v Maseru City Council and Others* (n 7) above at 23.

COMMUNAL LAND TENURE AFTER 20 YEARS OF DEMOCRACY IN SOUTH AFRICA¹

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ABSTRACT

Twenty years have passed since the Bantustans were reintegrated into South Africa. Yet for the 17 million people still living in these former homelands, the struggle for full recognition of their land rights persists. The post-1994 government refers to the former homelands as ‘communal areas’, where ‘communal tenure’ is at play. This paper focuses on ‘communal tenure’ reform developments (or lack thereof) with reference to law, policy and practice in rural areas in South Africa.

While laws to promote tenure security for farm dwellers and labour tenants have been enacted, there is no legislation beyond the Interim Protection of Informal Land Rights Act (IPILRA) to secure the land rights of people living in the former Bantustans. Despite the post-1994 constitutional requirement that the state make secure the land tenure of people in all of South Africa, it has so far failed to do so. This legislative ‘vacuum’ has contributed to the precarious nature of people’s land rights in the former homelands.

This paper argues that communal land tenure is not in a healthy state and discusses recent laws and policies that are symptoms of this ill health, including the ‘willing buyer-willing seller’ policy, the Communal Land Rights Act, the Traditional Leadership and Governance Framework Act and the government’s recent new communal land tenure policy. Taking cognisance of the interface between customary and ‘informal land rights’, and South Africa’s legal systems of property recognition, the paper explores the historical roots of the insecurity of land tenure with which millions of South Africans struggle. Finally, the paper diagnoses some of the root causes of the failures of communal land tenure reform and posits some alternative solutions.

Keywords: Homelands, communal areas, right to security of land tenure, land tenure reform

I Introduction

In 1994, the Bantustan system was abolished in South Africa. Yet for the 17 million people still living in these former homelands, the struggle for full recognition of their land rights persists. The post-1994 government refers to the former homelands as ‘communal areas’.² For the majority of people living in these areas, their rights to land are uncertain and vulnerable.

The right to security of land tenure – that is, the legal and practical ability to defend one’s ownership, occupation, use of and access to land from interference by others – is enshrined in s 25(6) of the Constitution. The

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¹ A different version of this article entitled, ‘The contested status of “communal land tenure” in South Africa’ appeared in a publication for popular reading produced by the Programme for Poverty, Land and Agrarian Studies at the University of the Western Cape.

² Department of Rural Development and Land Reform, ‘Communal Land Tenure Policy’ (published online 8 September 2014), available at <<http://www.dla.gov.za/publications/land-tenure-summit-2014/file/2882-communal-land-tenure-policy-framework>>.

Constitution further prescribes that the government should enact a law to provide for the realisation of the right to security of tenure in s 25(9). Land tenure reform is one of the three main areas of the government's land reform programme – the other two are land redistribution (related to s 25(2), (3) and (4)) and restitution (s 25(7)).

While laws to promote tenure security for farm dwellers and labour tenants have been enacted, there is no legislation beyond the Interim Protection of Informal Land Rights Act (IPILRA) to secure the land rights of people living in the former Bantustans. IPILRA was introduced in 1996 as a temporary solution that would protect people living in the former homelands from being deprived of their land rights. Despite the post-1994 constitutional requirement that the state make secure the land tenure of people in all of South Africa, it has so far failed to do so. This legislative 'vacuum' has contributed to the precarious nature of people's land rights in 'communal areas'. The 'state' or 'government' is referred to throughout this article with the awareness that it is not homogenous but made up of different and sometimes contradictory actors.³

Communal land tenure is a heavily contested term. It was employed by the colonial and apartheid governments in a crude way to describe African customary land tenure systems as 'group-based', in opposition to individual property ownership in Europe. To reclaim the term 'communal land tenure', it is necessarily to recognise that it is not a single system that can be legislated and centrally controlled. The term carries greater clarity when used to describe a variety of local, regionally specific land tenure practices that maintain common characteristics, which set them apart from individual, private property.⁴ Communal tenure practices are also common in but not limited to the former Bantustans.

This article focuses on communal tenure reform developments (or lack thereof) with reference to law, policy and practice in rural areas in South Africa. It shows that communal land tenure is not in a healthy state. It discusses recent laws and policies that are symptoms of this ill health, including the Communal Land Rights Act (struck down by the Constitutional Court), the Traditional Leadership & Governance Framework Act (passed in 2003), and the Communal Land Tenure 'wagon wheel' policy (in place since 2013). The article explores the historical roots of the insecurity of tenure millions of South Africans struggle with, diagnoses some of the root causes of the failures of communal land tenure reform and posits some alternatives that might provide the remedies required.

³ Cooper, *Colonialism in Question: Theory, Knowledge, History* (University of California Press 2005); Berry, 'Hegemony on a Shoestring: Indirect Rule and Access to Agricultural Land' (1992) 62(3) *Africa: Journal of the International African Institute* 327-355.

⁴ Cousins, 'Characterising "communal" tenure: nested systems and flexible boundaries' in Claassens & Cousins (eds), *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (Juta 2008) 109-137.

II Contestations over communal land tenure

In order to ground contemporary interpretations of communal land tenure, it is helpful to document its historical baggage. Colonial administrators had a distorted perception of communal land tenure, believing it to involve a system of collective land ownership at the expense of any individual interest.⁵ This understanding relied on ‘communitarian principles of indigenous African landholding, codified in a way that allowed indirect rule by the state’.⁶ Colonial administrators also interpreted the land to vest solely in a chief as the representative of the ‘collective’.⁷

The former Bantustans or homelands refer to the ten areas of land designated by the apartheid government in the 1950s as separate ‘ethnic’ zones where black people would live. Scholars William Beinart, Anne Mager and Ivan Evans have noted that the key idea behind the Bantustans was that black people would be citizens of ‘ethnic’ and ‘self-governing’ homelands rather than of South Africa itself.⁸ In addition, while being separate from South Africa, the apartheid government sought to keep black people close enough to serve as a source of cheap labour for whites.⁹

With the creation of the Bantustans, the apartheid government entrenched the link between communal land tenure and notions of tribal identity. Historians have argued that people practiced a wide variety of tenure arrangements in the areas designated as Bantustans.¹⁰ However, the apartheid government attempted to shut down these forms of tenure (for example by outlawing individual property ownership), arguing that they would erode ‘communal land tenure’ – that is, the government’s version thereof.¹¹ As the government’s White Paper on the Tomlinson Report argued in 1956: ‘individual tenure would undermine the whole tribal structure. The entire order and cohesion of the tribe...is bound up with the fact that the community is a communal unit...’¹² This misreading of communal tenure systems and its link to ‘tribes’ has continued to confuse discussions around communal land tenure laws and policies in South Africa in the present.

⁵ Cross, ‘Landholding Systems in African Rural Areas’ in De Klerk (ed), *A Harvest of Discontent: The Land Question in South Africa* (IDASA 1991) 63-97.

⁶ Cross (n 5) at 77.

⁷ Bennett, *Customary Law in South Africa* (Juta 2004).

⁸ Cf Beinart, *Twentieth-Century South Africa* (Oxford University Press 2001); Evans, *Bureaucracy and Race: Native Administration in South Africa* (University of California Press 1997); Mager, *Gender and the Making of a South African Bantustan: A Social History of the Ciskei, 1945-1959* (Heinemann 1991).

⁹ Legassick and Wolpe, ‘The Bantustans and Capital Accumulation in South Africa’ (1976) 7 *Review of African Political Economy* 87-107.

¹⁰ Cousins (n 4); Kingwill, ‘Custom-building freehold title: the impact of family values on historical ownership in the Eastern Cape’ in Claassens and Cousins (n 4) at 184-208.

¹¹ Evans (n 8).

¹² Quoted by Evans (n 8) at 187.

Recent scholarship argues that communal tenure systems have historically encompassed a variety of forms, and continue to do so today.¹³ As Kingwill notes, communal tenure defies ‘any neat division between collectivism and individualism’.¹⁴ The paragraphs that follow describe some of these characteristics, particularly in relation to how they differ from the private property model accounted for in the common law of South Africa.¹⁵ They also allude to the variety of communal land tenure arrangements across time and place.

Cousins describes land rights in communal tenure as ‘socially embedded’ and inclusive, meaning that individuals and families hold rights relative to the same residential and agricultural land. These individuals and families would also negotiate access, relative to other individuals and families, to ‘common property resources such as grazing, forests and water’.¹⁶ For example when people in Kalkfontein purchased land in the 1920s, they set up *dikgotla* (committees) made up of experienced men to negotiate the interests of individuals in relation to the wider group. As a result of pressure from within Kalkfontein, over time women also became part of the *dikgotla* that make decisions about land, meaning that women’s claims on land were also being weighed up in relation to men and other women’s interests.¹⁷ This is unlike private property rights in South African common law, which tends to involve – in law although often not in practice – a surveyed parcel of land and a person who holds an exclusive title deed to that parcel.

Perhaps one way to describe the ‘socially embedded’ nature of communal tenure arrangements is to conceptualise them as ‘bundles of rights’. The sticks in the bundles represent objects of value (such as land, houses or cattle), with respect to which stakeholders (such as individuals, groups or parts of groups, states etc) have rights and responsibilities in relation to other stakeholders.¹⁸ Another way to theorise about communal tenure involves thinking of people in terms of social units (instead of collectives and individuals) and property in terms of spatial units (instead of objects in a bundle).¹⁹ Based on a study of black freeholders in the Eastern Cape, South Africa, Kingwill argues that thinking of these units helps us see the socially-based nature of property rights

¹³ Cf. Berry, ‘Negotiable property: making claims on land and history in Asante, 1896-1996’ in Bond and Gibson (eds), *Contested Terrains and Constructed Categories: Contemporary Africa in Focus* (Westview Press 2002) 213-232; Claassens and Gilfillan, ‘The Kalkfontein land purchases: eighty years on and still struggling for ownership’ in Claassens and Cousins (n 4) at 295-314; Cousins (n 4); Lund, ‘Negotiating Property Institutions: On the Symbiosis of Property and Authority in Africa’ in Juul and Lund (eds), *Negotiating Property in Africa* (Heinemann 2002) 11-43; Peters, ‘The Limits of Negotiability: Security, Equity and Class Formation in Africa’s Land Systems’ in Juul and Lund (eds), *Negotiating Property in Africa* (Heinemann 2002) 45-66.

¹⁴ Kingwill, ‘The Map is Not the Territory: Law and Custom in “African Freehold”: A South African Case Study (unpublished PhD thesis, University of the Western Cape, 2013) at 30.

¹⁵ South African property law is a hybrid body of law, drawing on the Constitution, statute and common law. South African common law includes elements of Roman-Dutch law as well as the legal rules and practices developed by South African courts over the years.

¹⁶ Cousins (n 4) at 129.

¹⁷ Claassens and Gilfillan (n 13).

¹⁸ Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Wiber, ‘The Properties of Property’ in Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Wiber (eds), *Changing Properties of Property* (Berghahn Books 2006) 1-39.

¹⁹ Kingwill (n 14).

and to assess the power dynamics they involve. She notes that, 'within the families, rights depend on status informed by norms of affiliation and socially constructed identities such as gender, age and place of origin etc'.²⁰ Quoting Berry, she points out that while women or younger people, for example, are not excluded from access to land, their status means that 'their rights are open to negotiation and their ability to influence the outcomes of such negotiations may be compromised by their subordinate status'.²¹

In addition, whereas the rules as to who can make decisions about the use, transfer or disposal of private property tends to be regulated by statute, under communal tenure these decisions are made at various levels of a community. Although the colonial and apartheid governments tried to concentrate decision-making power over land in a traditional leader, in practice administration of communal land is 'nested' or 'layered' in nature.²² This means that people and groups who are consulted in decisions about land include individuals, families or households, kinship networks and wider communities. For example Schapera describes the Tswana system as 'one of ever-widening jurisdiction extending upwards from the household'.²³ He describes how a man intending to acquire land would first ask his father for permission to use family land, then if that land was unavailable he would ask his neighbour for nearby land, and if that did not work he would consult the headmen for other land in the vicinity. In other communal tenure situations, headmen and chiefs play a greater role in decisions about land. For instance in parts of KwaZulu-Natal traditional leaders ratify land allocations which had been decided upon at other levels of the group or community.²⁴ However, even in this situation chiefs are by no means the only people who made decisions about land.

The examples from work by Claassens and Gilfillan on Kalkfontein, as well as Alcock and Hornby on KwaZulu-Natal, show that communal land tenure is not as narrow as colonial and apartheid administrators espoused. Communal tenure practices sometimes involved purchases, or rights to land at the level of individuals and not just a 'collective', or involved decisions at the level of various social units, not just that of the chief. While communal tenure arrangements vary to the extent that a rigid set of rules would do them an injustice, they contain enough commonalities to establish a legal framework. Such a framework would need to formally recognise the rights that people hold under communal tenure arrangements while remaining flexible enough to accommodate a variety of local communal tenure practices. A legal framework for communal tenure would need to draw on living customary law, since *de facto* communal tenure arrangements are informed in large part by living customary law.

Living customary law is different from official customary law, which, in relation to communal land tenure, was 'produced out of colonial

²⁰ Kingwill (n 14) at 71.

²¹ Kingwill (n 14) quoting Berry at 33.

²² Cousins (n 4) at 125.

²³ Cousins (n 4) at 123.

²⁴ Alcock and Hornby, 'Traditional land matters: a look into land administration in tribal areas in KwaZulu-Natal' (2004) Occasional Paper for the Legal Entity Assessment Project (LEAP).

misunderstandings and politically expedient appropriations and allocations of land'.²⁵ One of the prevailing tendencies of colonial administrators was to interpret customary land law through the lens of common law from their own countries. Their use of the concept of 'ownership' played a pivotal role in the distortion of customary land systems.²⁶ The concept denoted the absolute concentration of interests in land in a single holder. Since they could not identify 'ownership' of this form in customary land tenure systems, colonial administrators declared 'ownership' foreign to customary law. Hence the notion of customary land tenure as 'collective' in nature or as a form of 'trust' law evolved (in which a chief held land in trust for a tribe).²⁷

However, some prominent scholars on customary land issues argue that living customary tenure systems are hybrid bodies of law, rules and practice.²⁸ They draw on various repertoires about land rights that are relational and contextual in character but subject to the ebbs and flows of power.²⁹ In Rabula in the Eastern Cape for instance, titling became part of living customary law as black landowners adapted 'titling to their particular needs and continued to apply norms and practices based on customary principles of property management'.³⁰ It is these sorts of shifting practices that have informed the variety of communal tenure arrangements in South Africa.

While 'communal land tenure' carries with it a great deal of historical baggage, the recognition of the land rights of millions of South Africans living in the former homelands depends upon an attempt to reclaim it – and in the process, to acknowledge the many, complex arrangements of rights in land existing in practice that make up communal land tenure.

III Land laws and policies under white rule

A series of measures implemented under colonialism and apartheid have shaped today's communal tenure regime. As mentioned above, the Dutch and British colonial governments, in asserting constructs of exclusive ownership, did not recognise indigenous systems of land as property rights. Through the recognition of ownership rights at the expense of local or customary land rights, colonial regimes justified categorising vast areas of African-held land as 'Crown Land' (land owned by the British Crown).

The 1913 Land Act was one of a series of laws that dispossessed black people of their land and rendered their rights to land insecure. One of the Act's intentions was to further side-line the African farming class and to force black people into becoming labourers in the cities or on the mines.³¹ In addition, the

²⁵ Peters, 'Beyond Embeddedness: a Challenge by a Comparison of the Struggles Over Land in African and Post-socialist Countries' in Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Wiber (eds), *Changing Properties of Property* (Berghahn Books 2006), quoting Colson at 85.

²⁶ Bennett (n 7).

²⁷ Bennett (n 7).

²⁸ Cf Lund (n 13); Peters (n 13).

²⁹ Peters (n 13); Cousins and Hall, 'Rural land tenure: the potential and limits of rights-based approaches' in Langford, Cousins, Dugard and Madlingozi (eds), *Socio-Economic Rights in South Africa, Symbols or Substance?* (Cambridge University Press 2014) 157-186.

³⁰ Kingwill (n 10) at 185.

³¹ Bundy, *The Rise and Fall of the South African Peasantry* (University of California Press 1979).

1927 Native Administration Act codified African customary law in a distorted way. This version of customary law gave traditional leaders powers over land they had not historically enjoyed, while simultaneously downplaying the usage, occupation and inheritance rights of most people within indigenous systems of land rights.³²

The 1936 Native Trusts and Land Act consolidated the African reserves slightly (from 7 percent to 13 percent of the country), making available certain areas of ‘Trust’ land alongside the existing reserves as ‘resettlement areas’ for black people who the government planned to remove from ‘white’ land.³³ African occupation of Trust land was conditional on the payment of yearly fees or rents, with the ownership of the land vesting in the South African Native Trust (SANT).

The 1936 Act also established the ‘six native rule’, which again distorted indigenous tenure systems in favour of an autocratic model that was easier for the state to control.³⁴ According to the rule, any group of more than six black people who had cooperated to purchase land had to constitute themselves as a tribe under a chief or they would lose their land. This was to pre-empt syndicates made up of black land purchasers from constituting themselves democratically. The ‘six native rule’ was rooted in the prevailing colonial assumption that all blacks were tribal subjects as opposed to active citizens, able to create their own identities and choose the legal arrangements that suited them.

The history of land purchasers who identified as ‘Bafokeng’ in the north of the country (today’s North West province) illustrates how chiefs and their advisors came to be seen as the sole ‘representatives’ of ‘tribes’ – even before the 1936 Act was passed. In a court case in 1906 (*Hermansberg Missionary Society v Commissioner of Native Affairs and Daniel Mogale* 1906 TS 135), Judge Innes determined that in order for a purchaser to buy land from a tribe, they must receive the tribe’s consent.³⁵ But he defined ‘consent’ as the chief’s agreement in consultation with his councillors – this despite a Bafokeng chief testifying that the entire *pitso* (gathering of all the married men in the tribe) should be consulted to give ‘consent’. In the cases that followed, groups identifying as part of the Bafokeng contested their right to hold land as groups separate from the chief. However, the judges in these cases found that a ‘section of a tribe’ could not hold land apart from the Bafokeng ‘tribe’ yet still identify as ‘Bafokeng’.³⁶

The apartheid period saw the onset of more extreme congestion on the land. During the 1960s the government enforced the Betterment Programme under the pretext of combating congestion, poverty, soil erosion and over-

³² Delius, ‘Contested terrain: land rights and chiefly power in historical perspective’ in Claassens and Cousins (n 4) at 211-237.

³³ Mager (n 8).

³⁴ Claassens, ‘Denying Ownership and Equal Citizenship: Continuities in the State’s Use of Law and “Custom”, 1913–2013’ (2014) 4 (40) *Journal of Southern African Studies* 761-779.

³⁵ Eberhard, ‘Case law on the question of customary law decision-making with regard to communally-held land’ (2014) Memorandum prepared for the Centre for Law and Society on file with the author.

³⁶ Eberhard (n 35).

stocking, and improving agricultural production.³⁷ But Betterment policies had little effect on reducing poverty, congestion and landlessness in the reserves (if that ever was the intention); if anything, they accelerated the process. Furthermore, Proclamation R188 of 1969 introduced 'Permission to Occupy' (PTO) certificates to be issued to black people. However, these certificates, like other land categories available to black people, made their land rights conditional and precarious.³⁸ The material conditions of life in the homelands, combined with rigid state land laws imposed on black people, made it increasingly difficult for people to survive off the land. A main feature of these laws and policies was that they prohibited black people from holding and managing land in a way that put them on an equal footing with white landowners.³⁹

At the same time that the apartheid government dispossessed black people of their land and forcibly removed them to rural homelands, they imposed on them a particular system of chiefs and tribal authorities. The apartheid government believed that chiefs were the sole African decision-makers in respect of 'communal' land. This version of power over land undermined customary practices that recognised the entitlements vesting in ordinary people and the role of groups in vetting and approving applications for land – in other words, the many bundles of rights or relationships inside and between social units that characterise communal tenure.⁴⁰ Apartheid's legal, military and economic apparatus helped chiefs protect their positions by suppressing structures that threatened their power, including social movements and organisations.⁴¹

In the context of severe land shortages and insecure land rights, women were increasingly excluded from access to land. Unwilling to recognise the reality of unequal distribution of land between blacks and whites as a problem of its own making, the state aimed to address land scarcity and congestion by excluding women from access to land in the reserves, on the basis of a distorted version of customary law.⁴² Magistrates and Bantu Affairs Commissioners increasingly told complainants that women could not inherit or manage land in their own right because it was not 'customary' to do so. Instead they said that the head of a household, who they believed was always a man, would make decisions about land for the benefit of the family.⁴³ In this way, officials used the notion of 'communal' and 'customary' tenure to justify the exercise of state power over black people, as well as discrimination against women.

³⁷ De Wet, *Moving Together, Drifting Apart: Betterment Planning and Villagisation in a South African Homeland* (Witwatersrand University Press 1995).

³⁸ Okoth-Ogendo, 'The nature of land rights under indigenous law in Africa' in Claassens and Cousins (n 4) at 95-108.

³⁹ Okoth-Ogendo (n 38).

⁴⁰ Delius (n 32).

⁴¹ Ntsebeza, 'Chiefs and the ANC in South Africa: the reconstruction of tradition?' Claassens and Cousins (n 4) at 238-261.

⁴² Weinberg, 'Contesting customary law in the Eastern Cape: gender, place and land tenure' in Claassens and Smythe (eds), *Marriage, Land and Custom: Essays on Law & Social Change in South Africa* (Juta 2013) 100-117.

⁴³ Weinberg (n 42).

Although Africans interacted with and resisted the legal institutions imposed on them as well as the discourses informing these institutions, a situation of conditional land tenure nevertheless became the norm for black South Africans under apartheid.⁴⁴ When it came to power in 1994, South Africa's first democratic government inherited this legacy.

IV What's at stake with communal tenure legislation?

The former Bantustans – where the government understands 'communal tenure' to be the norm – are home to an estimated 17 million people. As a result the government's failure to carry out widespread tenure reform in these areas affects about a third of South Africa's population. Since 59% of those living in the former homelands are women, they are particularly affected by uncertainty around 'communal tenure' arrangements.

During the negotiations for a democratic South Africa in the 1990s, there was much debate about the extent to which the existing property regime should be protected, since it was skewed in favour of existing (mostly white) landowners. A compromise was reached in terms of which the Constitution would protect property rights, but this would be balanced by measures intended to redress racial imbalances – specifically in the form of restitution and redistribution of land, as well as land tenure reform in the country as a whole. Sections 25(6) and (9) of the Constitution are particularly relevant (although not limited) to the 17 million people living in the former Bantustans. Those sections require the enactment of legislation to secure the tenure rights of people who are insecure because of past racial discrimination.

Constitution, Chapter 2 – Bill of Rights

Section 25(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(9) Parliament must enact the legislation referred to in subsection (6).⁴⁵

If the government does not develop legislation to secure the rights of millions of people living in the former Bantustans, it risks renegeing on the constitutional requirement in section 25(6) and could be found wanting if challenged in court. Beyond breaking a promise preserved in the Constitution, it will also rub salt into the wounds of people nursing the economic and psychological injuries of over 100 years of dispossession.

It has become evident that valuable natural resources are present in the former Bantustans. This is particularly the case along the 'platinum belt' in the North West province. In this region people have been locked in battles with traditional leaders like Nyalala Pilane of the Bakgatla ba Kgafela, who has entered into lucrative deals with mining companies apparently on behalf

⁴⁴ Cross (n 5).

⁴⁵ Constitution of the Republic of South Africa, 1996.

of the tribe. In the process many other people who identify as Bakgatla ba Kgafela have been excluded from the wealth Pilane has accrued.⁴⁶

V Land laws and policies post-1994

(a) The Mandela government (1994-1999)

In order to realise the right to security of tenure, South Africa's first democratic government needed to pay attention to the historical baggage accumulated by the communal land tenure model, strengthen land rights in law and practice, and move towards the fulfilment of the population's basic needs.⁴⁷

Under the first Minister of Land Affairs, Derek Hanekom, the strategy was to consult widely and incorporate many of the suggestions put forward by people in rural areas. Bearing in mind the role of the apartheid government in dispossessing black people of their land, policy-makers in the Department of Land Affairs saw an urgent need to secure the land rights of black South Africans against powerful actors, including the state.⁴⁸ This led to the enactment of the Interim Protection of Informal Land Rights Act (IPILRA) in 1996 and development of the Land Rights Bill (LRB) in 1999.

Informal rights to land are defined broadly, and include those who use, occupy or access land in terms of: Customary laws and practices; Beneficial Occupation; Land vested in the South African Development Trust, or a so-called self-governing territory, or the governments of the former Bantustans, or any other kind of trust established by statute. IPILRA also covers any person who is the holder of a right in land in terms of the Upgrading of Land Tenure Rights Act but who was not formally recorded as such in the register of land rights.⁴⁹

IPILRA remains a crucial law that can be used to protect people against deprivation of their informal rights to land, except under very exceptional circumstances. But IPILRA was only intended as temporary legislation that would provide a safety net to people who did not have land titles.⁵⁰ What is truly needed is tenure reform legislation that will legally recognise informal land rights held according to 'living' land tenure practices, so that they are on an equal footing with individual property titles.⁵¹ Simultaneously, this legislation must take account of and allow for enquiries into the contestations (claims and counter-claims) and inequality of power relations involved in the determination of 'living' land law.⁵²

The LRB moved to create relative 'protected rights' vesting in individuals who use, occupy and have access to land. Protected rights would be secured by statute, making them enforceable immediately, even before the complex processes entailed in enquiring into, and resolving cases of overlapping

⁴⁶ Matlala, 'There is nothing "pioneering" about Pilane's development model', accessed on 28 February 2014, at <<http://www.customcontested.co.za/nothing-pioneering-pilanes-development-model/>>.

⁴⁷ Cousins (n 4).

⁴⁸ Cousins and Hall (n 29).

⁴⁹ The draft Land Rights Bill (3 June 1999), on file with author.

⁵⁰ Claassens, 'South African proposals for tenure reform: the draft Land Rights bill' in Toulmin and Quan (eds), *Evolving Land Rights, Policy and Tenure in Africa* (Taylor & Francis Ltd 2000) 247-266.

⁵¹ Okoth-Ogendo (n 38).

⁵² Claassens (n 50).

and disputed rights on a case-by-case basis was completed. Minister Thoko Didiza withdrew the LRB when she took office, on the basis that it was too complicated and costly to implement.⁵³

(b) The Mbeki and Zuma governments (1999-2014)

Five main issues have characterised most land laws and policies since 1999: the government's failure to introduce a law to secure the rights of people living in the former homelands; the extension of traditional leaders' power over land; a lack of support for land reform beneficiaries, including Communal Property Associations and an attitude of paternalism towards people in rural areas, encompassing the exclusion of people with limited resources in particular from the ability to make decisions about land matters.

(i) *Failure to secure the land rights of people living in the former homelands*

Over the last decade, power over land has been removed further from the hands of people in rural areas, and placed in the hands of elites. An example is the Mala Mala restitution claim, where the landowners received nearly R1 billion (around a third of the total annual budget for land reform) from the state in compensation for their land.⁵⁴ Ashton argues that the state has paid landowners inflated prices for their land, in a context in which the state is empowered by the Constitution to compensate owners at below the market rate.⁵⁵ Lahiff and Ntsebeza have argued that this policy has made obtaining land for restitution prohibitively expensive.⁵⁶ Lahiff argues that since the majority of landowners of commercial farms in South Africa are still white, the 'willing buyer, willing seller' policy has failed to adequately tackle the structural causes of racial inequality in landholding.⁵⁷ The high sums paid to landowners have also reinforced a hierarchy of land tenure systems, with private property at the apex as the most powerful and most valuable.

Michael Aliber argues that analysts have overstated the role played by 'willing buyer, willing seller' in the failure of land reform.⁵⁸ He argues that the biggest problem with South Africa's land reform program is how it approaches compensation of landowners, not the pace at which it works. While a slow pace is difficult to remedy, compensation might be easier to tackle. He suggests that the state expropriate in the case of restitution but stick with 'willing buyer, willing seller' in the case of redistribution as the state is able to shop around

⁵³ Claassens (n 50).

⁵⁴ Ashton, 'South Africa: Restoring land and livelihoods' available at <<http://sacsis.org.za/site/article/1910>>, accessed on 28 February 2014.

⁵⁵ Ashton (n 54).

⁵⁶ Lahiff, 'Willing buyer, willing seller: SA's failed experiment in market led agrarian reform' (2007) 28(8) *Third World Quarterly* 1577-1597; Ntsebeza, 'Land Redistribution in South Africa: The Property Clause Revisited' in Ntsebeza and Hall (eds) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (HSRC Press 2007) chapter 5.

⁵⁷ Lahiff (n 56).

⁵⁸ Aliber, 'Unravelling the Willing Buyer, Willing Seller Question' in Cousins and Walker (eds), *Land Divided, Land Restored: Land Reform in South Africa for the 21st Century* (PLAAS 2015).

for better prices.⁵⁹ However, he does not explain exactly how this will address the structural racial inequalities in landholdings that persist today.

As well as treading carefully with commercial farmers, the government has put in place land policies and laws that serve the interests of traditional leaders (in the belief they can secure the rural vote). The problem is not that these laws recognise the institution of traditional leadership but that they condone traditional leaders' abuses of power. This was most clearly evident in the Communal Land Rights Act (CLRA), enacted just before the general elections in 2004. Many rural people argued that the CLRA would have undermined their security of land tenure because it gave traditional leaders and councils wide-ranging powers, including control over the occupation, use and administration of communal land.

The CLRA reinvigorated the combination of economic and political subjugation that existed under apartheid's Bantustan system. It was also very convenient for mining companies who could negotiate with a single individual to acquire land, and avoid the 'messy' and complex process of negotiating with all the component parts of a community. The Department of Land Affairs (as DRDLR was then known) said that chiefs would make decisions on behalf of people because it would be 'customary' for them to do – even though the historical evidence disputes this.⁶⁰

In 2010, the Constitutional Court struck down the CLRA. The Court found the Act unconstitutional on the technical ground that Parliament had followed an incorrect process in terms of the Constitution. Although the Court avoided the substantive issues raised by the applicants about traditional leaders' land powers, the discussion generated as a result of the case made it clear that many people in rural areas were against traditional leaders holding absolute power over the land on which they lived.⁶¹ For example, in affidavit in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*, Stephen Tongoane from Kalkfontein argued that people in his area wished to manage their land independently of the traditional council in their jurisdiction, as that council was derived from a tribal authority imposed on them under apartheid.⁶²

While the CLRA no longer exists, other laws that vest power in traditional leaders pose threats (and in the case of bills, future threats) to rural peoples' security of tenure. The Traditional Leadership and Governance Framework Act (TLGFA) entrenches the boundaries of the tribal authorities established under the Bantu Authorities Act of 1951. Laws like the TLGFA and the Traditional Courts Bill (TCB) marginalise women's voices, shifting the balance of power more towards male household heads and traditional leaders.⁶³ This situation affects single women the most, particularly those without male family members, who have little status in the eyes of some

⁵⁹ Aliber (n 58) at 15.

⁶⁰ Delius (n 32).

⁶¹ Cousins and Hall (n 29).

⁶² Claassens and Gilfillan (n 13) at 296.

⁶³ Thipe, 'Defining Boundaries: Gender and Property Rights in South Africa's Traditional Courts Bill' (2013) 2(4) *Laws* 483-511.

traditional leaders and structures.⁶⁴ The traditional leadership laws, like the CLRA, attempt to foreclose the ability of groups in the former homelands to constitute themselves independently of traditional authorities.

The DRDLR introduced several new proposals in 2013 and 2014, which will have an impact on the communal tenure situation in South Africa. These include policies on communal land tenure itself, land redistribution, state land leasing, recapitalisation and development, as well as laws like the Spatial Planning and Land Use Management Act and the Restitution of Land Rights Amendment Act. The new laws and policies reflect almost none of the suggestions put forward during the various consultation meetings and working groups often referred to by the DRDLR. In addition they often contradict each other, take little account of past mistakes and have the potential to undermine rural peoples' security of tenure.

(ii) *Expanded power for traditional leaders and traditional councils over land.*

The new Communal Land Tenure Policy (CLTP) (also known as the 'wagon wheel' policy, published 8 September 2014), like the CLRA, proposes to transfer the 'outer boundaries' of 'tribal' land in the former Bantustans to 'traditional councils'. The CLTP suggests that title deeds will be transferred to other entities like Communal Property Associations only in communal areas where traditional councils do not exist. Traditional councils will be title holders in 'conventional traditional communal areas' while CPIs will exist only in 'non-traditional communal areas'.⁶⁵

The policy envisages that 'traditional councils' will get title deeds (that is, full ownership) of pieces of land, while individuals and families will get 'institutional use rights' to parts of the land within traditional councils' land. While the DRDLR says these institutional use rights will allow people to hold traditional councils accountable, there is no indication of how this will be possible if titles are first transferred to traditional councils.⁶⁶ The CLTP also states that the traditional councils will own and control all development related to common property areas such as grazing land and forests. Traditional councils will furthermore be in charge of investment projects such as mining and tourism ventures.⁶⁷

The CLTP privileges the demands of the traditional leadership lobby over the people's desire to choose the kind of land-holding entity that best suits their needs. Alternative land-holding entities include Communal Property Associations (CPAs). CPAs are landholding institutions that were established so that groups of people could come together to form a legal entity to acquire, hold and manage property received through the restitution, redistribution and land reform programmes. Since millions of black people had been dispossessed of their land and their land rights under colonialism and apartheid, it was an

⁶⁴ Thipe (n 63).

⁶⁵ Communal Land Tenure Policy (n 2) at 10-11.

⁶⁶ Claassens (n 34).

⁶⁷ Communal Land Tenure Policy (n 2) at 4.

urgent priority of the new democratic government to restore land to black South Africans. CPAs and other communal property institutions therefore occupy an important role in land reform.

However, there is an indication that CPAs will be phased out in some parts of the country. According to the DRDLR's most recent policy on communal land tenure and on CPAs (published 14 May 2014), CPAs will be discouraged from forming on any land where traditional councils already exist (mostly the former homelands). In February 2014, Minister Nkwinti told the Portfolio Committee on Rural Development and Land Reform that CPAs and Trusts were 'sophisticated institutions imposed on our people'.⁶⁸ Such statements belittle the struggles of people around the country who want to be able to choose the property institution that best suits their needs, and who have pointed out that traditional leaders' lack of accountability is at odds with living customary law. People in rural areas have expressed alarm at the DRDLR's intention to preclude new Communal Property Associations (CPAs) from forming in the former homelands.⁶⁹

The refusal to allow CPAs within the former homelands read together with the Communal Land Tenure Policy (2014) indicates that government intends to transfer title to traditional councils as opposed to other land-holding entities or individuals. Yet the Restitution Act provides for restitution for those who lost land because of prior discrimination. Therefore the intended beneficiaries of land restitution might be a different group of people from those making up 'traditional communities', which according to the TLGFA, is composed of people whom the traditional leader claims to fall under his or her jurisdiction. For instance, the Makuleke community was forcibly removed from the North of the Kruger Park to vacant SADT land that had been assigned to the Mhinga Tribal Authority. Chief Adolf Mhinga, who was a Gazankulu Cabinet Minister, played a pivotal role in their removal, although the Makuleke's own traditional leaders strongly opposed the move. Since 1994, Mhinga has continued to claim that the Makuleke fall under his jurisdiction. Despite opposition from Mhinga, the people of Makuleke eventually managed to file a successful restitution and have the land restored to their CPA.⁷⁰ In its current form the Communal Land Tenure policy proposal of 2014 threatens groups like the Makuleke, who do not identify with the traditional council boundaries from the apartheid era. The proposal therefore undercuts a primary purpose of the Restitution Act, which was to identify and provide redress to those who suffered forced removal.

By the middle of 2014, the wheels of traditional leaders' claims had begun to turn. President Jacob Zuma told the House of Traditional Leaders on 27 February 2014 to line up their lawyers and prepare to lodge claims for land

⁶⁸ Weinberg, 'Government brushes aside submissions on Restitution Bill' available at <<http://www.customcontested.co.za/government-brushes-aside-submissions-restitution-bill/>>, accessed on 28 February 2014.

⁶⁹ PLAAS & Centre for Law and Society 'Report on the National Land Workshop in Johannesburg: October 2013', on file with author.

⁷⁰ Claassens and Hathorn, 'Stealing restitution and selling land allocations: Dixie, Mayaeyane and Makuleke' in Claassens and Cousins (n 4) at 346.

restitution. King Goodwill Zwelithini kaBhekuzulu announced in July 2014 that he would make a large land claim ostensibly on behalf of the Zulu nation. King Zwelithini's claim will be managed by the Ingonyama Trust Board (ITB), which was the outcome of a deal between the National Party and the Inkatha Freedom Party during the dying days of apartheid. The ITB already holds close to three million hectares of land in KwaZulu-Natal. Through its proposed new land claim, the Trust intends to acquire much more land in KwaZulu-Natal, as well as in the Eastern Cape, Free State and Mpumalanga. In addition to King Zwelithini, traditional leaders of the Hlubi (KwaZulu-Natal) as well as the Rharhabe and Thembu (both Eastern Cape) have also stated their intentions to lodge restitution claims. These claims may be found to be invalid on the basis that most of them take as their date of dispossession, a date prior to the Restitution Act's cut-off date of 1913. The claims are nevertheless likely to create confusion and uncertainty on the ground – making the security of tenure of people in rural areas, especially women, even more vulnerable.

The discouragement of CPAs in the former homelands is not just a matter of prospective policy; it is already happening. In the Eastern Cape, at least three CPAs have been waiting for their land titles since 2000, even though the Minister signed all the necessary forms. Despite a court order in May 2013 compelling the DRDLR to transfer the land to the Cata CPA, it has still not done so. The Masakhane and Iqayialethu CPAs, located south of Alice, have also waited fourteen years and counting. While lack of capacity and poor management within the DRDLR are certainly related to the delays in land transfers to CPAs, it seems there is also another agenda at play. In the cases of the Cata and Masakhane CPAs, there is no evidence of conflicts within the communities. One of the underlying reasons for the non-transfer of land to CPAs emerges in an affidavit from the Cata CPA's court case:

The practicalities in the facilitation of the transfer of the land have been cumbersome and have now encountered fierce objections by the traditional leaders who state that the agreements transferring ownership of rural land to community based associations undermined their authority. In various discussions with traditional leaders they are resolute in objecting to the transfer of land falling under their authority to CPA. The land in question falls under Chief Ulana and in order to get a long lasting solution it is imperative that Chiefs should accept the process.⁷¹

Members of the Cata CPA have never heard of Chief Ulana. The traditional leaders they recognise have been fully supportive of the transfer of title to the CPA. Some of them sit on the CPA committee. This implies that the main reason for the delay in transferring land to CPAs is that the government is committed to pandering to the demands of the traditional leader lobby, including the Congress of Traditional Leaders of South Africa (Contralesa). This lobby wants exclusive ownership and control over land in the former homelands. At the same time, the government's attitude towards CPAs reveals a serious reversal of policy commitments that emerged during the

⁷¹ Mashologu (Chief Director of the Department of Rural Development and Land Reform) 'Affidavit in Support of an Application for Postponement' in *Cata Communal Property Association v Minister of Rural Development and Land Reform and 9 Others* (LCC) unreported case no LCC 146/201 of 19 January 2011 at 4.

1990s, which supported black people's right to choose how best to constitute themselves as groups.

The idea that new CPAs should not be established in areas where traditional councils exist began to inform government policy after the publication of the Status Quo Report on Traditional Leadership and Institutions (2007). This report recorded traditional leaders' objections to CPAs on the basis of their claim that only traditional leaders are the rightful landowners in the former homelands and that the existence of land-holding CPAs undermines their authority. By denying people the ability to choose the land-holding entity that best fits their tenure practices and needs, the DRDLR's policy on CPAs and communal tenure forces people living in the former homelands to live under the thumb of traditional leaders while other South Africans can choose to opt in or out of this system.

(iii) A lack of capacity (human and financial) to support land reform beneficiaries

The re-opening of the window to lodge restitution claims in July 2014 has reinitiated conversation about the DRDLR's poor track record in supporting and communicating with restitution beneficiaries, including CPAs. There is a common discourse within the DRDLR that CPAs have failed, exemplified by Minister Nkwinti's speech at a Land Tenure Summit convened by DRDLR in Johannesburg in September 2014.⁷² CPAs are indeed struggling. In a recent report on CPAs (2011-2012), the Department surveyed around 1000 CPAs in the country and noted that they were struggling to function and needed more support.

However, a number of scholars and community activists have pointed out that CPAs have struggled because of a lack of support from the government and not because they are so inherently flawed that they cannot succeed. As a participant in the first session on CPAs at the Land Tenure Summit argued, 'it is not that CPAs have failed agrarian reform, but agrarian reform that has failed CPAs'.⁷³ The current CPA registrar's office is small and under-resourced. This has led to a range of problems. Government officials tasked with helping to set up CPAs often cut and paste constitutions from other CPAs, leading to a disjuncture between land tenure practices on the ground and the CPA's constitution. The CPA office has not communicated adequately with land reform beneficiaries or with parliament. Since its establishment 18 years ago, it has published only three annual reports (2009-2010; 2011-2012; 2013-2014).

The delay in the transfer of title deeds to CPAs has been both a result of the DRDLR's inclination to acquiesce to traditional leaders' demands and a major symptom of the DRDLR's failure to support CPAs. While the Department has not made available the names of the CPAs which are still waiting to have their land transferred to them, CLS's research has shown that the problem

⁷² Weinberg, 'Land tenure summit reveals threats to property rights' *Sunday Independent* 28 September 2014.

⁷³ Anonymous participant, Department of Rural Development and Land Reform's 'National Land Tenure Summit' in Boksburg, South Africa on 6 September 2014.

is widespread in all provinces. CPAs still waiting include the Magokgwane, Bakubung ba Ratheo, Bakwena ba Molopyane, and Goedgevonden CPAs in North West, the Mawubuye Umhlaba Wethu CPA in Mpumalanga, and the Tladi and Gamawela CPAs in Limpopo.⁷⁴ In DRDLR's CPA report released for 2011-2012, the Department admits that the failure of most CPAs are related to lack of support – in terms of human capacity, training programmes and financial aid – from the side of the government. But since this admission is not widely publicised, CPA committees often find themselves faced with angry members who question why the development money has not arrived and accuse the committee of 'eating the money' themselves.⁷⁵ The delay in the transfer of title generates an atmosphere of distrust within the CPA, which generates new and exacerbates existing conflicts within the group.

(iv) Exclusion of most people in rural areas from the ability to make decisions about land

Under the DRDLR's new set of policies, people's land rights under communal tenure have been made more conditional and less secure. The Department has justified the conditions attached to communal tenure rights, like the attack on CPAs, in the language of paternalism. According to the new policies the only way to acquire financial support for land received through a land reform programme is through the Recapitalisation and Development Policy Programme (RDPP). The RDPP requires that applicants prove 'productivity' on the land. 'Productivity' is not defined, meaning that the process is open to arbitrary decisions and manipulation by officials. In this way, recent policies allow people less choice about restitution and their own development.

In relation to restitution, the Parliamentary Ad Hoc Committee on the Legacy of the 1913 Land Act pointed out that land reform is not about agriculture only, and productivity should not be measured in terms of commercial agricultural viability only. The Committee added that 'it is vitally important that land reform should address the various needs of the beneficiaries, for example, those that want land for residential purposes'.⁷⁶ Post-settlement support 'should also not only be seen in terms of the Farmer Support Programme (FSP) or the existing Recapitalisation and Development Programme which targets farming with strategic partnerships'.⁷⁷

By making restoration conditional on cost and productivity, the implication of the new policies is that land ownership is neither appropriate nor allowed for the majority of people living in the former homelands.⁷⁸ Instead ownership is reserved for a small elite, condemning most people to a system of provisional

⁷⁴ Land Access Movement of South Africa (LAMOSA) home page, available at <<http://www.lamosa.org.za>>, accessed on 28 February 2014.

⁷⁵ Weinberg and Luwaya, 'Interview with Mawubuye Umhlaba Wethu CPA' (November 2013), unpublished transcript, on file with author.

⁷⁶ Ad Hoc Committee: Coordinated Oversight on the Reversal of the Legacy of the Natives Land Act of 1913 (Report to the National Assembly of the Parliament of South Africa in October 2013).

⁷⁷ Ad Hoc Committee (n 76).

⁷⁸ Department of Rural Development and Land Reform 'State Land Lease Policy' (July 2013), available at <http://www.ruraldevelopment.gov.za/phocadownload/Policies/state_land_lease_and_disposal_policy_25july2013.pdf>.

tenure and state leasehold that resembles the ‘trust tenure’ imposed by the South African Development Trust in terms of the 1936 Native Trust and Land Act.

The ownership status of most of the land in the former homelands is reflected in the Deeds Registry as owned by the government of the Republic of South Africa. Much of this land is held in trust by the state on behalf of specific groups of people who were prohibited by law from owning it outright because of their race.⁷⁹ There is a variety of such trust arrangements, some providing rights equivalent to ownership for groups who had purchased the land historically, others acknowledging long-term historical occupation of the land, others providing lesser occupation rights.⁸⁰ The new policies attempt to convert such rights to conditional leasehold or ‘institutional use rights’.⁸¹ The CLTP states that if land is transacted, households will be compensated only for ‘land-related investments rather than the land itself’.⁸² This flies in the face of IPILRA’s guarantee that people be compensated for any loss of occupation, use or access rights to land. In a similar vein the State Land Lease Policy provides that tenure awards granted to labour tenants and farm occupiers should take the form of long-term leases conditional on the payment of a nominal rent.⁸³ Yet the intention of previous land reform laws was to recognise and secure the underlying rights of these categories of people, not render them tenants in perpetuity.

The central fallacy of colonial thought on customary land tenure was that it confers no property rights in land. This fallacy has been subsequently internalised and used for similar purposes by post-colonial governments.⁸⁴ Instead of addressing the legacy of the 1913 Land Act and other such laws, recent land reform policy appears to mimic some of the Land Act’s *modus operandi*. Unfortunately, Catherine Cross’ assessment of the government’s approach to communal land tenure in the 1980s has resonance with land laws and policies introduced over the last decade:

Faced with collapsing policies and apparently desperate, the state has turned towards sweeping tenure innovations of a free market character within the homelands framework.⁸⁵

VI Explaining the failures of communal land tenure policy

There is an on-going debate among analysts as to why the government has failed to introduce legislation that would lay the foundation for resolving land issues faced by millions of people living under communal tenure. One of the

⁷⁹ Budlender and Latsky, ‘Unravelling Rights to Land in Rural Races Zones’ in De Klerk (ed) *A Harvest of Discontent: The Land Question in South Africa* (IDASA 1991) 115-137.

⁸⁰ Budlender and Latsky (n 79).

⁸¹ The State Land Lease Policy (July 2013) envisages leasehold, while the Communal Land Tenure Policy (August 2013) envisages institutional use rights. Both policies apply to all the land in the former Bantustans – apart, interestingly, from KwaZulu-Natal (2.1.1 of State Land Lease Policy). Neither policy references the other.

⁸² Communal Land Tenure Policy (n 2).

⁸³ State Land Lease Policy (n 78).

⁸⁴ Okoth-Ogendo (n 38).

⁸⁵ Cross (n 5) at 95.

difficulties is that the government does not act as a single body – officials within the government often hold differing views that are in tension with one another. Bearing that in mind, this section discusses some of the factors that might inform the state’s poor record on communal tenure reform.

Land reform in general is underfinanced and lacks adequate human capacity.⁸⁶ It makes up only 1 percent of the national budget, the majority of which goes towards the land restitution programme, in which thousands of claims must still be settled. The budget figures indicate that the government is not prioritising this aspect of development, despite its rhetoric to the contrary.⁸⁷

The failure of communal tenure reform has occurred in the context of the government’s ‘neoliberal’ economic turn. Since 1999, the government has increasingly taken on board proposals by lobby groups like AgriSA, which have argued that investors would be scared off by any systemic changes to South Africa’s property system. They have emphasised the importance of private property rights as the most secure and attractive form of land tenure to investors. The government’s latest land laws and policies make it clear that it intends to prioritise investor security over the security of tenure of most people living in the former homelands. This is outlined in the National Development Plan, which states that the priority for land reform will be the ‘transfer of agricultural land to black beneficiaries without distorting land markets or business confidence in the agribusiness sector’.⁸⁸ It is also evident in the RDPP, which is now the only form of financial support for land reform (including restitution) beneficiaries.⁸⁹ In order for these funds to be released, applicants must show that they have a business plan and a ‘strategic partner’ (usually a partner in the private sector, such as a commercial farmer of investor). Strategic partners are usually commercial farmers and BEE-accredited business people from the private sector.⁹⁰ Many of the business people involved in strategic partnerships, especially around mining, are also closely tied to traditional leaders. The requirement of a business plan and strategic partner does not bode well for beneficiaries with limited resources. Research has shown that money released through the RCPP have sometimes benefitted strategic partners at the expense of land reform beneficiaries.⁹¹

As this article has mentioned, an attitude of paternalism has characterised much of the government’s response to questions of land tenure reform in communal areas. In the process, the government consolidates the power of economic and political elites (black as well as whites) and further excludes people in rural areas further from the ‘control room’ where decisions about land reform are made. This had led to an assumption that government and

⁸⁶ Cousins and Hall (n 29); Ntsebeza (n 41).

⁸⁷ Cousins and Hall (n 29).

⁸⁸ Government of South Africa ‘National Development Plan’ (2011) at 206.

⁸⁹ Cousins, ‘Land Redistribution, Populism and Elite Capture: New Land Reform Policy Proposals under the Microscope’ (2013) 70 *Focus: The Journal of the Helen Suzman Foundation*.

⁹⁰ Cousins (n 89).

⁹¹ PLAAS Researchers ‘Submission on the Restitution of Land Rights Amendment Bill’ (2013), available at <www.plaas.org.za>, accessed on 28 February 2014.

'experts' know what is best, and a failure to adequately consult people in rural areas about what laws and policies would work best for them.

A sense of political insecurity on the part of the ruling party, the African National Congress (ANC) could also be behind some of the DRDLR's decisions. This was particularly relevant to the reintroduction of the Restitution Act just before elections. In the context of claims by opposition parties like the Economic Freedom Fighters (EFF) that land reform has failed, the ANC was pointing to the Restitution Act (and simultaneously distracting from the failure of land reform more generally) to say it is taking action.

The ruling party's insecurity has also played a major role in the rise of traditional leaders in South Africa, including attempts through laws like the CLRA to give them increased power over land. Marais argues that the ANC is trying to put in place a normative framework on custom and tradition, in the hopes of pre-empting rising dissatisfaction with the government that leads to a 'crisis of authority' and threatens the ANC.⁹² Mahmood Mamdani has argued that South Africa is experiencing the continuation of 'decentralised despotism', which was entrenched by colonial and apartheid governments.⁹³ Since other African countries have experienced similar spurts in traditional leaders' powers post-independence, South Africa is not exceptional. However, traditional leaders' powers in post-apartheid South Africa are not merely a continuation of their positions in the previous era. The government's tendency to give more power over land to traditional leaders' is linked to South Africa's specific economic and political conditions over the past twenty years.⁹⁴

The government (and this includes many opposition parties in parliament) has the impression that traditional leaders have widespread support in rural areas and therefore can bring them votes.⁹⁵ For example, in 2013 South Africa's main opposition party, the Democratic Alliance (DA), announced across multiple media platforms that AbaThembu King Buyelekhaya Dalindyebo had left the ANC to join their ranks.⁹⁶ It is unclear why the DA would create a media frenzy around recruiting Dalindyebo, opposed to any ordinary member, unless they saw him as a significant figure who could bring them votes. Research has long disputed the assumption that traditional leaders carry widespread support in rural areas.⁹⁷ Regardless, political parties' impression of rural areas as in the hands of traditional leaders has persisted.

Political parties' belief in the power of traditional leaders is informed by a number of factors. First, the ANC's brushes with the IFP in the early 1990s have led it to see traditional leaders as offering it both a carrot and a stick. The ANC believed it could entice some of the IFP's voters in KwaZulu-Natal

⁹² Marais, *South Africa Pushed to the Limit: The Political Economy of Change* (2011) at 424.

⁹³ Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996).

⁹⁴ Ntsebeza (n 41).

⁹⁵ Ntsebeza (n 41); Oomen, *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid era* (2005).

⁹⁶ SAPA, 'AbaThembu king Dalindyebo joins the DA' *Mail & Guardian* 15 July 2013, available at <<http://mg.co.za/article/2013-07-15-abathembu-king-joins-the-da>>, accessed on 28 February 2014.

⁹⁷ Ntsebeza (n 41); Oomen (n 95).

by pandering to traditional leaders.⁹⁸ At the same time, its desire to placate traditional leaders initially (in 1994) came from a fear that the IFP would mobilise traditional leaders to respond violently and boycott elections.⁹⁹

Secondly, the ANC was unable during the struggle against apartheid to establish democratic structures that challenged traditional leaders – although other civil society groups did so. This had made the ANC uneasy about its knowledge of and reach within rural areas, especially the former Bantustans.¹⁰⁰ This uneasiness has increased as people in rural areas have become more and more disenchanted with local government officials and the failure of service delivery. There has been a spike in service delivery protests since 2009.¹⁰¹ In the absence of responsive local government, some people have turned to traditional leaders – often out of desperation.¹⁰² As a result, some traditional leaders have gained greater authority, as without them people cannot get, for example, proof of address letters that are necessary to apply for social grants. But many people also have not approached traditional leaders, even though government officials have failed them.

Thirdly, when the ANC first came to power its initial assumption was that traditional leaders who were ‘allies’ (that is, those who resisted the Bantustan system and supported the ANC) would work with them and accept ‘ceremonial’ roles.¹⁰³ However, it soon became clear that traditional leaders would not accept the replacement of tribal authorities with democratically elected structures to manage land in the former homelands.¹⁰⁴ Traditional leaders have very strong lobbying power in the form of the Congress of Traditional Leaders (Contralesa). This has meant that traditional leaders’ views have infiltrated the government’s thinking on communal land tenure reform, while the voices of people in rural areas have either gone unheard, been ignored or aggressively silenced. An example is former President of Contralesa, Phatekile Holomisa, who is an ANC MP and has been vocal in his support for the TCB. In the process of traditional leaders’ elevation, people living in the former homelands have become ‘subjects’ with second-class land rights.¹⁰⁵

Finally, there are significant economic interests at play in the government’s courting of traditional leaders. Over the past ten years, it has emerged that many of the former Bantustans are much richer in minerals than the apartheid government believed. In particular, there is a rush for platinum, chrome and titanium in Limpopo and North West. There are also deposits of coal in Mpumalanga and KwaZulu-Natal and rare earth metals in the Eastern Cape. It is very convenient for mining companies and the state to negotiate with a single individual or institution to acquire land for mining, such as a traditional

⁹⁸ Oomen (n 95).

⁹⁹ Ntsebeza (n 41); Oomen (n 95).

¹⁰⁰ Oomen (n 95).

¹⁰¹ Municipal IQ team ‘2013 protest tally’, available at <<http://www.municipaliq.co.za/publications/press/201402041532567854.docx>>, accessed on 28 February 2014.

¹⁰² Ntsebeza (n 41).

¹⁰³ Ntsebeza (n 41).

¹⁰⁴ Ntsebeza (n 41).

¹⁰⁵ Claassens (n 34).

leader or traditional council, and avoid the ‘messy’ and complex process of negotiating with all the component parts of a community who can later hold them to account.¹⁰⁶

VII An alternative vision for land reform: the role of communal tenure

The challenges facing communal tenure areas are complex and difficult. The law can only take us so far as tenure security derives as much from ‘locally legitimate landholding’ sites as from legislation.¹⁰⁷ But this does not justify the government failing to take seriously inputs by people in rural areas about statutory remedies. The government must fundamentally change its approach towards land reform if it is to honour the Constitution’s principles and meet the needs of people in the former Bantustans – who make up nearly a third of the country’s population. A key priority would be to engage constructively and transparently with the suggestions for land reform put forward by people in rural areas.

Recent research shows that people in the former homelands are engaged in attempts to find positive ways to reconcile citizenship rights and indigenous precedents. An example of this are the ways in which rural women are redefining land rights in the context of living customary law. According to the stereotypes of official customary law, men were the only people entitled to inherit and manage land (although this was contested as far back as the 1930s).¹⁰⁸ Using evidence from surveys, parliamentary submissions and interviews at community workshops, Claassens and Mnisi-Weeks argue that single women in the Eastern Cape, KwaZulu-Natal and the North West have increasingly been allocated residential sites since 1994.¹⁰⁹ These changes have occurred as a result of local processes of struggle and negotiation around land rights led by women.

A combination of stake-holders, including NGOs and CBOs have suggested that in order to strengthen and recognise rural peoples’ land rights we can build on an already existing law: the Interim Protection of Informal Land Rights Act (IPILRA). IPILRA helps to protect people whose informal rights to land are threatened, but its impact has been limited in practice because some traditional leaders believe that they own the land and this is not disputed by the DRDLR. IPILRA’s enforcement has also been difficult because many DRDLR officials do not know what it is or how to work with it. In order to more effectively protect rural people against the deprivation of their land by traditional leaders and private enterprises such as mining companies, the act would need to be amended so as to:

¹⁰⁶ Claassens and Matlala, ‘Platinum, poverty and princes in post-apartheid South Africa: new laws, old repertoires’ in Pillay, Khadiagala, Naidoo and Southall, *New South African Review 4: A Fragile Democracy 20 Years On* (Wits University Press 2014) chapter 6.

¹⁰⁷ Okoth-Ogendo (n 38).

¹⁰⁸ Weinberg (n 42).

¹⁰⁹ Claassens and Mnisi-Weeks, ‘Rural women re-defining land rights in the context of living customary law’ (2009) 25 *South African Journal on Human Rights* 491-516.

- Be made a permanent law (it is currently renewed annually).
- Protect individuals within families and households from decisions being made without their consent. In this sense, women should be explicitly recognised and protected.
- Allow for inquiries if there are disputes about the disposal of land.

Ultimate authority for the enforcement of IPILRA lies with the state, which is the nominal owner of most of the land in the former Bantustans. As the nominal owner and trustee of most communal land, the state has a fiduciary duty to act in the best interests (and not on behalf) of rural people. To do so it must relinquish some of its decision-making and landownership power to people living in rural areas, while simultaneously playing a support or facilitation role where necessary.

An additional important tenet of a new communal land tenure policy would be to offer people a spectrum of land tenure options to choose from, including individual title deeds, quitrent titles, the involvement of communal property institutions and recognising rights on state-owned land so that they are legally protected. The spectrum of land tenure options should not be narrowed to traditional councils, as this article has already argued. It should also not be substituted wholesale with individual title deeds. As Cousins et al have argued, a blanket push for individual property rights can lead to a single household member gaining exclusive access and control of land, to the detriment of other household members. Individual titling can therefore lead to greater insecurity for people who have less power in the household, such as women.¹¹⁰ At the same time, since individual title deeds are still often the most valued kind of property-holding – due to the historical factors outlined in the first section of this article – they cannot be discarded as an option for land reform beneficiaries while still retained as an option for others, such as white South Africans, who already hold titles. Such a policy would be discriminatory on the grounds of race.¹¹¹ The spectrum of land tenure options should be broadened and should apply equally to all South Africans. So-called customary land rights must be given recognition in law or by the state that puts them on an equal footing with title deeds. If the state threw its authority behind forms of tenure other than only private property and traditional council ownership, it would go at least some way to strengthening the security of those forms of tenure.

The state also has a responsibility to set up a better-capacitated and more stable land administration system. This would include increasing capacity to resolve the urgent and serious problems facing groups in rural areas in relation to the protection of their land rights via communal property institutions,

¹¹⁰ Ben Cousins, Tessa Cousins, Hornby, Kingwill, Royston and Smit, 'Will formalising property rights reduce poverty in South Africa's second economy? Questioning the mythologies of Hernando de Soto' (October 2005) 18 *PLAAS Policy Brief*, available at <<http://dSPACE.africaportal.org/jspui/bitstream/123456789/33285/1/PB%2018.pdf?1>>.

¹¹¹ If the government prevented land reform beneficiaries from acquiring individual title deeds, that would be discriminatory on the ground of race. Most land reform beneficiaries are black or coloured people who would not have been allowed to possess title deeds under colonialism and apartheid, it would be discriminatory to allow whites to continue to hold individual title – which is presently the most secure form of tenure – but not land reform beneficiaries.

including its failure to honour existing commitments and court awards to CPAs. The Department should support initiatives within communities to democratise land-holding structures, and to make an informed decision about the structure they wish to use to manage land.

While the state is an essential role player, others play an important function in putting pressure on the state to change its agenda. NGOs, CBOs, as well as groups and individuals in communal areas have vital roles to play in this regard. They can open the political space for mobilisation around the realisation of security of tenure, provide visions for an alternative social order and support people in rural areas in their struggles against laws and practices that undermine their land rights.¹¹²

VIII Conclusion

The nearly 17 million people living in the former homelands continue to be vulnerable with respect to their land rights. They also live in the areas where the government understands 'communal land tenure' arrangements to exist. Instead of introducing legislation to secure the rights of people living in these areas, the post-apartheid government has courted commercial farmers (with their economic clout) and traditional leaders (with their supposed ability to bring in votes). The state has also failed to engage in a transparent and accountable manner with the solutions put forward by rural constituents. Legislation on its own will not solve the problem of insecurity of land tenure but it will provide people in rural areas with a much stronger base from which to make claims on land.

There is a great deal at stake in developing communal tenure legislation that meets the needs of people living in the former homelands. In areas like the platinum-rich North West, traditional leaders and mining companies are lining their pockets while the majority of people lack access to basic services. In many other rural areas, most people are in limbo, unsure of whether they can make use of the land on which they live and vulnerable to 'exploitation through the abuse of custom or denial of access to state institutions'.¹¹³ In this environment of uncertainty women have suffered most, as they did in the past.

The reason for the government's approach seems to be rooted in its sense of political insecurity in rural areas and the lobbying power of economic interests and traditional leaders. The government has not seriously interrogated the property system it inherited in 1994, with its skewed emphasis on the superior nature of individual property rights and its negation of alternative forms of land holding. Instead the government has reinforced the existing property system by making the rights of people in the former homelands conditional on 'good behaviour' while reserving ownership for powerful elite partners such as traditional leaders. A deep irony is that the restitution programme, which was designed to provide redress to those who suffered forced removal and

¹¹² Cousins and Hall (n 29); Ntsebeza (n 41). Cousins and Hall (n 29).

¹¹³ Okoth-Ogendo (n 38) at 99.

bore the brunt of the Land Act, is now being reconfigured in a way that might consolidate the power of elites.

While land reform is complex, NGOs, CBOS and people in rural parts of the country have already played an important role in articulating some solutions. If the government were to engage with these visions respectfully and transparently, it would be a step closer to resolving South Africa's communal land tenure question.

CUSTOMARY LAND LAWS WITHIN LEGAL PLURALISM OVER THE GENERATIONS

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Abstract

This paper considers the ways in which customary land laws in Africa have been changed over time, especially by their interaction with other laws, using examples of specific developments taken largely from certain common law jurisdictions. The purpose is to assist decision-making for immediate and long-term legal development. The relationship of types of customary land laws to types of legal pluralism forms a framework. State law pluralism is commonly the coexistence within a state law of received law and one or more customary laws 'recognised' by the state. These 'recognised' customary laws are official customary laws, as created and developed through state authorities. Deep legal pluralism is the coexistence of these plural state laws with living customary laws, which are the customary laws observed within communities.

Customary land laws have never been static. Changes in living customary land laws have often been brought about by indigenous factors such as contact between communities with different customary laws, or the influences of globalisation. Some changes in living customary land laws, such as the extent and nature of the authority of chiefs over land, have ensued from the very existence of the state. Many others have arisen from state 'recognition' of customary land laws. State 'recognition', whether institutional or normative, creates official customary laws, the content of which can result from misunderstandings of living customary laws, policies aimed at modifying them, and the necessity to reformulate customary law for use in state institutions. Other changes have resulted from deliberate state attempts to replace or change living customary land laws. Examples of significant changes concern the character of allodial titles, of communal land rights, and of transactions affecting land. Possible results of changes in the future are the disappearance of elements or entireties of current customary land laws, and the unification or integration of plural land laws.

Keywords: Customary Law, land laws, legal pluralism, state law pluralism

I Introduction

Customary land laws in Africa have, from as far back as we can trace, been constantly changing, the changes being brought about by both the members of the communities which observe the laws and external intervention. The nature and causes of such changes are considered in this paper, with special attention to the ways in which changes have been caused by the interaction of customary laws with other laws. An understanding of these changes is likely to assist deliberate, effective decision-making for the purpose of bringing about both immediate and long-term legal development, in so far as it is possible for conscious decision-making to produce or assist development.

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We need to take long periods of history where possible. For pre-colonial periods there is relatively little evidence, but a study of early colonial periods may provide reliable indications of the pre-colonial situations. An attempt is made here to consider the laws observed in societies over a broad geographical spread, although it is necessary at the outset to state the qualification that there is wide diversity between customary laws in Africa. The study is set within a certain, general conceptual scheme of legal pluralism and customary law.

II Types of legal pluralism and customary law

Legal pluralism may be defined as the condition in which a population observes more than one body of law. So long as there is some observance within a population, even of a slight degree, a body of norms may be considered as law for this purpose.¹

We may distinguish state law pluralism from deep legal pluralism. State law pluralism is commonly the coexistence within a state law of both received law and customary law. The category 'customary law' in this context almost always includes a number of different customary laws, so that state law pluralism consists of more than two bodies of law. The received law is also sometimes plural, as in the case of Cameroon, where common law and civil law coexist within the state law. On the other hand it seems doubtful whether the laws of Southern Africa states may be said to contain distinct bodies of (English) common law and Roman-Dutch law, since these different historical sources today take effect as a merged and unified received law. In any case, it is the coexistence of received law with customary laws which is significant for the present purpose.

State law pluralism is a characteristic of state law. It is of the essence of state law that, even if it is plural, the various elements are all subject to the overriding lawmaking power of the state. Thus the state has the authority to determine which of the constituent laws is to be applied in each case. This authority is not necessarily exercisable by ordinary legislation. It is possible for the constitutional law of a state to provide for the fields of application of ordinary statute law, received law and customary law. If this is done by entrenched constitutional provisions, then the law applicable in given circumstances, including a customary law, may apply in preference even to ordinary statutory provisions. Whenever the state provides for the application of a law this has the effect that at least some state institutions will apply that law. Typically these include some or all of the judicial institutions of the state. One effect of this in practice is always that some amendments are made to the

¹ Woodman, 'Legal Pluralism and the Search for Justice' (1966) *Journal of African Law* 152-167; Woodman, 'Ideological Combat and Social Observation: Recent Debate About Legal Pluralism' (1998) 42 *Journal of Legal Pluralism* 21-59, reprinted in Faundez (ed), *Law and Development* Vol II (Routledge 2012); Woodman (1999) 'The Idea of Legal Pluralism' in Dupret, Berger and al Zwaini (eds), *Legal Pluralism in the Arab World* (Brill 1999) at 3-19; Woodman (2008), 'The possibilities of co-existence of religious laws with other laws' in Mehdi, Petersen, Sand and Woodman (eds), *Law and Religion in Multicultural Societies* (DJØF Publishing 2008) at 23-42; Woodman (2012) 'Legal Pluralism in Africa: The Implications of State Recognition of Customary Laws Illustrated from the Field of Land Law' in Mostert and Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta 2012), first published as *Acta Juridica* 2011 at 35-58, esp. 36-37.

customary law as practised within the community (living customary law), so that a new version of that customary law is created (official customary law). Later in this paper an attempt will be made to show how this process of creation of official customary law is in the field of land law both far-reaching and inevitable.

Deep legal pluralism normally in modern times consists of state law and one or more living customary laws. It is today a universal phenomenon. There probably does not exist a state of which the population does not observe living customary laws in addition to the state law, nor in Africa a state in which there is not a living customary law of land. In the days before the creation of the modern state and its law, deep legal pluralism could exist when a people observed two or more customary laws. When state law is a constituent element of deep legal pluralism, it may well be a plural state law. Thus in Africa state law, including both received law and official customary laws, all regulated by the legislation of the state, commonly coexists with living customary laws which are not effectively regulated by the state. Thus the distinguishing feature of deep legal pluralism is that it includes no comprehensively overriding lawmaking power. Thus there is no authority which can determine which law is to apply to particular issues. Nevertheless, serious conflict between the laws can be avoided. All that is necessary is that each constituent law refrains (in its practice, if not by its express rules) from claiming authority over certain matters, with the effect that all or most issues are not claimed to be within the jurisdiction of more than one of the coexisting laws. It is rare in Africa (or elsewhere) for a state law to make any such explicit withdrawal, although implied withdrawals by state laws are in practice common.

Another type of legal pluralism is possible. There can be a number of laws, all subject to one overriding lawmaking authority which is not, however, the state. Such a case exists if, for example, a law derived from a religion holds effective control over a population, but permits certain other laws, such as the customary law of a subgroup within the population, to be observed. This is analogous to state law pluralism, except that the dominant law-making authority is not a state. We do not yet have a distinguishing name for it. Today every population in Africa is claimed to be subject to a state law, which is observed within that population to some extent (although it may be a slight extent). Consequently, for the purposes of the present discussion all instances of deep legal pluralism may be seen as involving a state law as an element.

That scenario of deep legal pluralism in which the element of state law itself manifests a state law pluralism suggests an analysis of customary laws according to two categories. We may use the terminology which has become known through its use in South Africa, where there are references to living customary law and official customary law. Legal theory failed for long to distinguish between these, and there remains controversy today as to whether there is truly a distinction to be drawn. Some aspects of that controversy will be considered later in this paper through examples from land law. Here we may indicate the meanings given to the two terms by those who accept the distinction.

Living customary law refers to normative orders which have been developed by common agreement among a population, and are in practice observed by the social groups within which they have thus developed. Such an order is not necessarily composed entirely of imperative norms. Nor is it necessarily associated with a state, written, applied in formal courts, or explicitly stated either formally or in informal settings. The view that all such orders are 'laws' is contrary to modern positivist theories of law and also to many other theories, some even accepted by legal anthropologists.² However, this very brief summary may be sufficient for the present purpose.³ It is common for a population which observes a certain living customary law to give observance also for some purposes to another living customary law, usually because this population comes into regular contact with another group which has a different principal living customary law. Thus there continue to be instances of legal pluralism where the elements include, in addition to state law, more than one living customary law.

Official (or state) customary law means the normative orders which have been 'recognised' as customary laws by state law. They purport to be reproductions or adaptations of living customary law, but their recognition means that they are treated by state law as having legal authority conferred by the state. They are likely to be enforced in state legal institutions. The common law is such a customary law to a certain extent, but official customary laws which purport to be reproductions of African living customary laws are more important for the present purpose. (The customary nature of English common law is complex, since it purports to be a body of common customs which has been interpreted and moulded by many generations of judges. This issue need not be further investigated here).⁴

For the purpose of this discussion it has been assumed that 'laws' or 'legal systems' are distinct, identifiable bodies of law operating in areas with clear boundaries. Admittedly that is highly questionable,⁵ but for the present purpose it is not necessary to investigate that issue further.

One further general observation is pertinent. Virtually no customary law of either type has ever continued to exist without change for any significant period of time. Research has shown again and again that in practice all customary laws are in conditions of constant change.⁶ Consequently the notion that a customary law or a portion thereof can be defined as a phenomenon which has existed in its current form 'since time immemorial', or otherwise for a

² See e.g. Pirie, *The Anthropology of Law* (Oxford University Press 2013), reviewed and criticised in this respect in Woodman, Book Review, (2013) 46 *Journal of Legal Pluralism* 374-379.

³ The classic critique of the view that customary law, to qualify as 'law', must be the law of a state, is Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1-55.

⁴ It is discussed at Woodman (2010), 'On the Sources of Law in Africa – and Elsewhere' in Bernreuther, Freitag, Leible, Sippel and Wanitzek (eds), *Festschrift für Ulrich Spellenberg zum 70. Geburtstag* (European Law Publishers 2010) at 661-672.

⁵ Bavinck and Woodman (2009), 'Can There Be Maps Of Law?' in Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Griffiths (eds), *Spatialising Law: An Anthropological Geography of Law in Society* (Ashgate 2009) at 195-218.

⁶ Berry, *No Condition is Permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa* (University of Wisconsin Press 1993); Berry, 'Debating the Land Question in Africa' (2002) 44(4) *Comparative Studies in Society and History* 638-668.

substantial period of time, is erroneous as a matter of fact, however much it may be used by state lawyers, and however effective it may be as a fiction for securing respect for that law.

To document and understand the changes in fields of customary laws, such as customary land laws, it is necessary to uncover the causes of these changes. It is likely that many of the more important changes in each law arise from a number of causes operating together. The next part of this discussion considers some of the causes, grouped according to their legal-pluralist characters, of customary land laws in Africa. Thereafter an attempt is made to summarise the changes in terms of the differences they have made to the customary land laws generally.

III Changes in living customary land laws not influenced by the modern state

The modern state, in the sense used here, was brought into existence by the colonial regimes. Since the living customary laws existed long before that, and had already undergone much change over the generations, it is obvious that there has been change which has not been produced by the modern state. However, since the creation of the state it has become increasingly difficult to distinguish between social change brought about by its influence and change unconnected with it. Many of the most important developments in living customary land laws seem to have resulted from a combination of factors, of which one was the influence of state laws. Consequently the discussion here is to some degree speculative. That would seem to be even more the case for the post-colonial period of the past half-century. (It seems appropriate to classify as colonial the period of South African history prior to the ending of apartheid for the present purpose.) Nevertheless it is important not to assume that all change since the inception of the state has been brought about by the state. That would be to fall into the trap of accepting the foundational assumption of the state centralist ideology.

There would appear to have been, especially in very early times, some changes caused predominantly by indigenous factors, that is, factors arising within the populations concerned. When, for example, a community of nomads or hunters settles on an area of land to cultivate it, they necessarily develop new norms for the regulation of land use. It is likely that they develop to some degree the notion of exclusionary rights held by groups over portions of land. Within such groups, individual members may acquire rights against other members, although later developments suggest that these are very rarely inflexible rights such that they can be insisted upon in all circumstances. Customary law may have been concerned rather with obligations owed within communities in respect of property than with rights which might be asserted against other members or outsiders.⁷ Also, developments may occur when there are changes in the potential uses of land, as when new crops are

⁷ Du Plessis, 'African Indigenous Land Rights in a Private Ownership Paradigm' (2011) 14(7) *Potchefstroom Electronic Law Journal* 45-69.

introduced. Thus in the earliest societies there was frequently social change, and so legal change, over time, and these have continued to the present. Scholars who have investigated these issues have frequently been concerned to identify the exercise of power. It seems that power struggles are sometimes the cause, and sometimes a part of these legal changes.⁸

Some such changes may also be caused partly or entirely by contact with outsiders. Thus there are records from early periods showing that population movements have included immigration by small or larger groups into areas already occupied, when the leaders of the host communities, sometimes led by an influential individual, have agreed to allow the incomers to use portions of the land. This can establish a rule that portions of land may in some circumstances be delivered to outsiders for their use,⁹ although it seems unlikely that this was categorised as a gift or sale of the land. We know also that immigration movements were not always peaceful, and it seems likely that warfare may on occasion have been concluded by agreements which had the effect of adding to or otherwise changing the previous land law.

Contact with outsiders often meant contact with their living customary laws, and it would seem that in some cases changes in a customary law were caused by contact with another customary law. For example, trade routes were established and functioned for prolonged periods in parts of the continent. Traders moving through lands occupied by other communities may have engaged in transactions which encouraged a more contractual view of the ways in which land might be dealt with. There is little clear evidence of this, but we might notice that deep legal pluralism involving different living customary laws must have been present, and that the coexisting laws were likely to interact and influence each other.

Many changes in more recent times may be classified as resulting from forces of globalisation.¹⁰ These forces may be seen as producing or contributing significantly to: an increased monetarisation of property transactions; the use of new technologies including at their most basic the use of writing; the development of new forms of agricultural production often coupled with the opening of international markets for agricultural commodities; and changes in effective forms of communal cohesion or even in the need for such cohesion. In the field of land law these developments have led to an increased tendency for living customary laws to permit transfers of interests in land for money payments,¹¹ and so to permit transfers of interests in land generally. Commercialisation of land rights and monetarisation of land transactions has become common in communities where customary law still governs. Sometimes use is now made of written documents in customary-law

⁸ Berry 1993 (n 6); Berry 2002 (n 6) at 640-641; Lund (2012), 'Access to Property and Citizenship: Marginalization in a Context of Legal Pluralism' in Tamanaha, Sage and Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press 2012) at 197-214.

⁹ Berry 2002 (n 6) at 643-644.

¹⁰ Woodman, Wanitzek and Sippel (eds), *Local Land Law and Globalization: A Comparative Study of Peri-Urban areas in Benin, Ghana and Tanzania* (LIT Verlag 2004).

¹¹ Griffiths (2012), 'The Changing Dynamics of Customary Land Tenure: Women's Access to and Control over Land in Botswana' in Mostert and Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta 2012), first published as *Acta Juridica* 2011 at 83-113.

transactions, although written titles are still the exception, at least for rural areas.¹² There follows from this commercialisation an increasing incidence of land holding by individuals who use it for commercial production as well as an increase in the holding of land rights by conjugal families and by groups of unrelated individuals formed for business purposes.¹³ These developments have in many areas led to a relative scarcity of land.¹⁴ That has led to a rise in the pecuniary value of land which has in turn produced an intensification of these trends. In this important area of development it can be especially difficult to discover to what extent changes have not been influenced by the modern state. This will therefore be noted further when state attempts to replace or change customary laws.

IV Changes in living customary land laws resulting from the existence of the state

We may place under this head changes which, while they have not come about through state action specifically directed at customary laws, are attributable in part or in whole to the fact that the modern state and its apparatus now exists in the same fields of social activity as those in which customary laws are followed. This also is a somewhat speculative category, and it risks bolstering the ideology of the state by attributing to it more effects than it truly has. However, there are instances of changes in living customary laws where it seems clear that the existence of the state has been a factor, although probably only one among others.

One set of much-discussed instances are the changes in the authority of traditional rulers, or chiefs. Of societies which had chiefs before the creation of the modern state, it is often said that the authority of the chief generally has come to be based more on support from the state than from traditional approval within their own society. Consequently the individual power of the chief over land distribution matters has increased.¹⁵ However, this generalisation is subject to the various instances of actions by the state directed specifically to changes in the customary laws in such matters as the selection of the person to be a chief, the creation of the position of chief in societies which did not previously have individual leaders, and express state control over chiefs' dealings with land.

More generally the existence of the state may be seen as a factor in the intensification of all the changes mentioned in the previous section. Thus, for example, the existence of the state and its maintenance of communication and transport across the boundaries between different communities contributed

¹² Toulmin, 'Securing Land and Property Rights in Sub-Saharan Africa: The Role of Local Institutions' (2008) 26 *Land Use Policy* 10-19 at 12-13.

¹³ Fitzpatrick (2005), "'Best practice' options for the legal recognition of customary tenure" (2005) 36(3) *Development and Change* 449-475 at 450-452; Bennett and Mostert (2012), 'Access to Property in Africa: An Introductory Survey' in Mostert and Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta 2012) first published as *Acta Juridica* 2011 at 1-22; Woodman (n 10).

¹⁴ Bennett and Mostert (n 13) at 4; Toulmin (n 12) at 11.

¹⁵ E.g. Ubink and Quan, 'How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana' (2008) 25(2) *Land Use Policy* 198-213.

to migration within the state and so to increased purchases of interests in communal land by strangers. Again, the introduction of educational systems by the state assisted the development of the use of documents for transactions under living customary law.

V Changes in customary land laws resulting from recognition by the state

'Recognition' by a state of a customary law generally means the enactment of a rule of state law declaring that an existing customary law is to be treated as state law; put differently, it means that customary observance is pronounced to be a source of state law. Recognition is accompanied by changes in the customary law to adjust it to the conceptual system of the existing state law,¹⁶ but these adjustments may be classed as changes by the state to customary law, which will be considered later. Taking mere recognition of customary law, we may distinguish two types. Normative recognition occurs when norms of a customary law come to be treated as norms of state law, so that they are applied by state institutions such as courts. Institutional recognition occurs when the acts and decisions of institutions of customary law, such as dispute settlement institutions, are required to be treated as having the same degree of authority as decisions of state institutions. These, at least, are the ostensible principles of normative and institutional recognition by the state of living customary laws.

Recognition necessarily implies that a state law is already in existence, which will inevitably include a body of land law. That pre-existing state law has in Africa been a form of received law. Because that law is already in existence whenever recognition of any type occurs, it becomes necessary to develop state law norms to direct the choice of law in those fields for which state law now has more than one body of law. In land law the choice of law principle may simply be the location of the land in issue in any case. Boundaries may be drawn on maps, with the choice of law principle providing simply that all issues involving land within designated areas are to be governed by customary law, either as to the institutions which are to determine the issue, or as to the norms to be applied, or both. However, the choice of law principle need not be based on territorial division. The other main possibility for land cases is the intention of the party or parties making a transaction or disposition. I return to these possibilities below.

The first effect of this recognition is the creation by the state of official customary law. While recognition may at one time have been expected to convert living customary law into official customary law without changing it, it has now been realised that in practice profound changes have occurred in customary norms and institutions in the process of recognition.¹⁷ It may

¹⁶ Fitzpatrick (n 13) at 450ff.

¹⁷ An attempt was made to show this in Woodman, 'Some Realism About Customary Law: The West African Experience' (1969) *Wisconsin Law Review* (1969) 128-152. There official customary law was referred to as courts' or lawyer's customary law, and living customary law as sociologist's customary law. The present paper uses the terms adopted in South Africa, which seem more appropriate.

also be suggested that these changes were and continue to be inevitable. They result in part from misunderstanding by state agents of the customary laws which they are required to recognise. This was especially marked during the colonial period, when state judges and administrators were usually foreign, and without training in anthropology. They often misunderstood the information they were given about the norms and institutions of the customary laws they were supposed to recognise, a problem which was exacerbated by the constant change and adaptation to new circumstances of most customary laws.¹⁸ This is a less serious factor today when the agents are nearly always citizens by descent of the states in which they work, although the ethnic diversity of African states still means that frequently they are required to recognise customary laws of communities of which they have little or no personal knowledge.

However, it may be more important today to notice that the structures and forms of state laws are such that, even if they have entirely accurate evidence of the living customary law, it is impossible for them to recognise this customary law without re-expressing it, and so creating official customary laws.¹⁹ However, in examining past cases it is not always easy to tell the difference between misunderstandings and inevitable adjustments.²⁰ The problem is then compounded by the fact that living customary laws are constantly changing, so that, when a point of official customary law has been decided upon in a case, any tendency to treat that decision as a precedent to be followed (which is for good reasons common in judicial and other state law activities) is likely to result in an ever-widening gulf between the living customary law and the official customary law. If on the other hand this problem is recognised, and the state seeks to avoid precedent-following in official customary law, the result is that state agents will need to seek information in every case as to the norms or institutions of living customary law, with the expense and possibility of error which this carries.

This divergence between living customary law and official customary law may be illustrated by a number of instances in land law. Most arise from the fact that in living customary law interests have often been negotiable rather than being fixed in the form of rights. Thus whenever there is a clash of interests the outcome in living customary law tends to depend on a process of advice-giving, negotiation, appeals to communal beliefs and standards of conduct, compromises, and other aspects of mediation, rather than the determination and application of rights according to predetermined rules. As Berry writes:

Negotiability is ... a pervasive feature of social and economic processes... In rethinking African agrarian change, we need to begin with historical and anthropological literature which represents

¹⁸ Berry 2002 (n 6) at 642-645.

¹⁹ Woodman (1985), 'Customary Law, State Courts, and the Notion of Institutionalization of Norms in Ghana and Nigeria', in Allott and Woodman (eds), *People's Law and State Law: the Bellagio Papers* (Foris 1985) at 143-163.

²⁰ Berry 2002 (n 6) at 644-645; Du Plessis (n 7) at 50-53.

law as social process, transactions as subject to multiple meanings, and exchange as open-ended and multidimensional rather than single-stranded and definitive.²¹

The scope of possible outcomes from negotiation should not be exaggerated. It would not be possible to carry on negotiations over such matters as land disputes unless there were some commonly accepted normative principles. However, these principles may be so general that the outcomes of negotiations cannot be said to be determined by rules.²² Hence even today any rights which an individual may claim to the use of land or to dispose of it may in practice be subject to claims of that person's family or community to have their interests, if considered reasonable according to the mores of the community, given effect.²³ Even boundaries to an area of land in which a person or group may claim rights are liable to be fluid in practice because of the interests and claims of neighbours.²⁴ The notion of ownership of land in an absolute sense has no room in such a context, although collective or communal holding of allodial interests in land has commonly been recognised.²⁵

State laws and institutions are so constituted that they are incapable of reproducing many of these features of living customary land laws. The process of a lawsuit in state law is normally concerned exclusively with the application of predetermined rules, with the result that at the end of the case one of the two parties wins and the other loses on each point in issue. State law has been able to recognise the corporate personality of some groups (such as lineages) in living customary law, so that title to land can be accepted to be held by such groups. However, it has struggled to recognise the subtleties of living customary law in the exercise of rights over such land. Thus they could not give full recognition to, for example, the norms according to which it is permissible for a non-member to be admitted to the use of a portion of such land, provided that this is in all the circumstances reasonable, and the arrangement ('grant') is made by the head of the group, and provided that there is agreement, at least by those members whose views are recognised as carrying weight. The solution, at least in some jurisdictions, has been to say that such a grant is valid if made by the head (as recognised according to a set of further rules), with the consent of the 'principal members', regardless of other circumstances. It has even been held that if the head makes the grant without the requisite consents, the grant is not void but 'voidable', that is, it can be set aside by those who did not consent to it but only if they act 'timeously',²⁶ which seems clearly an example of the creation of official

²¹ Berry 1993 (n 6) at 13. See also: Berry 2002 (n 6) at 655-656; Bennett and Mostert (n 13) at 4-5; Weeks, 'The Interface Between Living Customary Law(s) of Succession and South African State Law', DPhil thesis, University of Oxford; 2009 Weeks (2012), 'Seeing Women's Property Inheritance in the Context of Plurality: Negotiations of Land and Authority in Mbuluzini Customary Courts and Beyond' in Mostert and Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta 2012), first published as *Acta Juridica* 2011 at 140-173.

²² Weeks 2012 (n 21) at 150, considering especially 'negotiation' which takes place in courts.

²³ Bennett and Mostert (n 13) at 5, fn 32.

²⁴ Berry 1993 (n 6); passim, Berry 2002 (n 6) at 644.

²⁵ Fitzpatrick (n 13); Berry 2002 (n 6) at 642.

²⁶ Woodman, 'A Note on Voidable Grants of Land in Customary Law' (1966-67) 3 *Law in Society* 59-72; Woodman, *Customary Land Law in the Ghanaian Courts* (Ghana Universities Press 1996) at 322-330.

customary law. Regarding the boundaries of lands, the application of state law rules has the result that the boundaries of land which is the subject of an issue are always fixed.

Those are examples of attempts at normative recognition of customary laws. Institutional recognition is perhaps represented most fully by the British colonial policy of indirect rule. It has been shown repeatedly that chiefs and other local customary authorities when given places in the state systems of government and courts changed the nature of their authority and their ways of carrying out their functions, most noticeably by narrowing their dispute processes to adjudication.²⁷ This occurred because they came to rely for their authority increasingly on the support of the state, not on their traditional, customary sources of support, and to reach decisions in ways which would be acceptable to state authorities rather than in accordance with customary norms. The effect here was close to a replacement of living customary law.

Recognition of customary laws has invariably entailed state law pluralism in respect of the normative and institutional fields to which the recognition refers, because received norms and institutions continue to be parts of the state legal system. As a result there are opportunities for choice of law and for forum-shopping in these parts of the systems, which state laws usually attempt to regulate by rules of 'internal conflicts'. Thus, even when state recognition is given to contractual arrangements under customary law, such as those entailing transfers of interests in land (which, as noted, may have developed to involve the use of written documents), it is frequently possible for individuals to opt not to act under customary law but to make use of received law. For example, instead of a formal transaction to grant access to land under customary law, whether in writing or not, the parties may choose to execute a written grant in a form valid under the received law.²⁸ The state's choice of law rules frequently provide that in such cases the intention of the parties will determine whether received law or customary law is to be applied. This freedom to choose between laws has been extended to unilateral transactions also, such as wills. It is generally assumed that a person holding an interest in land which continues after their death may opt to make a will in the form required by the received law, although this ignores the problem that living customary laws may not permit such wide freedom of testamentary disposition as the received law.

The recognition of customary laws has sometimes been carried out, or claimed to be carried out, through codification. This has to be treated with some reserve because most instances of codification have included conscious attempts to change customary laws, usually to bring them into accord with declared state policies. Even if those aspects of codification are set aside for the moment, it needs to be recognised that the process of codification has been similar to that of state judicial ascertainment of customary laws,

²⁷ For early case studies see e.g. Field, *The Social Organisation of the Ga People* (Crown Agents 1940); Busia, *The Position of the Chief in the Modern Political System of Ashanti* (Oxford University Press 1951).

²⁸ Nwauche (2012), 'Legal Pluralism and Access to Land in Nigeria' in Mostert and Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta 2012), first published as *Acta Juridica* 2011 at 59-82.

entailing similar distortions as a result of misunderstandings and of the perceived need to make the customary laws applicable in state institutions. The result has been again the creation of official customary laws which often differ profoundly from living customary laws. Moreover, again this divergence is likely to increase with time because the codes largely remain unchanged after enactment, whereas, as noted above, living customary laws are in constant change. Commoner than codification in recent times has been the more moderate process of restatement. A restatement arguably does not result in an official customary law because it is not enacted by the state, and it is usual for it to be promoted as a guide, not a law for state authorities.²⁹ Nevertheless, it is affected by much the same defects as codification. There has perhaps been a greater attempt to obtain first-hand information from local traditional authorities, and to obtain their consent to the expression of restatements. However, one effect of this is that the sources consulted are quite noticeably those representing particular sections of communities. Moreover, the resources available for restatements are usually such that in countries with hundreds of distinguishable communities, only a cursory study can be made of the living customary law of each.

VI Changes in customary land laws resulting from state attempts to replace or change them

It is not necessary to distinguish between a change in a law and a replacement of a portion of a law. If the observer focuses exclusively on a small portion of the law affected, it may be concluded that the original law has been replaced, whereas if a larger field is surveyed that 'replacement' will appear to be merely a change in that overall field.

Changes by the state to official customary laws are procedurally easy to achieve. It is necessary only to enact legislation to this effect, provided that, in any case in which the legislation entails amendment to entrenched articles of a constitution, there is compliance with the requisite procedure. There is, however, no certainty that any such change will have an effect outside the field of activity of state institutions. The problematic question is how far the state may effect changes in living customary laws.

Attempts by states to change living customary laws have often been ineffective. It has been observed that the force of reciprocity is sometimes more effective in maintaining living customary law than state recognition.³⁰ It is noticeable that social pressures (which do not necessarily amount to reciprocity) may also be more effective. Both social pressure generally and reciprocity may well have the effect of maintaining living customary law when the state attempts to change it. However, we may discern some

²⁹ Allott, 'What is to be done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950' (1984) 28 *Journal of African Law* 56-71 especially at 67-68.

³⁰ Dickerson (2012), 'Promises of Future Performance and Informal-Sector Transfers of Personal Property: The Example of Anglophone Cameroon' in Mostert and Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta 2012) first published as *Acta Juridica* 2011 at 285-307, although that paper is not concerned primarily with land claims.

changes which have been brought about by the state, either through its use of overwhelming force or because they accord with other influences such as those of globalisation.³¹

Perhaps the most obvious instance of relatively effective attempts by the state to change customary land laws has been, in a number of territories where there were large numbers of settlers in the colonial period, the confiscation of land from Africans for the use of settlers.³² This is also the crudest instance of the use of force by the state to bring about the change. However, even in this case it is worth noting that the communities which were thus divested of their lands have in many instances retained collective beliefs in entitlement to this land, and have continued when possible to advance claims of right, sometimes with recent success. This was more likely in the many instances where they continued to reside on the land, for example as employees of the settlers who had taken it over.

A comparable development, of more doubtful effectiveness, has been the introduction of the 'right of occupancy'. Introduced in the colonial period it entailed a formal declaration vesting land (usually of an entire colonial territory or a large region thereof) in the Crown, together with a provision that those persons who had had rights under customary law and who were in actual occupation of portions of the land taken should hold the right to remain in occupation, although usually this was subject to the will of the state government, and did not include powers to transfer their interests. Thus allodial rights in land were removed and the scope of usufructuary rights reduced in the view of state law. This appears generally to have made little difference to the living customary laws, except when outsiders to a community sought to engage in commercial dealings with land. Needing the support of the state for their transactions, they needed to comply with state law, which meant effectively that they needed to obtain grants from the state. They would also need to secure the safety of their business by meeting the demands of local individuals and the community, although it is likely that the cost of this may have been less than it would have been without the state intervention.

Changes in the right of occupancy systems have occurred since Independence. There is a marked contrast between Nigeria and Ghana in this respect. In Nigeria the right of occupancy system which had been introduced in the North of the country in the colonial period was extended to the whole country by the Land Use Act, 1976 enacted by a military regime. In Ghana, where the system had also been introduced in the North of the country in the colonial period, it was replaced in 1963 by a statute vesting all such lands in the President, but then this was repealed, and title to the lands restored to the communities which had previously held them by the Constitution

³¹ A revealing study of land disputes which considers how 'tradition' may change in response to new circumstances including attempted interventions by state law, but also may prevail over state law, is Berry 2002 (n 6), especially 653-664.

³² See e.g. Berry 2002 (n 6) at 641-642.

of the Third Republic, 1979.³³ Another variation in the development of the rights of occupancy system occurred in Tanzania, where the system had been introduced for the mainland (Tanganyika) in the colonial period. This was used in the villagisation policy of the early post-colonial period, resulting in the relocation of more than half the population.³⁴ Subsequently in 1999 the Village Lands Act, 1999 set up village councils to administer communal lands.³⁵ In all of these cases a part of the customary laws relating to land were, according to state law, kept in effect but with a reduction in the rights which they had conferred. In so far as the state exercised the powers it had taken, these were effective, although land relations outside the limited sphere of the state continued to be governed by living customary law, which itself was adapting to new circumstances. In Senegal, Mali, Burkina Faso and Ethiopia also in state law the ownership of most or all land has been vested in the state, with occupants according to state law holding limited rights of user.³⁶

Regulation of chieftaincy was general in colonial states, and affected the customary land laws because chiefs exercised customary law powers over communal lands. As part of the process of consolidating its power over colonised territories the colonial state sought to secure that every community would be led by a chief who had been approved by the state government. (sometimes known as the process of 'gazetting'). One result was that the institution of chieftaincy was imposed on societies which had been customarily acephalous. This was contrary to their living customary laws but the state generally had the power to ensure that the chiefs it 'recognised' would, by having access to portions of state authority, be able to exercise some power. In those cases where chiefs had already existed, the effect of this form of recognition was that chiefs came to rely on the state rather than the approval of their communities as the basis for their exercise of power. In many districts the effect was that chieftaincy disputes became commoner than they had been, since it became more worthwhile and easier to challenge the right of any particular person to be a chief. However, it has been rare for a community to have two opposed chiefs, one holding office according to living customary law and one under official customary law. Generally state law has triumphed in this matter. On the other hand, in Ghana the power to appoint chiefs was officially taken out of the hands of the state and restored to the procedures of customary law by the Constitution of the Second Republic, 1969. These issues have tended to decline in intensity as the power of the state has gradually eroded the power of chiefs. In the field of land law their powers have been widely subjected to the approval of state authorities, and sometimes taken away. Nevertheless in many areas a person's rights in land are in practice

³³ Woodman 1996 (n 26) at 57; Lund (2009), 'Recategorizing "Public" and "Private" Property in Ghana' in Sikor and Lund (eds), *The Politics of Possession: Property, Authority, and Access to Natural Resources* (Wiley-Blackwell 2009) at 125-141.

³⁴ Hyden, *Beyond Ujamaa in Tanzania: Underdevelopment and an Uncaptured Peasantry* (University of California Press 1980); Berry 2002 (n 6) at 650.

³⁵ Fitzpatrick (n 13) at 462-465, giving similar examples also from Botswana and Lesotho.

³⁶ Toulmin (n 12) at 13.

precarious unless they have the approval of the chief, whereas the approval of state authorities is not always obtained.³⁷

There has been a trend towards intervention by the state to replace the continuous exercise of land use through the generations by self-perpetuating groups, usually lineages, with patterns of individual holding of land rights, which often extend beyond the individual holder's lifetime. These changes have been influenced by globalising forces to such an extent that it is difficult to determine the extent of the role of state law in the changes, but they need mention here.

It appears that in early living customary laws individuals' rights over land were relatively limited. An area of land controlled by a community would be seen as their communal land, although it is doubtful whether the notion of 'ownership' would have been used. That community could permit outsiders to make use of portions of the land, although it would be considered wrong to do this if it limited the reasonable use of the land by members. The community would permit individual members to make use of portions of the land. It is not certain that either member or outsider users of land could be accurately described as holding 'rights', although state recognition of these aspects of customary law has produced an official customary law in which they are thus empowered, with the community now being named as the owner, or allodial holder of the land. Living customary laws may have moved towards an acceptance of these concepts, in part because globalisation has brought modes of land use which are more intensive and require the exclusion of others' claims to the same land.

However, living customary laws have often retained the notion that, even if an individual may have extensive rights over the communal land which he personally had occupied and used, these rights could not continue after his death. Thus he could have at most a life estate in his interest. After his death the community could decide how it was to be used, although the usual assumption continued that they ought to reach reasonable decisions, and that these would often require the lineage of the deceased to have the use of the land, and persons such as his widow and children to receive assistance from it.

Official customary law as administered in state institutions, influenced by the tenure systems of received land laws, tended to hold that the individual could have an interest which extended beyond their life. This required that there should be a law of inheritance. Once again here the practices which were normally followed because they were thought right and proper were adopted as embodying rules of law. Thus it was concluded that a deceased person's interest in land, if not a life estate, was inherited by his lineage, subject to certain obligations including that to maintain the widow and children in so far as this was considered reasonable in the circumstances. State institutions were prepared to enforce this if called upon. It appears that living customary law also moved towards this notion of inheritance of the land and the obligations

³⁷ Fitzpatrick (n 13) at 459-462, referring to forms of intervention called the 'the Agency Method' and 'Group Incorporation', which are instances of policies directed at chiefs and extended to heads of family, and which fall into this category.

of the deceased by his lineage. However, this version of living customary law appears to have been less fully accepted and more contested, with the result that frequently the injunctions of official customary law have not been obeyed. There has been widespread discussion of ‘property-grabbing’, where members of the lineage of a recently deceased person invade his property and forcibly seize it from the wife and children. State laws have been enacted specifically to declare such practices criminal offences, and victims are assisted by state law to recover their entitlements if they instigate court proceedings. However, state law again is relatively ineffective here, largely because the victims often do not have the resources to set this law in motion, but also because of the uncertain and equivocal nature of the customary law as presented to the state courts.³⁸ A further consequence of this has been the enactment by some states of legislation changing the law of inheritance to provide for the distribution of estates in a manner similar to that provided in the received laws.³⁹ All the evidence is that these provisions are quite often evaded. Even when cases reach the state courts, it is possible to use arguments such as that to the effect that the deceased held only a life estate in the land, with remainder to his lineage or a reversion to the community.

This development also raised at a relatively early date the issue of a law of wills. It has long been a practice accepted by living customary laws for a person to declare what should be done on his death with regard to his property or other matters in which he has an interest. These declarations have often been followed, out of respect for the deceased or fear of his spirit, provided that they are not considered unreasonable. Thus a law of wills has long existed in the living customary laws, although exactly how binding these declarations are, and in what circumstances they are binding, has been a question with a complex answer. They are normally unwritten, although they are sometimes evidenced in writing today. The official customary laws have been developed on this basis to include a law of wills. However, the possibility for a person to opt to use the received law for unilateral transactions has meant that wills are frequently made on legal advice in the form validated by that law, rather than would-be testators taking the risk of the uncertainties (both over testamentary capacity and over the required form) of the customary-law will. This does not appear to have happened very frequently, but its availability could well have been a hindrance to the development of official customary laws of wills.

The introduction by the state of land title registration, or titling, has been widely proposed as an effective measure to overcome doubts and difficulties in the living customary land laws, and in various forms has been introduced in many jurisdictions. The initial forms of registration relating to land were not title registration, but modes of registering written transactions affecting

³⁸ See inter alia Himonga (2012), ‘Taking the Gap—“Living Land Law Grabbing” in the Context of Customary Succession Laws in Southern Africa’ in Mostert and Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta 2012), first published as *Acta Juridica* 2011 at 114-139.

³⁹ E.g. Ghana Intestate Succession Act, 1985: this was originally the Intestate Succession Law, 1985 (P.N.D.C.L. 111), and is now the Intestate Succession Act, 1985, *Laws of Ghana* (rev. ed. 2005), Vol. V, at 1951.

land.⁴⁰ These could not in most instances be used to register customary-law transactions, even when these were evidenced in writing. They did not affect the living customary law except that sometimes parties used the received law to engage in written transactions so that they could be registered, with the result that customary laws were less often chosen for such transactions. The second possibility was land title registration for titles governed by received law only. This again resulted in the choice of received law for certain proportions of dealings in land. The third possibility, which is currently being extended ever more widely, is land title registration for both received and customary law titles.⁴¹ However, frequently the land registration laws allow for the registration of some customary laws titles, such as the allodial titles of communities, and not for others, such as individual titles.⁴² In virtually all cases the process of registration requires considerable administrative resources, which are not available to all parties. They can therefore give opportunities for the rich and powerful to increase their advantages. The systems may operate more effectively if they are locally based, although this is rare.⁴³ It has been argued that general title registration is likely to result in a unification of the laws governing interests in land, and even that it entails this result,⁴⁴ although observation of the system in the Ghana Land Title Registration Act, 1986⁴⁵ leads one to question this.⁴⁶

More general legislation has sought to enforce gender equity in all circumstances, including those governed by living customary laws which can be attacked as discriminating against women. The legislation is often contained in constitutional provisions. These again have some effect when cases on customary law reach the state courts, that is, when official customary laws are to be applied, but otherwise they seem to have effected little change in living customary laws. It is likely that living customary laws will change in this respect, given that there are increasingly organised political and social drives in this direction. The state legislation has no doubt played a part in this development, although other aspects of social change may have been more influential.

⁴⁰ The possibilities are considered by Fitzpatrick (n 13) at 467-471.

⁴¹ Cf Pienaar (2012), 'Land Information as a Tool for Effective Land Administration and Development' in Mostert and Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta 2012) first published as *Acta Juridica* 2012 at 238-271, asking whether it is possible for land registration to be adapted to assist customary law; some of these arguments had been anticipated in Toulmin (n 12) especially at 14-16.

⁴² Fitzpatrick (n 13) at 465-467.

⁴³ Toulmin (n 12) at 12-17.

⁴⁴ Pope (2012), 'Indigenous-law Land Rights: Constitutional Imperatives and Proprietary Paradoxes' in Mostert and Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta 2012) first published as *Acta Juridica* 2011 at 308-333.

⁴⁵ *Laws of Ghana* (rev. ed. 2005), Vol. V, at 2601.

⁴⁶ See Fitzpatrick (n 13) at 453-54; Claessens (2012), 'Contested Power and Apartheid Tribal Boundaries: The Implications of "Living Customary Law" for Indigenous Accountability Mechanisms' in Mostert and Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta 2012), first published as *Acta Juridica* 2011 at 174-209; Kingswill (2012), 'Lost in Translation: Family title in Fingo Village, Grahamstown, Eastern Cape' in Mostert and Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta 2012), first published as *Acta Juridica* 2011 at 210-237.

Finally we should notice that there have been many instances where attempts have been made to force other specific changes to living customary laws through the medium of state intervention. In the colonial period the 'repugnancy clause' was designed to require state institutions to inquire in all cases when they were asked to recognise customary laws whether those laws were 'repugnant to natural justice, equity and good conscience' or similar. The hope and expectation was that, if the state refused to recognise these customary norms, thus excluding them from official customary laws, they would soon cease to be aspects of living customary laws. In practice the repugnancy clauses were not often applied,⁴⁷ and when they were it was not clear how far they modified living customary laws. The clauses have been mostly removed from the law since Independence, although the courts have declared that they had continuing duties to avoid (what they see as) injustice. Codifications and restatements have often explicitly excluded customary laws which were adjudged by the compilers to be unjust. Finally there have been interventions by the state to deal with specific issues. Instances are the legislation in a number of states which has declared female genital mutilation to be a crime, and in the case of Ghana the statute providing that the head of a family who has custody of family property is not merely 'accountable' in a general sense (which was already the case under living customary law), but may be sued for an order to render accounts in the state courts (Head of Family (Accountability) Act, 1985).⁴⁸

VII General effects of state law on customary land laws

In attempting a general summary of these developments, it must first be stated that living customary land laws have continued to exist, with their own characters. They remain distinct from official customary laws, and the difficulty of recognising customary law and incorporating it into the state law without changing it has continued. Nevertheless, many living customary laws have undergone substantial change. How far this change has been caused by state law is debateable, but the changes appear on the whole to have brought living customary laws closer to harmony with official customary laws. On the other hand, even when states have expressly attempted to change living customary laws they have had only limited success, so that, for example, territorial boundaries remained 'as contentious at the end of the [twentieth] century, forty years after the end of colonial rule, as they were at the height of colonial map-making'.⁴⁹ Part of the reason for this has been that the changes would have reduced the power and property rights of some sections of society which benefited from the existing systems, while the beneficiaries of the intended changes have not had effective access to state institutions to enforce them.⁵⁰

⁴⁷ Woodman (1988), 'How State Courts Create Customary Law in Ghana and Nigeria' in Morse and Woodman (eds), *Indigenous Law and the State* (Foris 1988) at 181-220, especially at 193-197.

⁴⁸ *Laws of Ghana* (rev. ed. 2005), Vol. V, at 551.

⁴⁹ Berry 2002 (n 6) at 644 especially n 6.

⁵⁰ Lund (n 8).

There have been fundamental changes to ultimate, or allodial titles to land. In official customary laws the allodial title, which can now be reasonably referred to as ownership of the land, is vested either in the state or in traditional authorities. The living customary laws, which earlier did not include the concept of absolute ownership of land, have changed to accept by and large this position.⁵¹

There has been change in communal rights over land, which in official customary laws have often come to be individually held. Living customary law has moved in the same direction, although it still holds that there are areas of land under communal title when official customary law sees them as composed of subdivisions held by many individuals. As a result access to land is less often gained today through membership of a group, and more often through transactions with the current holders by which titles are transferred, frequently for money payment.⁵²

There has been a change in the nature of land transactions which may be engaged in, and their consequences. In practice received law procedures for both bilateral and unilateral transactions in land have become common. One result has been a decline in the use of customary-law procedures. Another has been a tendency for customary-law procedures, when they are used, to be designed to resemble increasingly their received law counterparts. More substantially, another result has been the licensing of transactions, including outright sale of interests in land, which were previously unusual or unknown. A further result has been the possibility of the creation of interests governed by received law in place of customary-law interests. Although strictly binding only between the parties, in land law bilateral transactions have become binding between successors.⁵³ One of the broadest effects of all has been summarised by Berry thus: ‘... “land-grabbing” has become everybody’s business.’⁵⁴ The uncertainties in titles caused by modern circumstances has resulted in more attempts to obtain interests in land by grants from persons who do not have the authority to grant them, and who may even have no rights whatever in the land they purport to grant. However, at this point developments can hardly be explained entirely by the availability of transactions in other laws. Berry herself explains the causes as economic breakdown, exacerbated if not caused by international development policies.⁵⁵

If we attempt to look into the immediate future, we find that there is likely to be a continuation and intensification of global pressures to unify land rights, and to recognise the predominance of individual over communal interests.⁵⁶ But there remains doubt as to how far consciously planned change

⁵¹ Cf Scott (2012), ‘Absolute Ownership and Legal Pluralism in Roman Law: Two Arguments’ in Mostert and Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta 2012) first published as 2011 at 23-34, considering Roman Law.

⁵² Nwauche (n 28).

⁵³ Woodman, ‘The Scheme of Subordinate Tenures of Land in Ghana’ (1967) 15 *American Journal of Comparative Law* 457-477; Woodman 1996 (n 26) at 128-133.

⁵⁴ Berry 2002 (n 6) at 654.

⁵⁵ Berry 2002 (n 6) at 654.

⁵⁶ Bennett and Mostert (n 13).

of customary law will be possible, and particularly how far it can be changed by the state.⁵⁷

Finally, in the longer term we could see the disappearance of some old cultures and laws, including land laws. Somewhat different from that is the possibility of the unification of different laws which currently coexist. This would entail the replacement of existing plural laws with single systems which contained elements of all the laws they replaced. Less drastic is the possibility that there may be integration of laws, that is, a continuation of plural laws but changes in them which would bring to an end conflicts between them. In the field of deep legal pluralism this would require both tolerance and inventiveness in the processes of law reform, not only by the state, but by other bodies which hold legal authority.

⁵⁷ Weeks 2012 (n 21) at 149, usefully considers how living customary law may be changed, and at 173 considers what the state should do; but at 151-153 includes a note of dispute over whether state court decisions change anything in living customary law.

PROSPECTS FOR MEDICINES REGULATION HARMONISATION IN THE SADC: REFLECTIONS ON THE AU DRAFT MODEL LAW AND OTHER DEVELOPMENTS*

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ABSTRACT

Fourteen of the fifteen SADC member states signed the Protocol on Health, in Maputo, on 18 August 1999. The Protocol recognises, among other things, 'that close co-operation in the area of health is essential for the effective control of communicable diseases, non-communicable diseases and for addressing common health concerns in the Region'. Critically, it provides that 'State Parties shall co-operate and assist one another in the harmonisation of procedures of pharmaceuticals, quality assurance and registration'. There is thus a regional imperative to harmonise medicines regulatory laws, regulations and procedures. In the ensuing decade and a half, a number of developments have taken place along the path to harmonisation.

The AU's 'draft Preliminary Model Law on Medicines Regulation Harmonization' has sought to take the process of harmonisation to a continental level. Given the complexities and disparate backgrounds of AU member states, this is a mammoth task to accomplish. For example, a number of thorny policy issues will need to be clarified. Furthermore, the success of AU-wide harmonisation and model legislation must be premised on the regional blocs achieving significant consensus within their ranks.

This contribution evaluates the progress which the SADC bloc is making to attain harmonisation, identifies the critical issues which need to be addressed in the run-up to full harmonisation, and explores how these may be addressed. It concludes that the significant progress made by other regional blocs in Africa, and the experience of the AU Model Law, offer useful exemplars for progress by the SADC in this regard.

Keywords: Medicines regulation, regional harmonisation, AU model law, intellectual property provisions.

I Introduction

We all use medicines, whether for everyday acute conditions like headaches, or more long-term chronic illnesses such as diabetes, cancer or HIV infection. What is distinctive about medicines, compared to other items we consume, are their intrinsic properties and the manner in which they are transacted.¹ Because their intrinsic qualities must be powerful enough to be effective in treating disease, they may also invariably cause adverse side effects in some users. The manner of their transaction also varies from those requiring a

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¹ Jackson, *Law and the Regulation of Medicines* (Bloomsbury Publishing 2012) at 1-2.

doctor's prescription, through to routine over-the-counter purchases.² These considerations lead to the necessity for government regulation in the approval, purchase and sale of medicines, as they are considered to be 'meritorious goods'.³ The underlying rationale for the regulation of medicines is that 'all medicinal products should have to meet the same exacting standards of proof of quality, safety and efficacy'.⁴ Thus, most countries have institutions in place which are tasked with this important regulatory function.

A recent review of regional integration initiatives concluded that 'regional economic integration makes sense for Africa and for Southern Africa in particular. Given small economies with limited domestic markets, the creation of an integrated economic space can facilitate efficiencies in production, investment and trade, thus enhancing development outcomes'.⁵ As regulatory functions such as medicines registration are resource-intensive activities, clearly, the same can be said for initiatives to integrate and harmonise medicines regulatory systems in the region.

A World Bank report highlights the importance of medicines regulation as follows: 'Strengthening governance, regulations and accountability in the pharmaceutical sector is an important segment of health systems strengthening. Improved medicines regulatory policy and harmonization efforts can lead to more competitive markets, economic growth, improved access to new medicines, better quality of pharmaceuticals in circulation and ultimately better health outcomes'.⁶ Another report⁷ notes that '(a)cross Africa, medicines regulatory harmonization continues to rise higher on the national agendas, with several promising initiatives underway in the regions ... (and) that regional capacities for medicines regulatory harmonization would be strengthened to boost collective efforts toward universal access to quality and affordable medicines'.

Fourteen of the fifteen SADC member states (the exception being Madagascar) signed the Protocol on Health (PoH), in Maputo, on 18 August 1999.⁸ The Protocol recognises, among other things, 'that close co-operation in the area of health is essential for the effective control of communicable diseases, non-communicable diseases and for addressing common health concerns in the Region'.⁹ Critically, it provides that 'State Parties shall co-operate and assist one another in the harmonisation of procedures of pharmaceuticals,

² Ibid.

³ Gray, 'Developing, registering and using medicines' in Hassim, Heywood and Berger (eds), *Health and Democracy: A Guide to Human Rights, Health Law and Policy in Post-Apartheid South Africa* (Siber Ink 2007) at 420.

⁴ Jackson (n 1) at 261.

⁵ Kalenga, *Regional Integration in SADC: Retreating or Forging Ahead?*, tralac Working Paper (2012) at 1.

⁶ World Bank, 'Global Medicines Regulatory Harmonization Discussed' (18 October 2012) available at <<http://www.worldbank.org/en/news/feature/2012/10/18/gGlobal-medicines-regulatory-harmonization-discussed>> accessed on 2 October 2013.

⁷ Global Medicines Regulatory Harmonization (GMRH) Multi-Donor Trust Fund, 'Stronger Regulatory Systems for Better Access to Quality and Affordable Medicines 2013 Progress Report' (2013) available at <http://www.amrh.org/sites/default/files/downloads/2013_gmrh_progress_report_abridged_version.pdf> accessed on 30 October 2013.

⁸ SADC, 'Protocol on Health in the Southern African Development Community' (1999) available at <<http://www.sadc.int/member-states/>> accessed on 1 August 2013.

⁹ Ibid, Preamble.

quality assurance and registration'.¹⁰ There is thus a regional imperative to harmonise medicines regulatory laws, regulations and procedures.

A dedicated Unit within the Social and Human Development and Special Programmes Directorate – called the SADC Pharmaceutical Programme (SADC-PP) – has been in operation since June 2004.¹¹ This Programme is in place in order to discharge of the obligations in Article 29 of the PoH.

The strategies being pursued by SADC-PP include the strengthening of regulatory capacity, supply and the distribution of basic pharmaceutical products through ensuring a fully functional regulatory authority with an adequate enforcement infrastructure. Other strategies entail:

harmonising standard treatment guidelines and essential medicine lists; rationalising and maximising the research and production capacity of the local and regional pharmaceutical industry of generic essential medicines and African Traditional Medicines; promoting joint procurement of therapeutically beneficial medicines of acceptable safety, proven efficacy, and quality to the people who need them most, at affordable prices; establishing a regional databank of traditional medicine, medicinal plants, and procedures in order to ensure their protection, in accordance with regimes and related intellectual property rights governing genetic resources, plant varieties and biotechnology; developing and retaining competent human resources for the pharmaceutical programme; developing mechanisms to respond to emergency pharmaceutical needs of the region; and facilitating the trade in pharmaceuticals within SADC.¹²

In July 2011, the SADC Secretariat finalised the Harmonisation of Medicines Registration in the SADC Region project proposal. The overall purpose of the project is to improve public health by achieving rapid and sustainable access to safe, affordable, essential medicines of acceptable quality. The project goal is to improve the availability of medicines through the regional harmonisation of regulatory systems, guidelines and processes among member states in the SADC, and, in particular:

Harmonising the system of medicines registration and broadening the scope of products reviewed (new chemical entities, vaccines and biologics) and regulatory functions undertaken (clinical trial oversight, pharmacovigilance).

- Achieving political, legislative and financial support by communicating the value of the project to all stakeholders.
- Building regulatory capacity and capability.
- Sharing information to facilitate faster decision making.¹³

The five-year programme, 'Harmonisation of Medicines Registration in the SADC Region' which is guided by the African Medicines Registration Harmonization Initiative (AMRHI), will allow for the development and implementation of new or more developed legislation, and standardised sets of guidelines, processes and procedures. This would facilitate medicines registration across the SADC and ensure intensified market surveillance.

¹⁰ Ibid Article 29(a).

¹¹ SADC, available at <<http://www.sadc.int/sadc-secretariat/directorates/office-deputy-executive-secretary-regional-integration/social-human-development-special-programmes/>> accessed on 1 August 2013.

¹² SADC, 'Pharmaceutical Business Plan (2007-2013)' available at <<http://apps.who.int/medicinedocs/en/m/abstract/Js19282en/>> accessed on 1 August 2013.

¹³ Southern African Generic Medicines Association, available at <<http://www.sagma.net/Activities/registration.html>> accessed on 1 August 2013.

Regional regulatory harmonisation, including mutual recognition of registration, can improve the availability of quality-assured medicines – especially for priority products with small sales volumes – since the increased market size will offer better incentives for suppliers to register such products.

More recently, in November 2012, the SADC Ministers of Health approved the ‘draft SADC Strategy for Pooled Procurement of Essential Medicines and Health Commodities’. This development holds encouraging prospects for increasing efficiencies in medicines procurement and hence access to affordable medicines, and is discussed in great detail below.

The AU’s ‘draft Preliminary Model Law on Medicines Regulation Harmonization’ has sought to take the process of harmonisation to a continental level. Given the complexities and disparate backgrounds of AU member states, this is a mammoth task to accomplish. For example, the following policy issues, among others, will need to be clarified:

- (a) Whether the legislative and regulatory framework will encompass merely medicines for human use (including traditional, complementary and alternative medicines) or a broader range of products such as veterinary medicines, medical devices, cosmetics and pesticides, as well as food.
- (b) How the decision-making power in the regulatory authority is vested.
- (c) The means to achieve harmonisation between differently-capacitated national authorities, and the future role of regional regulatory bodies in the overall African context.
- (d) How to maximise transparency within the constraints applicable to all regulatory bodies that rely on commercially-sensitive data to inform their decisions.
- (e) How to adopt a pro-public health approach that does not allow intellectual property protections to burden the medicines regulatory authority with unnecessary, and onerous, obligations and restrictions.

It is submitted that the success of AU-wide harmonisation and model legislation must be premised on the regional blocs achieving significant consensus within their ranks.

This contribution: evaluates the progress which the SADC bloc is making to attain harmonisation; identifies the critical issues which need to be addressed in the run-up to full harmonisation; explores how these may be addressed; discusses why harmonisation of medicines registration is important; and then reviews the status quo in SADC countries in terms of regulatory capacity. This is followed by an examination of the AU/NEPAD Model Law on medicines harmonisation. In conclusion there is a discussion on the challenges, opportunities and possibilities raised by the Model Law, and other regional initiatives, and some suggestions for the way forward are presented.

At the same time, it is important to recognise that several parallel processes and initiatives are taking place simultaneously – such as negotiations for free-trade agreements, pooled procurement of medicines, and initiatives to reform patent laws to adopt the flexibilities available under the Trade-Related

Aspects of Intellectual Property Rights (TRIPS) Agreement, and make them more pro-public health.

II Why harmonisation is important

Globally, there is a growing body of practice and knowledge in the regional harmonisation of medicines regulatory systems, including those developed within South East Asian Nations, the Andean Community, the European Union, the Southern Common Market, and the Pan American Network.¹⁴ Harmonisation is favoured because of its potentially positive impacts on a number of factors. Thus harmonisation:

- Helps build capacity across the region. Information and technical skills can be disseminated across the region from larger, better-resourced medicines regulatory authorities to smaller, resource-strapped ones.
- Potentially increases accessibility of medicines through standardised approval processes between countries, resulting in the approval process being accelerated and medicines coming to market in all countries in the region almost simultaneously.
- Increases access through pooled procurement. Countries with similar disease profiles and medicines needs can benefit from bulk purchasing, through pooled procurement and other contractual schemes.
- Strengthens the regulatory system through joint surveillance and enables it to counteract the entry of substandard and harmful products across regional borders.

A study by the African Union and NEPAD Agency¹⁵ identified the following benefits of regional harmonisation:

- Increase of safe, effective, quality medicines for neglected diseases.
- Availability at affordable prices.
- National Medicines Regulatory Agencies will be better equipped to register medicines in a cost-effective and timely manner.
- Greater technical capacity, improved quality inspections, and better control over registered, unregistered, counterfeit or substandard medicines.
- Companies benefit from simplified and standardised approval and processing of applications.¹⁶

The AU/NEPAD Agency report also identified several challenges confronting the harmonisation drive: the Seychelles does not have a national medicines regulatory agency, with the relevant functions being conducted within the Ministry of Health; human resource capacity is often limited in the SADC and within countries; the capabilities of physical facilities in countries vary and there is a need to expand them in order to fulfill their functions; there is

¹⁴ WHO, 'Medicines Challenges' available at <http://www.who.int/medicines/areas/quality_safety/challenges/en/> accessed on 22 August 2013.

¹⁵ AU/NEPAD Planning & Coordinating Agency, *Situation Analysis of Medicines Regulation Harmonisation* (2010).

¹⁶ Ibid at 6.

usually a grave shortage of quality control laboratories, with only a handful WHO pre-qualified; and there is inadequate financial support for medicines regulatory agencies, particularly the smaller ones.

III The status quo in SADC countries

Harmonisation initiatives are no doubt complicated by the disparate profiles of member states along cultural, demographic, economic and other lines. Countries vary considerably in terms of size and population (from 87 000 in the Seychelles to 155 million in the United Republic of Tanzania, and gross national income (from US\$140 in the DRC to UDS\$8960 in the Seychelles).

While the main causes of morbidity are generally similar within the SADC region, many differences exist between them with regard to pharmaceutical procurement and supply-chain practices, as well as quality-assurance procedures. Furthermore, a number of countries experience serious shortages of pharmaceutical personnel. These factors present challenges to the harmonisation process.¹⁷

As regards the medicines regulatory environment, further serious challenges exist. There is unevenness in the legislative framework across the region, with four member states (Angola, Lesotho, Swaziland and Seychelles) not being able to register medicines. However, the regulatory agencies in three states operate at internationally acceptable levels, which is promising for the provision of capacity and support within the region. Regulators cover the basic issues of licensing of manufacturing facilities, inspections, quality control and registration. There are some registration guidelines available. Information-sharing is a key objective, but websites are often not updated, thus frustrating this objective. South Africa has the most developed pharmaceutical industry in the region. There is, in fact, a strong commitment to harmonisation, despite the serious challenges.

Another study,¹⁸ although not specific to the SADC, revealed similar obstacles and problems confronting sub-Saharan African countries. Regulatory frameworks were found to be too complex, with a lack of clarity on definitions, and with many gaps and overlaps; some were not fully established; and not all regulatory functions were operational. They almost uniformly lack sustainable funding, qualified staff and operational resources, quality management systems for regulatory procedures, updating of technology and science and measures to deal with confidentiality and the conflict of interests. Furthermore, medicines registration guidelines are not up to WHO standards, and they are administrative rather than technical in nature. Quality control is another critical issue, and while the majority of countries do have regulatory quality laboratories, qualified staff, and serviceable equipment, few had effective quality management systems in place.¹⁹

¹⁷ Ibid at x.

¹⁸ WHO, 'Assessment of medicines regulatory systems in sub-Saharan African countries' (2010) available at <<http://apps.who.int/medicinedocs/documents/s17577en/s17577en.pdf>> accessed on 22 October 2013.

¹⁹ Ibid at 4-5.

Further evidence of the difficulties inherent in harmonisation efforts is contained in the SADC Pooled Procurement Strategy.²⁰ While the focus of this strategy is the harmonisation of practices of pharmaceutical procurement and supply management (PSM) in member states, it identified the following key challenges, which are relevant to this discussion:

- Inaccessibility of information on pharmaceutical procurement in the region, including the lack of transparency in public and private pharmaceutical markets, and price and other purchase information.
- Variable availability of essential medicines between member states (3 to 70 percent of certain tracer items were out of stock over one 12-month period).
- The lack of standardisation regarding procurement and price information – for most products in a group of 50 tracer items, the difference between the highest and lowest prices was five-fold or more.
- Data on pharmaceutical budgets and expenditure were hard to obtain, a situation complicated by the reliance of most member states on donor support for the purchase of essential medicines.
- Variability in the levels of pharmaceutical sector development and pharmaceutical services delivery, as well as in the application of regulations and procedures such as quality assurance and public procurement.
- Variability in the capacity of the regulatory authorities of member states to assess and approve medicines, with four countries not having a medicines regulatory authority for this purpose.
- A serious shortage of qualified pharmaceutical personnel across the region, averaging 0.7 personnel (pharmacists, pharmacy assistants and technicians) per 10 000 inhabitants.
- The lack of coordination between the ministries of finance, trade, industries and health at national and regional levels, with the result that there was limited information on the use of TRIPS flexibilities in national legislation in order to improve access to medicines.²¹

Significantly, the Strategy contains a response analysis section, which identified specific strategies adopted at regional and national levels, in order to enhance the availability, affordability and quality of essential medicines. These include the following observations:

The similarity of national medicines policy and regulations in all SADC member states, including a National Medicines Policy and Essential Medicines List. With the exception of South Africa, all have a Public Procurement Act

- Most of the internationally accepted Operational Principles for Good Pharmaceutical Procurement are being applied by SADC member states.

²⁰ SADC Strategy for Pooled Procurement of Essential Medicines and Health Commodities, 2013-2017 (April 2013) available at <<http://www.sarpam.net/wp-content/uploads/2012/12/SADC-PP-Strategy-16-11-12-final-English.pdf>> accessed on 22 October 2013.

²¹ Ibid at 3-4.

- Three WHO pre-qualified quality control laboratories²² are to be found among the 42 laboratories in the SADC (one in Tanzania, and two in South Africa).
- Overall, there are also 14 approved regional guidelines that support regulatory harmonisation in medicines registration.
- Most recently, a Situational Analysis and Feasibility Study was undertaken as part of the development of the SADC Strategy for Pooled Procurement of Essential Medicines and Health Commodities.²³ This study observes that SADC Pharmaceutical Programme activities are related to harmonisation guidelines as part of an overall thrust towards regulatory harmonisation, and this has led to the development of infrastructure to support that goal. The Programme has also organised National Medicines Regulators regionally into a regulators' forum, which meets regularly.²⁴ Significantly, this process, through the offices of the SADC Secretariat Senior Programme Officer, and with support from international cooperating partners, has yielded 17 regional guidelines for registration of medicines.²⁵ These guidelines have been developed by SADC regulators and approved by SADC ministers of health. However, few of the existing SADC medicines regulatory guidelines are actually available or used in the member states.²⁶ Nonetheless, these developments enable the SADC to remain aligned to, and participate in, the AMRHI.

The SADC Situational Analysis and Feasibility Study concluded, *inter alia*, that the initial forays into information sharing on prices and suppliers could result in price reductions of 10 percent regionally, and that despite differences and weaknesses in the procurement systems of member states, there was a strong case for moving forward on the pooled procurement strategy.²⁷ The Study proceeds to make a number of recommendations, which include the need to continue to invest in regional procurement; to commission follow-up research; and to optimise the use of TRIPS flexibilities to enhance access to medicines. Significantly for this discussion, a key recommendation is to support medicines regulatory harmonisation:

Medicines regulatory harmonisation should be supported by facilitating the process of harmonising medicines registration requirements and processes in the region (including updating of standardised guidelines and capacity building plans for implementers).

While this recommendation is thin on detail, it demonstrates the pivotal role of the medicines regulatory harmonisation process in the achievement of several of the goals of the SADC community: access to affordable medicines

²² WHO pre-qualified laboratories are assessed as part of the WHO Prequalification Programme, and accredited if found to comply with standards recommended by WHO Good Manufacturing Practices (GMP). See: WHO, List of Prequalified Quality Control Laboratories, available at <http://apps.who.int/prequal/lists/PQ_QCLabsList.pdf> accessed on 23 October 2013.

²³ SADC, 'Pooled Procurement of Essential Medicines and Medical Supplies Situational Analysis and Feasibility Study' (June 2013); pdf version available on file with author.

²⁴ *Ibid* at 24.

²⁵ SADC, 'Medicines' available at <http://medicines.sadc.int/?page_id=121> accessed on 24 October 2013.

²⁶ SADC (n 23) at 25.

²⁷ *Ibid* at 63.

of assured quality, and the ‘prerequisite for the improved health status of the people of the Region’.²⁸

IV The AU/NEPAD initiative²⁹

A welcome recent development is the formulation of a Draft AU Model Law on Medicines Regulation Harmonization, which has its origins in the ‘Roadmap for Shared Responsibility and Global Solidarity for AIDS, TB and Malaria in Africa’ adopted by the AU in January 2012.³⁰ This decision was reiterated in the 19th Assembly of the African Union which, among other things, resolved ‘to accelerate and strengthen regional medicines regulatory harmonization initiatives and lay the foundations for a single African regulatory agency’.³¹ The Draft is currently in the process of being finalised in preparation for endorsement by various stakeholders.³²

As originally tabled, the Draft³³ was conceptualised as a detailed model law, consisting of 24 chapters and 239 sections dealing with extensive provisions regulating a wide variety of matters.³⁴ The implementing agency – The NEPAD Agency – convened a Technical Working Group (TWG) on Medicines Policies and Regulatory Reforms, which made substantial comments on the Draft, and also invited various partners³⁵ to submit comments. In its original iteration, the Draft was considered to contain many troubling provisions which would potentially have a negative impact on access to affordable, quality medicines. Furthermore, there appeared to be several important policy-related issues which required closer examination. The key problem areas were identified as:

(a) Overall structure of the Draft Model Law

It was presented as a detailed piece of legislation, requiring a single approach to a large range of issues to be regulated – thereby restricting the ability of national authorities to implement local variation to suit national peculiarities.

²⁸ SADC (n 8), Preamble.

²⁹ Much of this section draws on a Review of the AU Draft Model Law on Medicines Harmonisation, compiled jointly by the author, Brook Baker and Andy Gray (on file with the author).

³⁰ AU, ‘Roadmap on Shared Responsibility and Global Solidarity for AIDS, TB AND Malaria Response in Africa’ (2013) available at <[http://www.hst.org.za/sites/default/files/Shared_Res_Roadmap_Rev_F\[1\].pdf](http://www.hst.org.za/sites/default/files/Shared_Res_Roadmap_Rev_F[1].pdf)>, accessed on 25 October 2013.

³¹ AU, ‘Draft Preliminary Model Law on Medicines Regulation Harmonization’ (January 2013), Preamble (on file with author).

³² A sub-committee of the Technical Working Group on Medicines Policies and Regulatory Reforms met in a working session in August 2013, in Durban, South Africa, in order to fine-tune the Draft.

³³ AU (n 31).

³⁴ The original draft comprises: a long Preamble and Resolution section; Preliminary Provisions; Administration and General Provisions; Registration and Licensing of Premises; Permits and Licences; Registration/Market Authorisation of Products; Control of Import and Export; Quality Assurance/Quality Control; Control of Clinical Trials; Market Surveillance/Safety Monitoring of Products (Pharmacovigilance); Control of Falsified and Sub-Standard Medicines; Inspections; Control of Medicine Promotion and Advertisement; Control of Retail and Wholesale; Control of Medicines; Control of Licensing; Dangerous Substances; Regulation of Other Products; Regulation of Donations of Medicines and Health Care Products; Enforcement and Legal Proceedings; Miscellaneous Provisions, Regulations, Transition, Repeals; Human Resources and Development; Monitoring and Evaluation of the Agency; and Statutory and Transitional Arrangements.

³⁵ Among the partners who submitted comments are: the World Health Organisation AFRO section, the United Nations Development Programme, and the World Bank.

A good example is the requirement for the labeling of medicines.³⁶ As this would have to be language-specific, and country-specific, a uniform provision would not be feasible. Thus, the Draft Model Law did not appear to take cognisance of the historical development and colonial influences on the systems adopted by different African countries. On the other hand, certain regulatory aspects were inadequately covered, for example the rules and procedures for medicines harmonisation across the continent and regions, being a key objective which the Draft Model Law was intended to achieve.

(b) Scope of the regulatory authority

A critical problem area is the scope of the regulatory authority. In other words, what type of products and subject matter should it cover? The proposed scope was both over-broad and under-specified. The issue of breadth was that at various points in the definitional and other sections, the Draft Model Law was described as if it would include registration, licensing, inspection and other regulatory oversight over medicines, vaccines, biologics, food and dietary products (including meat), cosmetics, complementary medicines, traditional medicines, Chinese and Western herbal medicines, homeopathy, blood products (including sera, plasma, proteins and hormones), chemical substances, medical devices, poisons (and other dangerous substances, presumably sold for this purpose) and veterinary medicines.³⁷ There was also mention of regulating a very broad list of premises, including manufacturing plants, importers, wholesalers and distributors, community pharmacies (and, in some sections, other health establishments that are involved in the provision of medicines, including hospitals), as well as non-pharmacist 'drug sellers'.³⁸ This approach did not take into account, first, that countries were at different levels of development in terms of their approach to the issues covered here, and secondly, the proposition that harmonisation is most effective when collaborating on essentially the same sets of issues. Thus, while a fully-capacitated regulatory authority might eventually regulate the full spectrum of health-related products, the critical starting point (and common denominator) would have to be the effective regulation of medicines first, followed by certain high-risk medical devices. There are also the thorny questions of how to accommodate within such a regime the regulation of vaccines, biological medicines and blood products; complementary and alternative medicines; and traditional medicines.

(c) The decision-making model

The Draft Model Law was overly prescriptive and appeared to be highly ambitious in approach – entailing a very detailed bureaucratic administrative structure³⁹ well beyond the technical and human-resource capacity of many

³⁶ AU (n 31) at s 143.

³⁷ *Ibid* s 4 and Part V.

³⁸ *Ibid* Parts III and VI.

³⁹ *Ibid* Part II.

members of the AU. This difficulty of inaugurating an elaborate structure at national level is that, since national medicines regulatory authorities are to be established before regional harmonisation activities have been completed, such extremely burdensome administrative initiatives may prove to be unnecessary once regional harmonisation is realised. Thus, if there are future agreements on, for example, marketing authorisations, there will not be the necessity to establish fully-fledged technical-analysis capacity in each country. An added problem is the lack of a sufficient pool of independent academics or other experts who may be recruited to assist in the regulatory functions.

(d) Mechanisms and processes for harmonisation

The main purpose of the proposed Model Law is to promote the systematic and progressive movement towards harmonisation of medicines regulatory schemes within the AU, so as to increase efficiencies, to share specialised resources, to capacitate in key areas (especially those that can only be conducted domestically), and ultimately to ensure that patients have timely access to safe and efficacious medicines of assured quality. This is an area where the Draft Model Law underspecifies such mechanisms and processes. These issues are dealt with briefly at the very end,⁴⁰ and this is inadequate to provide appropriate guidance on the achievement of harmonisation.

(e) Transparency

The secrecy provision⁴¹ does not lend itself to openness and transparency. There is a global thrust towards greater transparency in regulatory matters, including the disclosure of non-personally-identifying information from clinical trials. This is partly a response to recent disclosures that the information published by pharmaceutical companies is sometimes self-selected and biased, in that they tend to disclose the results of studies which are advantageous to their products while keeping unfavourable studies out of the public eye. This is an issue that deserves greater public scrutiny. As a result, more and more countries, including those in Europe and North America, are insisting on greater disclosure of previously confidential information submitted to medicine regulatory authorities. Such disclosures are necessary in the public interest, although there are also provisions to protect secret, purely proprietary information from disclosure, through exceptions to the disclosure norm or through redaction. Another benefit of wider disclosure is that it allows researchers to re-analyse risk/benefit and safety/efficacy issues, and can then provide prescribers and patients with more informed choices with respect to medicines.

⁴⁰ Ibid ss 235-237.

⁴¹ AU (n 31) at s 225.

(f) Intellectual property issues

The Draft Model Law contained major threats to the sourcing of generic medicines of assured quality with the incorporation of certain forms of intellectual property-related data protections⁴² and certain enforcement provisions. By and large African countries provide for data protection, as required by the TRIPS Agreement,⁴³ but do not allow data exclusivity with respect to clinical trial data and decisions. This correct, it is submitted, interpretation does not interfere with the right of a national medicines regulatory authority to make reference to or place reliance on such data or decisions in assessing the safety and efficacy of follow-on generic products. The provision for five years of data exclusivity, a TRIPS-plus measure, would in essence have erected a data monopoly barrier, in addition to patent barriers, to the registration of generic medicines. And of course, such a measure might nullify attempts by governments to remedy access failures through issuing compulsory licences or government use orders, for the duration of the period of data exclusivity. Similarly, the Draft Model Law included patent-registration linkage,⁴⁴ meaning that a product may not be registered unless the applicant can first show that no patent would be infringed were the medicine to be marketed. This too is a TRIPS-plus provision. Not only would this require the national medicines regulatory authority to enforce patent rules – a matter outside its competency and mandate – but the patent holder could also use linkage to block registration of a generic, even where the patent was a frivolous one or improvidently granted by the patent authorities. A particularly worrying provision refers to medicines that are ‘imitations of’ or ‘substitutes for’ another medicine as ‘falsified’.⁴⁵ Since generics are essentially therapeutic ‘imitations’ of and ‘substitutes’ for existing medicines, generics could inadvertently and undesirably be considered ‘falsified’ and thus subjected to punitive and confiscatory actions.⁴⁶ Such miscarriages in the seizure of generic medicines in transit in Europe, after such medicines had wrongfully been identified as ‘counterfeit’, have been witnessed.⁴⁷

The working session of the sub-committee of the TWG was alive to all these difficulties, and took the various submissions into account in revising the Draft Model Law.⁴⁸ This document deals with the six issues identified above, as follows:

⁴² Ibid ss 197-200.

⁴³ Article 39.3 of TRIPS requires members merely to ‘protect such data against unfair commercial use’, and does not mandate data exclusivity as such.

⁴⁴ AU (n 31) at ss 177-180.

⁴⁵ Ibid s 122.

⁴⁶ Ibid s 212.

⁴⁷ Particularly around 2008, there was a series of seizures of legitimate generic medicines in transit through European ports, with some 17 similar instances in the Netherlands alone. See: Business Standard ‘Dealing with nasty EU customs’ (10 June 2009) available at <[http://www.business-standard.com/india/news/latha-jishnu-dealingnasty-eu-customs/360551/\[1\]](http://www.business-standard.com/india/news/latha-jishnu-dealingnasty-eu-customs/360551/[1])> accessed on 25 October 2013.

⁴⁸ The revised version has a working title ‘Model Law on Medicines Regulation and Harmonization in Africa: Structure and Outline’ (13 August 2013); on file with the author.

- (a1) In the proposed revised form, it is envisaged as an enabling construct providing an outline for member states to craft their own legislation. An example would be the requirements for labelling of medicines, which need to be specific as to the languages required. It would be difficult to include all the required elements in a detailed law, but an enabling construct could empower a national minister of health to make regulations that provide locally-relevant details. The key would be to develop a comprehensive enabling section listing the issues on which regulations would need to be developed, and a section dealing with the process for developing such regulations.
- (b1) The recommendation is that scope of coverage be restricted to medical products, and that matters such as inspection and licensing of premises, and other related matters, will be covered.⁴⁹
- (c1) The recommendation is for an independent board to oversee and approve the strategic plan, annual work plan and budget, establish ad hoc committees for the various functions, approve the appointment of heads of department, and monitor and evaluate implementation.⁵⁰
- (d1) The revised proposal recommends a substantial section on harmonisation: cooperation between countries and regional or continental regulatory agencies, and on various activities such as registration of medical products, inspections, quality and information management, accreditation of quality-control laboratories, recognition of technical guidelines, harmonisation of data requirements, and mutual recognition of regulatory decisions.⁵¹
- (e1) The recommendation is to promote transparency⁵² and information-sharing of regulatory information, as well as paper and electronic web-based copies of regulations, laws, forms, applications, a list of registered drugs, and the like.
- (f1) TRIPS-plus provisions, such as data exclusivity, the linkage between registration and patent status, and overly-wide ‘counterfeiting’ provisions have been removed from the recommended draft.

V Challenges, opportunities and possibilities

As is evident from the various studies and situational analyses cited above, the member states within the AU, and indeed the SADC, are disparate with regard to their demographics, language and culture, levels of economic development, and regulatory capacity. This itself poses a major challenge to the harmonisation project. However, there are significant exemplars of the prospects that exist for harmonisation projects, which are drawn from both the AU Model Law experience and the progress noted in other regional communities. In this regard, the experiences of both the East African and West African communities are instructive.

⁴⁹ Ibid Part II.

⁵⁰ Ibid Part II.

⁵¹ Ibid Part IV.

⁵² Ibid Part XIV.

The East African Community (EAC) has made particularly good progress in medicines regulatory harmonisation. It has taken two major initiatives: the Medicines Registration Harmonisation and the Regional Harmonisation of Medical Devices and Medical Diagnostics[...]. In pursuit of these initiatives, four technical working groups have been set up, dealing with the following regulatory functions: Medicines Evaluation and Registration; Good Manufacturing Practice; Quality Management System; and Information Management System. Discussions are ongoing with regard to progress on implementation of these initiatives.⁵³ Much of this progress was made possible because of technical and financial support from multi-donor funding such as the Global Medicines Regulatory Harmonization (GMRH) Trust Fund. In particular, such support included implementation support missions, training workshops, a diagnostic study, and specialised technical assistance.⁵⁴ No doubt, this and other technical support is also available to the SADC region.

The West African Health Organisation (WAHO), in partnership with other regional organisations, has taken a slightly different approach. It has demonstrated that some implementation measures can be inaugurated before the harmonisation project is officially launched. It has established a Medicines Regulatory Harmonisation Steering Committee, with draft terms of reference, and details of the composition of Expert Committees which deal with: Medicines Dossier Evaluation and Registration; Quality Management Systems and Quality Control; Information Management Systems; Good Manufacturing Practice and Inspections; and Capacity Building and Legislation.⁵⁵

While the progress within the SADC has not been of the same order, there are other encouraging developments. One is the SADC Pooled Procurement Strategy, which is discussed above. It was approved by SADC health ministers and ministers responsible for HIV and AIDS in November 2012. In recognising the variable strengths and weaknesses of member countries, the strategy focuses on information and work sharing. In terms of actual procurement, countries can participate in group contracting when they are ready, but this has not materialised yet. What is proposed is a phased approach to the issue of pooled procurement.⁵⁶

In this regard, it is also encouraging that the First Biennial Scientific Conference on Medicines Regulation in Africa will be held in the SADC region, in Johannesburg, during December 2013.⁵⁷ The conference aims to 'enable policy makers, regulators, industry, academia, research organisations and scientists to network and exchange information on innovative approaches for pharmaceutical sector development in Africa'.⁵⁸ This will be followed

⁵³ AMRH/NEPAD 'Newsletter No 10' (2013) at 1-2, available at <<http://www.amrh.org/sites/default/files/newsletters/NEWSLETTER%20ISSUE%2010.pdf>> accessed on 26 October 2013.

⁵⁴ GMRH Stronger Regulatory Systems (n 7) at 8-9.

⁵⁵ AMRH/NEPAD (n 53) at 2.

⁵⁶ SADC (n 23) at 60.

⁵⁷ AMRH/NEPAD (n 53) at 5.

⁵⁸ *Ibid.*

immediately by the Third African Medicines Regulatory Authorities Conference.⁵⁹

The Draft AU Model Law is also instructive, in that it focuses the attention of regulators and legislators on some of the key policy issues which must inform continental or regional regulatory harmonisation. The route to consensus will have to be charted around the shape and character of the regulatory authority; its philosophical approach to medicines regulation; its broad mandate and areas of jurisdiction; the types of products, professions and facilities it will regulate; the form of its decision-making structures; and the manner in which harmonisation and cooperation across the region is to proceed. For the SADC region, the Model Law provides the parameters to conceptualise and implement its own harmonisation measures, and thus constitutes an important building block in continental-wide harmonisation.

VI Conclusion

Several things can be learned from the other successful harmonisation initiatives enumerated and discussed above. First, that where there is the will, great strides can be made in achieving harmonisation, as we have witnessed in the EAC example. Secondly, an incremental approach can help to reach higher levels of harmonisation, as is demonstrated by the experience of WAHO. This, interestingly, is the approach adopted by the SADC Pooled Procurement initiative. Finally, the Draft AU Model Law on Medicines Regulatory Harmonization provides a useful template on which to construct regional harmonisation models.

The GMRH Stronger Regulatory Systems Report summarises the impending challenges thus:

Harmonizing medicines registration systems within a region is not an easy task. It is a long-term process of change that must be consistent, requires continuous dialogue and consensus-building among multiple stakeholders and policy makers across countries. As such, it presents new opportunities and challenges.⁶⁰

While the challenges have been extensively elaborated in this contribution, opportunities are to be found in the commitment of governments and various stakeholders, the increasing number of fora where harmonisation initiatives are being discussed, and the determination of the leaders of the region to advance health outcomes for its communities.

All this considered, the SADC can and must succeed in getting there.

⁵⁹ Ibid at 6.

⁶⁰ GMRH Stronger Regulatory Systems (n 7) at 14.

