

“If a Person Must Die, Then So Be It”:  
A Constitutional Perspective on South Africa’s Land  
Crisis

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INTRODUCTION

A stark, green line separates manicured rows of grapevines from the sprawling warren of shacks and shanties that makes up Kayamandi township, just miles from the urban heart of Cape Town.<sup>1</sup> The township strains under the pressure of rapid population growth, with more than 7,000 dwellings cramming into some of the most crowded blocks in South Africa.<sup>2</sup> Above the township, Louiesenhof winery sits like a colonial redoubt atop the pristine acres of rolling vineyard it has occupied since 1701.<sup>3</sup>

In May 2018, Kayamandi boiled over. Black South Africans from the township pushed up the hill to erect shacks on the winery’s land in an effort to claim it as their own.<sup>4</sup> Community members squared off with those sent to evict them, weathering tear gas, pepper-spray, and jail.<sup>5</sup> Though eventually rebuffed, they returned just a few months later even more determined to claim a piece of precious soil.<sup>6</sup> As one community

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1. Selam Gebrekidan & Norimitsu Onishi, *In South Africa’s Fabled Wine Country, White and Black Battle Over Land*, THE NEW YORK TIMES (March 9, 2019) <https://www.nytimes.com/2019/03/09/world/africa/stellenbosch-south-africa.html?smid=nytcare-ios-share>. For a powerful visual illustration, see Johnny Miller, *Stellenbosch/Kayamandi*, UNEQUAL SCENES, <https://unequalscenes.com/stellenbosch-kayamandi> (last visited April 11, 2019).

2. *Id.*

3. LOUIESENHOF, <http://www.louiesenhof.co.za/> (last visited April 11, 2019).

4. Gebrekidan & Onishi, *supra* note 2.

5. *Id.*

6. *Id.*

leader put it, “[I]f a person must die, then so be it. Because we are not moving here. We will fight until we receive places to live in.”<sup>7</sup> A year later, on the evening of Sunday June 2, 2019, four masked men entered the home of Stefan Smit and shot and killed him while he ate dinner.<sup>8</sup> Smit was the owner of Louiesenhof winery.<sup>9</sup>

Conflict arising from a gaping disparity in land ownership is not unique to Kayamandi and the Louisenhof winery. Roughly seventy percent of all individually owned farms are—like Louisenhof—in the hands of South Africa’s white minority which makes up just eight percent of the population.<sup>10</sup> Like Kayamandi, much of South Africa is buckling under the pressure of inequality in land ownership, which is the product of a history of legal dispossession stretching back centuries. Recently, however, that scene has become increasingly tinged with violence.

The government’s failure to implement promised land reforms<sup>11</sup> remains a pressing national issue and the lack of progress has inspired burgeoning resentment, threats, and violence.<sup>12</sup> Julius Malema, Commander-in-Chief of the Economic Freedom Fighters (EFF), a radical political offshoot of the dominant African National Congress (ANC),<sup>13</sup> was famously charged in 2016 for inciting his supporters to seize land by

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7. Jenna Etheridge, *Stellenbosch Land Owner Heads to Court for Eviction Order*, NEWS24 (August 21, 2018) <https://www.news24.com/SouthAfrica/News/stellenbosch-land-owner-heads-to-court-for-eviction-order-20180821>.

8. Norimitsu Onishi and Kimon de Greef, *South African Wine Farmer in Land Dispute is Shot Dead*, N.Y. TIMES (June 3, 2019) <https://www.nytimes.com/2019/06/03/world/africa/south-africa-wine-farmer-killed.html>.

9. *Id.*

10. Gebrekidan & Onishi, *supra* note 2; Statistics South Africa, *Community Survey 2016: Statistical Release*, Table 2.2 (2016) [http://cs2016.statssa.gov.za/wp-content/uploads/2016/07/NT-30-06-2016-RELEASE-for-CS-2016-Statistical-releas\\_1-July-2016.pdf](http://cs2016.statssa.gov.za/wp-content/uploads/2016/07/NT-30-06-2016-RELEASE-for-CS-2016-Statistical-releas_1-July-2016.pdf).

11. *See, e.g., 1994 National Election Manifesto*, AFRICAN NAT’L CONGRESS, <https://web.archive.org/web/20160618165435/http://www.anc.org.za/shsh.php?id=262> (last captured June 18, 2016) (“South Africa belongs to all who live in it. To make this a reality, an ANC government will . . . encourage large scale farming, and ensure security of tenure and all basic rights for farm workers...guarantee victims of forced removals restitution...use state land in the implementation of land reform.”).

12. Shaazia Ebrahim, *The Land Question Part 2: Why is Malema Bent on Getting the Land Back?*, THE DAILY VOX (Jan. 19, 2017), <https://www.thedailyvox.co.za/the-land-question-part-2-why-is-malema-bent-on-getting-the-land-back-shaazia-ebrahim/>.

13. *Julius Malema of South Africa’s Economic Freedom Fighters—A Profile*, BBC (Sept. 30, 2014), <http://www.bbc.com/news/world-asia-pacific-14718226>.

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force.<sup>14</sup> He later faced similar charges for implying violence against white landholders, telling a crowd of hundreds “[w]e are not calling for the slaughter of white people, at least for now. . . .”<sup>15</sup> His message has slowly begun to gain traction with certain segments of the population, many of whom have lost patience with the glacial pace of formal reform. As the threat of armed struggle grows, the need for the government to take decisive and immediate action becomes ever clearer.<sup>16</sup>

South Africa's current land crisis is the direct consequence of apartheid—the policy of strict racial segregation established by the white-ruled Nationalist Party in 1953<sup>17</sup>—and of earlier colonial laws which conditioned property ownership along racial lines.<sup>18</sup> After decades of political struggle the minority rule of the Nationalist Party was brought to an end in 1994 when Nelson Mandela became the first democratically elected president of South Africa.<sup>19</sup> The transition marked the beginning of efforts to dismantle the legal apparatus that had sustained the apartheid state for half a century.<sup>20</sup>

In May 1996, South Africa adopted its modern Constitution, which explicitly established the goal of reversing the systematic, racist

14. James Macharia, *Malema Tells EFF Supporters to Seize White-Owned Land, Defying Court*, MAIL & GUARDIAN (Nov. 14, 2016), <https://mg.co.za/article/2016-11-14-malema-tells-eff-supporters-to-seize-white-owned-land-defying-court>.

15. *Malema: “We Will Take Back the Land. By Any Means Necessary.”*, SA PEOPLE NEWS (Nov. 7, 2016), <https://www.sapeople.com/2016/11/07/julius-malema-sings-kiss-the-boer-hints-white-slaughter-land-back-south-africa/>. See also Macharia, *supra* note 14. (“When we leave here and you see any beautiful piece of land and you like it, occupy it, it belongs to you . . . It is the land that was taken from us by white people by force through genocide”).

16. Since early drafts of this paper an emerging groundswell in South Africa's Parliament has pushed for a constitutional amendment to Section 25 to allow for the expropriation of land without compensation. See Luke Daniel, *Land Expropriation Report Adopted by Parliament*, THE SOUTH AFRICAN (Dec. 4, 2018), <https://www.thesouthafrican.com/land-expropriation-adopted-by-parliament/>. While it is not my purpose to analyze the impact of such a constitutional amendment, its implications hover in the background of any conversation about land reform.

17. Katie Nodjimbadem, *A Look Back at South Africa Under Apartheid, Twenty-Five Years After Its Repeal*, SMITHSONIAN (Oct. 15, 2015), <https://www.smithsonianmag.com/history/what-did-apartheid-south-africa-look-180956945/>.

18. *Tongoane & Others v. National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC) ¶ 11 (S. Afr.) [hereafter *Tongoane*].

19. *The South African General Elections: 1994*, SOUTH AFRICAN HISTORY ONLINE (Feb. 27, 2014), <https://www.sahistory.org.za/article/south-african-general-elections-1994>.

20. *Id.*

dispossession of land relentlessly pursued under apartheid.<sup>21</sup> Section 25 of the Bill of Rights (the “Property Clause”) sets out a concrete vision for land reform consisting of three “pillars”: (1) the restitution of land to those who were deprived of it through racially discriminatory laws and practices after the Natives (Black) Land Act of 1913; (2) the redistribution of land to create more equitable patterns of land ownership across the country, particularly in racial terms; and (3) improving security of tenure by upgrading the legal rights to land for those living on farms, working as labor tenants, or living in communal areas.<sup>22</sup>

Despite this constitutional mandate, land reform has made scant headway since the end of apartheid. The country’s agrarian structure has barely been altered by land reform efforts, and it has had only minor positive impacts on rural livelihoods.<sup>23</sup> There is a backlog of over 7,000 unsettled restitution claims, which it is estimated will take 43 years to clear.<sup>24</sup> Only 8-9% of farmland has been transferred through restitution and redistribution, and many settled restitution claims have not been fully implemented,<sup>25</sup> in stark contrast to the government’s initial goal of transferring 30% of white-owned agricultural land by 2014 and settling all claims for redistribution by 2005.<sup>26</sup> Tenure security, the third constitutional pillar of land reform, has overall received few resources.<sup>27</sup>

This Note will focus on the third pillar of tenure reform (security of

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21. *Tongoane*, 2010 (6) SA 214 ¶¶ 27-28 (“Relentlessly, African people were dispossessed of their land and given legally insecure tenure over the land they occupied. One of the goals of our Constitution is to reverse all of this. It requires the restoration of land to people and communities that were dispossessed of land by colonial and apartheid laws after 19 June 1913. It also requires that people and communities whose tenure of land is legally insecure as a result of racially discriminatory colonial and apartheid laws be provided with legally secure tenure or comparable redress. CLARA was enacted with the declared purpose to “provide for legal security of tenure”).

22. Shaazia Ebrahim, *The Land Question Part 1: What Is Land Reform?*, THE DAILY VOX (Feb. 6, 2017), <http://www.thedailyvox.co.za/the-land-question-part-1-what-is-land-reform-shaazia-ebrahim/>.

23. *Id.*

24. Peter Delius, *It Could Take 200 Years and R600bn to Finalise New Land Claims*, CITY PRESS (April 24, 2018), <https://city-press.news24.com/Voices/it-could-take-200-years-and-r600bn-to-finalise-new-land-claims-20180425>.

25. Ben Cousins, LAND REFORM IN SOUTH AFRICA IS SINKING. CAN IT BE SAVED? 8 (2016), available at [https://www.nelsonmandela.org/uploads/files/Land\\_law\\_and\\_leadership\\_-\\_paper\\_2.pdf](https://www.nelsonmandela.org/uploads/files/Land_law_and_leadership_-_paper_2.pdf).

26. Henk Kloppers & Gerrit Pienaar, *The Historical Context of Land Reform in South Africa and Early Policies*, 17(2) POTCHEFSTROOM ELECTRONIC LAW JOURNAL/POTCHEFSTROOMSE ELEKTRONIESE REGSBLAD 677 (2014) <http://dx.doi.org/10.4314/pelj.v17i2.03>.

27. Cousins, *supra* note 25 at 4, 8.

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land tenure), in particular the need for legislation to upgrade and secure communal property rights.<sup>28</sup> The Constitutional Court—South Africa's highest—has made clear that whole communities may possess a collective right of ownership in land under indigenous law, and that these rights must be respected as being as authoritative as any conferred at common law.<sup>29</sup> Many of these rights, like the majority of indigenous law, have never been written down.<sup>30</sup> In fact, it is estimated that nearly sixty percent of the country's population hold land or dwellings outside of the formal property system.<sup>31</sup> These rights are sometimes referred to as “informal” or “off-

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28. See generally S. AFR. CONST., 1996, §§ 25(6), 25(9) (A person or community whose . . . 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 . . . comparable redress. . . . Parliament must enact the legislation . . . in subsection (6)). We are forced to confront a definitional problem at the very outset. Tenure security is a fundamentally contested issue. Indeed, one could see this entire Note as an attempt to provide a context specific definition of the concept. The South African Constitution does not define precisely what secure tenure looks like. In the most general sense “security of tenure” and “security of property rights” are interchangeable. See Chris D. Arnot, Martin K. Juckert & Peter C. Boxall, *What is Tenure Security? Conceptual Implications for Empirical Analysis*, 87 LAND ECONOMICS 297 (2011). However, it is important to note that, while legal title can be a proxy for and indicator of secure tenure, it is not a necessary or even sufficient precondition. *Id.* at 303. Duration of tenure can also be an indicator of security, for example an illegal settler with an empirically low probability of eviction would have relatively secure tenure. *Id.* Thus security of tenure can only be understood with respect to empirical realities, it cannot be established just by examining the theoretical framework of property rights. “If the title is formal, legal, and state enforced, but the government is unstable, then the property rights associated with this title may not be very secure.” *Id.* Moreover, mere duration does not necessarily equate with tenure security. Embedded in the latter concept is the ability of the holder of the property right to realize the benefit derivable from the interest in land. *Id.* at 304. An individual who knew they weren't going to be evicted but without title might be assured that their tenure will have duration but might also be denied access to the funds to invest, for example because they cannot use the land as collateral for a loan. *Id.* at 304-05. As we shall see, differing priorities yield different definitions of tenure security. If all you care about is using land as collateral, then individual titling schemes clearly provide the greatest security of tenure. However, when more complicated property rights relationships are figured in—such as reciprocal rights of use and access shared within a community as part of a joint cultural heritage—it becomes much more difficult to arrive at a precise definition. Because South Africa's Constitution defines the mandate to secure tenure in the context of the racially discriminatory laws and practices that resulted in black South Africans having few rights in real property, this Note will begin by mapping the impact of those laws and policies to understand what insecure tenure looks like and thereby provide a basis to reverse engineer a working definition of tenure security in constitutional terms.

29. *Alexkor Ltd. & Another v. Richtersveld Community & Others* 2004 (5) SA 460 (CC) ¶¶ 50-62.

30. *Id.* ¶¶ 52-53.

31. Rosalie Kingwell, *A Proposal to End Insecurity of Land Tenure in South Africa*, GOOD GOVERNANCE AFRICA (Aug. 11, 2017), <https://web.archive.org/web/20170811150637/https://www.gga.org/a-proposal-to-end-insecurity-of-land-tenure-in-south-africa/>.

register,” as they are not recorded in the formal Deeds Registry.<sup>32</sup>

Though the Constitution mandates the promulgation of tenure securing legislation, which includes legislation relating to communal property rights, a comprehensive statutory framework has yet to be realized.<sup>33</sup> The Communal Land Rights Act (CLARA) of 2004 was meant to be such a piece of legislation; however, it was declared unconstitutional on procedural grounds by the Constitutional Court in 2010 and never implemented.<sup>34</sup> The Communal Land Tenure Bill (CLTB) was drafted to fill the void left by CLARA and was published for comment in July 2017 but, as of 2019, remains stalled and has yet to reach Parliament.<sup>35</sup> The Bill must strike a delicate balance between being precise enough to fulfill its constitutional obligations, pragmatic enough that its implementation doesn't exceed the limited resources of the government, and flexible enough that it accounts for the fluid expression of indigenous law protected by the Constitutional Court's "living customary law"

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32. *Id.*

33. Various pieces of legislation serve as stopgap measures. For example, the Interim Protection of Informal Land Rights Act 31 of 1996, which was only meant to last one year but has been renewed annually since, protects the informal rights of individuals lacking documentary evidence of their claims to land. The Extension of Security of Tenure Act 62 of 1997 protects the occupiers of land in rural or peri-urban areas, mostly farm workers and dwellers. The Land Reform (Labour Tenants) Act 3 of 1996 creates a process whereby labor tenants on privately owned farms can obtain ownership of the land they occupy. The Communal Property Associations Act 28 of 1996 enables the creation of legal entities to take ownership of communal land. Rosalie Kingwill et al., *The Policy Context: Land Tenure Laws and Policies in Post-apartheid South Africa*, in UNTITLED: SECURING LAND TENURE IN URBAN AND RURAL SOUTH AFRICA 44, 62-69 (Donna Hornby et al., eds., University of KwaZulu-Natal Press 2017).

34. *Id.* at 73-74. In *Tongoane* the Constitutional Court held that CLARA in substantial measure affected matters of indigenous law, customary tenure, and traditional leadership and therefore should have been enacted according to the procedures set out in section 76 of the Constitution. *Tongoane*, 2010 (6) SA 214 ¶ 97. Because Parliament incorrectly tagged it a section 75 Bill, following the process set out in that section, the provinces were denied their "constitutional role that the provinces must play in considering legislation which affects them." *Id.* ¶ 109. The Court held that this procedural defect rendered CLARA "unconstitutional in its entirety." *Id.* ¶ 110. Because of this procedural ruling, the Court never reached the substantive questions presented concerning whether CLARA's version of customary property rights comported with the requirements of the Constitution and the empirical realities. *Id.* ¶ 116. Thus, while we know that customary and communal rights in land are protected in form, the actual content of those rights is fundamentally contested. Much of this Note will be a discussion of competing visions of those rights gleaned from the works of anthropologists, theorists, and the writings of the Court itself. While *Tongoane* provides, in dicta, an historical and legal jumping-off point, it leaves the ultimate questions for another day.

35. Communal Land Tenure Bill 2017, GN 510 of GG 40965 (7 July 2017), <http://www.ruraldevelopment.gov.za/legislation-and-policies/file/5426>.

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jurisprudence.

This Note proposes an alternative solution that seeks to combine the best aspects of various pieces of legislation into an implementable statutory framework. Rather than attempt to articulate exhaustively the substance of communal land rights, the proposal emphasizes procedural rights, effective dispute resolution, and affordable modern surveying methods as a way of efficiently providing a trajectory toward tenure security within the capacity of official resources.

Part I of this Note examines the history of apartheid laws and policies as described by the Constitutional Court in order to formulate a working understanding of the meaning of tenure security in terms of constitutional minimum standards. Part II looks at three differing theories of tenure security in the context of indigenous law. Part III considers three alternative legislative attempts to secure tenure—one proposed, one hypothetical, and one that is already in effect. Part IV weighs the relative strengths and weaknesses of the competing theories and statutes, judging them against the minimum standards discernible from Part I.

Finally, Part V lays out the proposal for a new legislative approach for achieving communal tenure security. This boils down to four basic policy principles from which to develop tenure securing legislation: (1) policies of quick and cost-effective surveying; (2) accessible dispute resolution to simultaneously resolve contested land rights and build a body of law around communal property mores; (3) a starter title scheme to provide a modicum of security to those whose tenure is most tenuous; and (4) systematic investment in Communal Property Associations and local governance organizations. These principles will stabilize the management of communal property, begin the process of formalizing off-register land rights, provide economic security and liquidity to those living and working on land to which they have no documentation at present, and provide a mechanism for the vindication of indigenous property rights in court. Not only will this begin the process of securing land tenure for millions of South Africans, it will do so in a way that attempts to fuse indigenous and common law concepts according to the vision of the Constitutional Court.

## I. HISTORY OF APARTHEID LAWS &amp; POLICIES

“Awakening on Friday morning, June 20, 1913, the South African native found himself, not actually, a slave, but a pariah in the land of his birth.”<sup>36</sup> The passage of the Natives Land Act (also called the Black Land Act)<sup>37</sup> reserved 87% of South Africa’s land for the ruling white minority, driving the bulk of the nation’s population onto the remaining 13% and creating overnight a “floating, landless proletariat whose labour could be used and manipulated at will, and ensured that the land had finally and securely passed into the hands of the ruling white race.”<sup>38</sup>

Even criminals dropping straight from the gallows have an undisputed claim to six feet of ground in which to rest their criminal remains. But under the cruel operation of the Land Act little children, whose only crime is that God did not make them white, are sometimes denied that right in their ancestral home.<sup>39</sup>

The Black Land Act of 1913 and the Native Trust and Land Act of 1936 were key in determining where African people could live and precluded them from purchasing land in most of South Africa.<sup>40</sup> In 1936 the Development Trust and Land Act established the South African Native Trust, setting aside land for native peoples and granting the Governor-General the power to regulate, among other things, the conditions under which natives could purchase, hire, and occupy trust lands.<sup>41</sup>

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36. SOL. T. PLAATJE, *NATIVE LIFE IN SOUTH AFRICA, BEFORE AND SINCE THE EUROPEAN WAR AND THE BOER REBELLION* 16 (South African History Online 4th ed.) (1916), available at [https://www.sahistory.org.za/sites/default/files/Native%20Life%20in%20South%20Africa\\_0.pdf](https://www.sahistory.org.za/sites/default/files/Native%20Life%20in%20South%20Africa_0.pdf).

37. *Tongoane*, 2010 (6) SA 214 ¶ 11.

38. Ebrahim, *supra* note 22 (quoting foreword by Bessie Head to original edition of PLAATJE, *supra* note 36).

39. PLAATJE, *supra* note 36, at 66.

40. *Tongoane*, 2010 (6) SA 214 ¶ 12.

41. *Id.* ¶¶ 14-15 stating:

The land that vested in the Trust was “held for the exclusive use and benefit of natives”. The Trustee had the power to “grant, sell, lease or otherwise dispose of land . . . to natives” and “on such conditions as he [deemed] fit”. Further, the Governor General had the power to make regulations, among other things, “prescribing the conditions upon which natives may purchase, hire or occupy land held by the Trust” and “providing for the allocation of land held by the Trust for the purposes of residence, cultivation, pasturage and commonage.

In 1969 these conditions were comprehensively addressed by the Bantu Areas Land Regulations<sup>42</sup> and the Township Regulations,<sup>43</sup> which pertained to rural and urban areas respectively.<sup>44</sup> The Bantu Areas Land Regulations “recognised two forms of land tenure, namely, quitrent tenure of land and occupation of land under permission to occupy.”<sup>45</sup> Quitrent, though defined as a “title deed relating to land,” did not confer full ownership as it was subject to conditions imposed by regulation. The title deed could not be transferred without the consent of the Bantu Affairs Commissioner and could be cancelled for noncompliance with any of the conditions upon which it had been granted or in the event the holder was convicted for certain offenses such as theft or the possession or dealing of drugs.<sup>46</sup> Permissions to Occupy (PTOs) were similar, though, if anything, provided fewer rights in land than quitrent.<sup>47</sup> Africans could not even be absent from their allotted land without permission from the Commissioner. Absence for more than a year without permission resulted in the land reverting to commonage and becoming eligible for re-allocation.<sup>48</sup>

In *Tongoane*, decided in 2010, the Constitutional Court examined this history in detail and used it to derive an understanding of tenure insecurity.<sup>49</sup> Insecurity of tenure is an effect of a history in which Africans were systematically dispossessed of land and relocated,<sup>50</sup> granted

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42. *Id.* ¶ 16 (citing Bantu Areas Land Regulations, GN R.188 of GG 2468 (11 July 1969)).

43. *Id.* (citing Regulations for the Administration and Control of Townships in Bantu Areas, GN R.293 of GG 373 (16 November 1962)).

44. *Id.*

45. *Id.* ¶ 17 (footnotes omitted).

46. *Id.*

47. *Id.* ¶ 18 (“Substantially similar conditions applied to the permission to occupy. However, in the case of the permission to occupy, the regulations made it clear that “[p]ermission granted to occupy the allotment shall not convey ownership.”).

48. *Id.* ¶ 19.

49. *Id.* ¶ 21 (“What emerges from these regulations therefore is that (a) the tenure in land which was subject to the provisions of the Black Land Act and Development Trust and Land Act and which was held by African people was precarious and legally insecure”).

50. *Id.* ¶ 25 describing:

Under apartheid, these steps were a necessary prelude to the assignment of African people to ethnically-based homelands. This commenced with the creation of “legislative assemblies” which would mature into “self-governing territories” and ultimately into “independent states”. According to this plan, there would be no African people in South Africa, as all would assume citizenship of one or other of the newly created homelands, where they could enjoy social, economic and political rights. Section 5(1)(b) of the Black

conditional title to what land they were allocated,<sup>51</sup> and tolerated in “white” South Africa only to the extent they provided a necessary labor force.<sup>52</sup> The purpose of Section 25(6) of the Constitution, requiring that parliament pass legislation combating insecurity of tenure, is to reverse this history.<sup>53</sup>

In 2004 with *Alexkor Ltd and Another v Richtersveld Community and Others*,<sup>54</sup> the Constitutional Court found that a community, which had inhabited a large portion of land for centuries,<sup>55</sup> possessed a “right of communal ownership under indigenous law” in the subject land.<sup>56</sup> The Court refers to this communal right—which it held to include the exclusive use and occupation of the land—as ‘title.’<sup>57</sup> When attempting to understand the “nature and content” of the rights that make up this form of

Administration Act became the most powerful tool to effect the removal of African people from “white” South Africa into areas reserved for them under this Act and the Development Trust and Land Act. And as we noted in *DVB Behuising*, “[t]hese removals resulted in untold suffering.” The forced removals of African people from the land which they occupied to the limited amount of land reserved for them by the apartheid state resulted in the majority of African people being dispossessed of their land. It also left a majority of them without legally secure tenure in land.

51. *Id.*

52. *Id.* ¶ 26 detailing:

The Bantu Homelands Citizenship Act, 1970<sup>56</sup> and the Bantu Homelands Constitution Act, 1971<sup>57</sup> further entrenched land dispossession as a key policy of the apartheid edifice. African people would, as a consequence, have no claim to any land in “white” South Africa. African people were tolerated in “white” South Africa only to the extent that they were needed to provide labour to run the economy. They had precarious title to the land they occupied to remind them of the impermanence of their residence in “white” South Africa.

53. *Id.* ¶ 28 describing:

One of the goals of our Constitution is to reverse all of this. It requires the restoration of land to people and communities that were dispossessed of land by colonial and apartheid laws after 19 June 1913. It also requires that people and communities whose tenure of land is legally insecure as a result of racially discriminatory colonial and apartheid laws be provided with legally secure tenure or comparable redress. CLARA was enacted with the declared purpose to “provide for legal security of tenure.”

54. 2004 (5) SA 460 (CC).

55. *Id.* ¶ 4.

56. *Id.* ¶ 62.

57. *Id.*

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title, the Court concluded that such rights must be determined with reference to indigenous law, and not viewed through the distorting prism of the common law.<sup>58</sup> Indigenous law “depends for its ultimate force and validity on the Constitution”<sup>59</sup> and courts are obliged to “apply customary law when it is applicable.”<sup>60</sup> When doing so “the courts must have regard to the spirit, purport and objects of the Bill of Rights.”<sup>61</sup> The Court makes it very clear that indigenous law is subject to the Constitution and must be “interpreted in light of its values”, offering a jurisprudential model in which “indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.”<sup>62</sup>

The *Alexkor* Court does not provide a concrete test for resolving conflicting views of the content of indigenous law,<sup>63</sup> noting only that “[b]y its very nature it evolves as the people who live by its norms change their patterns of life”<sup>64</sup> and may be established by “reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary,” but that caution should be taken “when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of legal conceptions that are foreign to it.”<sup>65</sup> The Court concluded that the “determination of the real character of indigenous title to land therefore ‘involves the study of the history of a particular community and its usages.’ So does the determination of its content.”<sup>66</sup> This position was reiterated and affirmed in 2013 with the Court’s decision in *Pilane and Another v Pilane and*

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58. *Id.* ¶ 50.

59. *Id.* ¶ 51.

60. *Id.*; S. AFR. CONST., 1996, § 211(3).

61. *Id.* § 39(2).

62. *Alexkor*, 2004 (5) SA 460 ¶ 51.

63. *Id.* at ¶ 54.

64. *Id.* at ¶ 52.

65. *Id.* at ¶ 54.

66. *Id.* at ¶ 57 (quoting *Amodu Tijani v. The Secretary, Southern Nigeria* [1921] 2 AC 399, 404 (PC) (appeal taken from S. Afr.) (“There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. . . . To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance and are as often as not misleading.”).

*Another*.<sup>67</sup>

Our history. . . is replete with instances in which customary law was not given the necessary space to evolve, but was instead fossilized and “stone-walled” through codification, which distorted its mutable nature and subverted its operation. The Constitution is designed to reverse this trend and to facilitate the preservation and evolution of customary law as a legal system that conforms with its provisions.<sup>68</sup>

The Court is not blind to the fact that this process of reversal has the potential for conflict. It is almost inevitable in a “living body” of “active and dynamic” law “with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs”<sup>69</sup> that differences of interpretation and competing claims to authority will arise. *Pilane* does not resolve these tensions. If anything, it exacerbates them by allowing that “statutory authority accorded to traditional leadership does not necessarily preclude or restrict the operation of customary leadership that has not been recognized by legislation.”<sup>70</sup> The best framework for resolving these tensions is “uncharted legal terrain” and an important issue for future litigation to grapple with.<sup>71</sup>

Tenure security is thus located within a shifting legal landscape. *Alexkor* and *Pilane* require that ‘indigenous title’ be determined by referencing the living, customary law. *Tongoane* articulates a lofty aim for tenure security—to heal the wounds left by the systematic dispossession of African land and the damage done by viewing black South Africans as nothing more than a standing reserve of labour, to be tolerated so long as they were productive and then sent back to their Homelands.

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67. 2013(4) BCLR 431 (CC) (S. Afr.).

68. *Id.* ¶ 35 (footnotes omitted).

69. *Id.* ¶ 34 (citing *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC) at ¶¶ 87, 90).

70. *Id.* ¶ 44.

71. *Id.* ¶ 45.

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## II. COMPETING THEORIES BEHIND TENURE REFORM

### *A. Property Rights as Reciprocal and Nested*

Understanding customary law is complicated by the fact that the only early written records of indigenous practices are refracted through the “distorting prism” of colonization, and in particular the European construct of absolute ownership.<sup>72</sup> Of the numerous misconceptions developed by colonial and post-colonial jurists regarding indigenous law in Africa, it has been suggested that five fundamental fallacies stand out in explaining the distortions that traditional law has undergone up to the present: (1) that indigenous law was not really law at all, as it didn't derive from a sovereign authority, and therefore tribal groups required ordering through the imposition of foreign law; (2) indigenous law conferred no property in land; (3) ultimate title could only vest in the colonial sovereign; (4) indigenous communities had no juridical persona; and (5) indigenous institutions were incapable of, or unsuitable for, allocating and managing land.<sup>73</sup> These fallacies, particularly the belief that indigenous communities had no juridical persona, gave rise to the notion that tribal tenure must always be mediated through some form of trusteeship.<sup>74</sup>

Moreover, scholars argue that many of the distortions suffered by indigenous law were not merely the result of erroneously viewing customary law through a European lens, but also the product of a deliberate attempt by colonial powers to construct a version of traditional authority amenable to their control.<sup>75</sup> “It was in the interests of both [colonial officials and African male elders] to elevate the power of chiefs, and downplay the rights of ordinary people, particularly women.”<sup>76</sup> Theophilus Shepstone's strategy for colonial control as Natal's Secretary for Native Affairs was to deputize the existing tribal hierarchies, allowing

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72. Aninka Claasens, 'Communal Land,' *Property Rights and Traditional Leadership*, RURAL WOMEN'S ACTION RESEARCH PROGRAMME, CENTRE FOR LAW AND SOCIETY, UNIVERSITY OF CAPE TOWN (July 2014), <https://wiser.wits.ac.za/system/files/documents/Claasens2014.pdf>.

73. Okoth-Ogendo, *The Nature of Land Rights Under Indigenous Law in Africa*, in LAND, POWER & CUSTOM 95, 96-97 (Claasens & Cousins eds., 2008).

74. *Id.*

75. Claasens, *supra* note 72.

76. *Id.* See also Affidavit for Benjamin Cousins in *Tongoane*, 2010 (6) SA 214 ¶ 72-75.

them to continue the day-to-day management of their people but making clear that ultimate authority resided with the British conquerors.<sup>77</sup>

A series of early twentieth century cases ossified a vision of despotic chiefly power which conformed neatly with the European model of feudal authority. Within this feudal paradigm, power was thought to derive exclusively from the monarch and flow down to the subjects.<sup>78</sup> Courts denied that tribal chiefs would have required any form of consent from the community to alienate land,<sup>79</sup> and held that individual members of a tribe were incapable of private ownership of real property.<sup>80</sup>

Some scholars and anthropologists argue that this version of customary law, created to suit the strategic needs of the ruling class, is inconsistent with the realities of traditional power structures and land rights, which are far more nuanced than the iterations cemented in statute and judicial opinion. Benjamin Cousins insists that “[a] key feature of ‘communal’ systems is the layered nature of units of social organization. Different units, for example the family, clan, village, ‘location’ and ‘tribe’ nest within one another.” Therefore, the term ‘communal’ can be misleading, as there are “strong individual rights within ‘communal’ systems.”<sup>81</sup>

Tom Bennett identifies three serious misconceptions arising from the

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77. Reitz Bloemfontein, *Native Policy: the Reitz-Shepstone Correspondence of 1891-1892*, 2 NATALIA 10, 17 (1972). A Letter from Theophilus Shepstone states:

Use their influence, their system of tribal management, their principle of mutual responsibility; make room for these in your own system. Let the chiefs understand that they rule as your lieutenants that they carry out your behests, subject to your general supervision, even in tribal matters. Pay them fairly. They will prove loyal and zealous, inclined, perhaps, to severity rather than otherwise; correct this by giving their people the privilege of appeal to a white magistrate, and ultimately to a still higher tribunal. Forbid, except by special leave, the performance of any function devised to keep up the idea of tribal independence.

78. Classens, *supra* note 72, at 5 (“It is hardly disputed... that the powers exercised by chiefs... were of a despotic character.” (citations and internal quotation omitted)).

79. *Id.* at 6 (“[I]n the purchase or sale of land there is no obligation on the chief to obtain the consent of, or even to consult his people.” (internal citations and quotations omitted)).

80. *Id.* at 6-7 (“[N]o member of a tribe can ever acquire ownership of any land allotted to him.” (internal citations and quotations omitted)).

81. *Tongoane*, 2010 (6) SA 214 ¶ 35.

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effort to express customary land rights in Western terms.<sup>82</sup> The first is that ownership was a concept of 'civilized society' and therefore unknown to native Africans.<sup>83</sup> Bennett points out that, not only has this notion been dispelled academically, but it has been legally banished by "implication of the fact that customary law interests are protected in post-1994 legislation" in South Africa.<sup>84</sup> The second misconception is to view customary tenure only as 'communal,' thus precluding individual rights in property. Bennett asserts that, while 'communal' might aptly describe rights to pasture and natural resources, it does not accurately portray communal tenure with respect to residential land or arable plots.<sup>85</sup> Finally, the third misconception is that all customary tenure must be the equivalent of a trust in which it was often implied that allodial title vested in the tribe, the chief was trustee, and the community members had only usufructuary rights.<sup>86</sup> The word 'trust' has partial descriptive accuracy in that it denotes a chief's responsibilities with respect to the community members. However, reducing individual tenure to a set of usufructuary rights does not "do justice to a landholder's interests in customary law."<sup>87</sup> Moreover, the concept of a trust is impotent in situations where the trustee abuses their power, for customary landholders are denied the remedies afforded trust beneficiaries at common law.<sup>88</sup>

Cousins maintains that "very many people live in practice under a system which derives from indigenous tenure."<sup>89</sup> That system has been described as a "land ethic" or "social tenure systems of relative rights"<sup>90</sup> or

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82. Tom Bennett, *'Official' vs 'Living' Customary Law: Dilemmas of Description and Recognition*, in *LAND, CUSTOM & POWER: CONTROVERSIES GENERATED BY SOUTH AFRICA'S COMMUNAL LAND RIGHTS ACT 138* (Aninka Claasens & Ben Cousins eds., 2008).

83. *Id.* at 142.

84. *Id.* at 142 n.17.

85. *Id.* at 143.

86. *Id.* at 143-44.

87. *Id.* at 144.

88. *Id.* It seems that no one has explored the possibility that traditional common law causes of action such as breach of trust and fiduciary duty could be imported into the communal property context. Bennett takes this failure to be an inherent feature of the trust concept when applied to communal property systems. Though he may be correct in practice, it is not obvious that beneficiaries of communal property trusts should necessarily be denied the remedies afforded beneficiaries of trusts at common law.

89. *Tongoane*, 2010 (6) SA 214 ¶ 61.

90. *Id.* ¶ 59.

as a “web of reciprocal rights and obligations that bind together and vest power in community members” as a “function of membership in the family, lineage or community maintained through active participation in processes of production and social organization.”<sup>91</sup> This land ethic undergirds a superstructure of conventional law that, for the most part, either ignores or actively subverts it.<sup>92</sup> However, these indigenous norms and structures have proved both resilient and persistent, and form the essential basis for tenure security for many South Africans.<sup>93</sup> Still, the rights they provide are not accurately recognized by law, something Cousins identifies as a serious issue for tenure security.<sup>94</sup> One of the primary ways in which the formal legal system neglected indigenous rights is in its failure to understand their “nested” quality.<sup>95</sup>

This means that control of land is vested at different levels of the social organization depending on the resource in question. “For example, allocations of arable land are often controlled at the level of the family and the neighborhood, while grazing and woodland use is the concern of a wider segment of society. Members have the right to participate in decision-making processes at the appropriate level.”<sup>96</sup> It is in this way that the rights of individuals and sub-groups are protected by customary mores. Power over different aspects of the use and control of property vests at different levels of the socio-political community, in which individuals, neighbors, “headmen,” and “sub-headman” all have crucial roles to play.<sup>97</sup>

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91. Claasens, *supra* note 66.

92. *Id.*

93. *Tongoane*, 2010 (6) SA 214 ¶¶ 59, 61.

94. *Id.* ¶ 61.

95. *Id.* ¶¶ 67-68. Okoth-Ogendo has proposed that, in light of this theory of indigenous land rights, tenure security be defined as an assurance that:

[A]ccess to land resources will always be available as long as membership in a community and equivalent use functions are maintained; the land resources of the community will always be preserved for the sole enjoyment of its members; land resources remain also available to future generations; and community land resources are generally not alienable outside the group unless this is in the interest of its members.

*Id.*

96. *Id.* ¶ 69.

97. *Id.* ¶ 74.

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Cousins conducted research into customary land allocation in Msinga, an area under the administration of the Ingonyama Trust.<sup>98</sup> He reported that, should an outsider desire to seek access to land in the community, it is necessary for them to go through a detailed procedure established by custom.<sup>99</sup> A local champion is required to vouch for the character of the applicant to potential neighbors.<sup>100</sup> The *nduna* (headman) of the area is asked for assistance and the applicant then approaches the *nkosi* (chief) with a letter of reference from the tribal office of the area he is moving from explaining that he is of good character, not subject to criminal charges, and listing his reasons for moving.<sup>101</sup> Should the *nkosi* accept the applicant the *nduna* will call a meeting of the *ibandla* (a local assembly of men 'old enough to be wise') and the potential neighbors where the applicant will provide beer and the land will be demarcated in front of everyone as witnesses.<sup>102</sup> This is evidence of the vertical and horizontal segmentation of land control within the socio-political community where "[n]eighbours, *ibandla* and *izinduna* [headmen] play key roles in accepting and validating requests for land, demarcating boundaries and resolving disputes."<sup>103</sup> Following this procedure confers membership in the community of which neighbors, *ibandla*, and *izinduna* are a part and it is from this membership—rather than a formal transfer of title—that secure rights to land in the community are derived.<sup>104</sup>

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98. BEN COUSINS, SUBMISSION TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT, 15 OF 2008, 1-2 § 1.2 (2008).

99. *Id.* § 2.2.

100. *Id.*

101. *Id.*

102. *Id.*

103. BEN COUSINS, THE 'LIVING CUSTOMARY LAW OF LAND' IN MSINGA, KWAZULU-NATAL, UNTITLED: SECURING LAND TENURE IN URBAN AND RURAL SOUTH AFRICA 145 (Donna Hornby, Rosalie Kingwill, Lauren Royston & Ben Cousins, eds., University of KwaZulu-Natal Press 2017). *See also*, Ben Cousins & Aninka Claasens, More Than Simply 'Socially Embedded': Recognizing the Distinctiveness of African Land Rights, Keynote Address at the International Symposium on 'At the frontier of land issues: social embeddedness of rights and public policy' (May 17-19 2006) at 22-23 <https://pdfs.semanticscholar.org/7304/3007f91122069355a6c561b028905f7fe411.pdf>.

104. Ben Cousins, *Characterising 'Communal' Tenure: Nested Systems and Flexible Boundaries*, in LAND, CUSTOM & POWER: CONTROVERSIES GENERATED BY SOUTH AFRICA'S COMMUNAL LAND RIGHTS ACT 109, 112-13 (Aninka Claasens & Ben Cousins eds., 2008) ("Land rights, as in the pre-colonial era, are closely inter-related with social and cultural relationships more generally and the identities associated with these...Tenure security derives in large part from locally legitimate landholding rather than law.") *Id.*

*B. Property Rights as Hierarchical & Non-Racial*

The conception of property rights as layered and nested in the traditional context is disputed. Some have insisted that it is an “unsupported view of customary law” proffered by a “small group of dissident intellectuals” in order to challenge the “institution of traditional leadership.”<sup>105</sup>

Sipho Sibanda argues that colonial and apartheid governments did more than simply “impose a distorted version of customary law on pre-existing indigenous land tenure systems” but actually, in many instances, created “current communal lands to achieve their policies of segregation and to serve as sources of cheap labour.”<sup>106</sup>

Jan Bekker details how some of these policies continually redefined the extent of communal lands through the forced segregation of people in “white” and “Bantu” areas; the consolidation of homelands; rampant urbanization; the establishment of formal townships and the dramatic effects of economic development and industrialization.<sup>107</sup> Moreover, Bekker points out that there often was no fixed, definable tribal boundary to the land in the first place. “[T]he tribal territory *naga* (literally, land, also sometimes called *lefase*, literally, the earth) extended as far as the tribe could competently exploit it, without having really well-defined boundaries.”<sup>108</sup> This makes it difficult to reconstruct a pre-colonial topography of communal land rights. Bekker also questions the way in which “communal land tenure is generally assumed to be *African* land tenure,” implying that there may be other ethnic groups deserving of security of communal tenure whose claims cannot be articulated in racial terms.<sup>109</sup> The effect of these violent mutations in the history of South African land tenure is that “the present government cannot base its communal land tenure reform on Utopian pre-colonial traditional land

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105. Pleadings in *Tongoane*, 2010 (6) SA 214, Volume 2 “B”, First respondents answering affidavit [Dr Sipho Sibanda] ¶ 3.4.

106. *Id.* ¶ 4.2.

107. *Id.* ¶¶ 6.1-6.2.

108. *Id.* ¶ 7.2.

109. *Id.* ¶ 6.3.

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tenure.”<sup>110</sup>

In 2006, Samuel Khunou was appointed by the National Minister for Provincial and Local Government to “conduct research on communal land systems, traditional institutions and related in matters in respect of Makgobistad traditional community, including Mayaeyana.”<sup>111</sup> This research included a survey of pertinent literature concerning the area and material from the National Archives; “[v]arious legislation and proclamations” defining the land area and tribal authority; case law; tribal records, and in-depth interviews with individuals.<sup>112</sup> From this Khunou concluded it “appeared quite obvious that Mayaeyane was a traditional community and the land was communally ‘owned’. Of significance is that the senior traditional leader played an important role in the administration of communal land.”<sup>113</sup> Khunou qualifies the idea of communal ownership by noting that the “control of the land on which the community had settled vested in the headman and he allotted (with the sanction of the senior traditional leader) land to the heads of families for purposes of residence.”<sup>114</sup> Some land was also allotted for cultivation and grazing, and other for commonage.<sup>115</sup>

Khunou examines the evolution of the community in terms of the theory of “structural stratification or functionalism” which views the “social world [as] for all time divided into rulers and ruled.”<sup>116</sup> He states that the “headman of Mayaeyane and the Kgosi of Makgobistad had authority and legitimacy” and that it was clear the “community . . . consented to the authority of the headman.”<sup>117</sup> He also maintains that the individuals he interviewed did not view themselves as owners of their property, but rather “recognized the kgosi and the headman as the ‘owners’ of the land who served their interests.”<sup>118</sup> However, this is not to

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110. *Id.* ¶ 8.4.

111. Affidavit of Samuel Freddy Khunou at 1466-1508 ¶ 6 in *Tongoane*, 2010 (6) SA 214.

112. *Id.* ¶ 10.

113. *Id.* ¶ 16.6.

114. *Id.* ¶ 17.4.

115. *Id.*

116. *Id.* ¶ 18.2 (citing Haralambos, M; Holborn, M & Heald, R, *Sociology Themes and Perspectives* 90-91 (London 2004)).

117. *Id.* ¶ 18.3. Khunou cites ANTHONY GIDDENS, *SOCIOLOGY* (3d ed. 1989) to support the latter proposition. The relevance of the source in this context seems arguable.

118. *Id.* ¶ 18.5.

say that individuals did not have rights in land, it is rather to say they did not own the land allocated to them in a common law sense. Khunou calls this a “traditional right to . . . land,” described as “more than the right of *possessio* or usufruct but less than full ownership (*dominium*).”<sup>119</sup> Thus, landholders may not dispose of land or sell it, but neither may anyone—including the *kgosi*—arbitrarily deprive them of their use of it.<sup>120</sup>

Individuals access to land is situated within a structure of rights pertaining to the family group.<sup>121</sup> Essentially, the “right of use and occupation of land by an individual is subject to the customary law of communal ‘ownership.’ It is generally accepted that traditional communities in South Africa did not recognize a system of individual land tenure”;<sup>122</sup>

All land occupied by a tribe is vested in the Chief and administered by him as head of the tribe. This he does through his sub-Chiefs and headmen who regulate the distribution and use of land in their respective areas. The land is not his personal possession with which he can deal as he pleases. None of the land belongs to the Chief nor can he dispose of it.<sup>123</sup>

Khunou agrees with Bekker that communal ownership can be a non-racial concept. He points to examples of traditional authorities allocating land to Afrikaner and Coloured families<sup>124</sup> in accordance with customary practice.<sup>125</sup> Khunou, Bekker, and Sibanda offer a starkly different version of customary law than that provided by Claasens, Cousins, and Okoth-Ogendo. Rather than reciprocal and nested, they see property rights as hierarchical, with ownership largely concentrated at the apex of tribal authority.

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119. *Id.* ¶ 20.6 (citing Olivier NJ et al., *Indigenous Law South Africa* 3 (1988)).

120. *Id.*

121. *Id.* ¶¶ 22-23.6.

122. *Id.* ¶ 23.4.

123. *Id.*

124. *Id.* ¶ 21.4.

125. It is important to note that Sibanda, Bekker, and Khunou are writing in the context of a legal attack on the Communal Land Rights Act, 11 of 2004 (CLARA), which was subsequently ruled unconstitutional on procedural grounds. They do not put forward a definition of secure tenure, but it can be implied from the context of the litigation that CLARA itself is their model of tenure security.

*C. Individual Titling as the Gold Standard of Property Rights*

Some commentators and policy-makers consider the entire project of securing tenure in terms of communal property rights flawed and instead argue that private ownership with registered title deeds constitutes the 'gold standard' of tenure reform.<sup>126</sup> They argue that communal tenure discourages conservation and improvement because farmers do not benefit from the increased value of the land they work;<sup>127</sup> that it is difficult to finance because banks are unwilling to extend credit on un-liable property;<sup>128</sup> that it is vulnerable to nepotism;<sup>129</sup> and that it is unclear if it is even something supported by the majority of individuals affected.<sup>130</sup>

For the last proposition, commentators point to the failed attempt to institute Ujamaa, a form of African socialism, in Tanzania in the 1960's and 70's.<sup>131</sup> Under this system, villages were consolidated with appurtenant land for the purpose of collective farming.<sup>132</sup> The rationale for this shift was that it would make it easier for the government to provide technical assistance and services, while at the same time establishing a system which adhered to African values of cooperation and mutual assistance.<sup>133</sup> Over ten years after implementation, only fifteen percent of land had been collectivized, and much of that had been achieved through coercion.<sup>134</sup> The people rejected Ujamaa, and the result undermined the project of African socialism as a whole.<sup>135</sup>

Proponents of private ownership argue that individualized tenure, typically defined as demarcation and registration of freehold title, is superior to communal titling models because it gives owners incentives to

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126. Cousins, *supra* note 17, at 9.

127. Lauren G. Robinson, *Rationales for Rural Land Redistribution, in South Africa*, 23 BROOK. J. INT'L L. 465, 499 (1997) (citing Russell King, *Land Reform* 358-59 (1977)).

128. *Id.* (citing Sebastian Mallaby, *After Apartheid, The Future of South Africa* 141 (1992)).

129. *Id.*

130. *Id.*

131. *Id.* at 499-500.

132. *Id.* at 500 (citing John P. Powelson & Richard Stock, *The Peasant Betrayed* 54-55, 57. (1987)).

133. *Id.*

134. *Id.*

135. *Id.*

use the land most efficiently, thereby maximizing agriculture's contribution to social well-being.<sup>136</sup>

### III. LEGISLATIVE ATTEMPTS TO SECURE TENURE

#### *A. Communal Land Tenure Bill*

As of 2019, South Africa's Parliament has not enacted permanent legislation to legally secure tenure for the victims of the nation's repressive colonial and apartheid legacy, as mandated by Section 25 of the Constitution.<sup>137</sup> A preliminary attempt, the Communal Land Rights Act (CLARA) of 2004, sat on the books for six years without being implemented.<sup>138</sup> In 2010 it was declared unconstitutional on procedural grounds.<sup>139</sup>

In July 2017, the government of South Africa proposed new legislation to replace CLARA.<sup>140</sup> The Communal Land Tenure Bill (CLTB) proposes that communal land be vested directly in the community,<sup>141</sup> loosely defined as a group of people with shared rules determining access to commonly held land.<sup>142</sup> It is the duty of the Minister of Rural

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136. Scott J. Shackelford, *Neither Magic Bullet Nor Lost Cause: Land Titling and the Wealth of Nations*, 21 N.Y.U. ENVTL. L.J. 272, 332 (2014) (citing Richard Barrows & Michael Roth, *Land Tenure & Investment in African Agriculture: Theory and Evidence*, 28 (2) J. MODERN AFR. STUD. 265, 265 (1990)).

137. See Ebrahim, *supra* note 12.

138. Okoth-Ogendo, *supra* note 73, at 104 n.2.

139. *Tongoane*, 2010 (6) SA 214 ¶ 133.

140. Communal Land Tenure Bill 2017, GN 510 of GG 40965 (7 July 2017), <http://www.ruraldevelopment.gov.za/legislation-and-policies/file/5426>.

141. Communal Land Tenure Bill 2017, ch. 1 § 2.

142. *Id.* at ch. 1 § 1. (“‘Community’ means a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group regardless of its ethnic, tribal, religious or racial identity and includes a traditional community”). The potential problems associated with this vague definition of community have been pointed out by Beinart *infra* note 165, stating:

Is the community with shared rules intended to mean a group settled within an existing political boundary, such as a municipality or a ward? If community implies a unit that derives shared rules from customary practices and retains boundaries from the homeland era, such as an old Tribal Authority area, or a traditional council recognised under the Traditional Leadership and Governance Framework Act (2003), then it is more likely to come under the influence or control of traditional authorities. This seems to be implied in

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Development and Land Reform (Minister), in consultation with the community, to determine the location and extent of the land to convert to communal ownership.<sup>143</sup>

In order to begin this process, the Minister is required to initiate a land rights enquiry.<sup>144</sup> It is the function of the enquirer to investigate, among other things, the nature and extent of land rights, state's interests, and options available to ensure legally secure tenure.<sup>145</sup> The Minister then uses the results of this enquiry to make a determination about the location and extent of communal land.<sup>146</sup>

Communities must choose a legal entity to administer their land, a communal property association, a traditional council, or some other entity "approved by the Minister."<sup>147</sup> A communal property association is a juristic person capable of holding and managing land for a community in terms of a written constitution.<sup>148</sup> A traditional council, which many communities already possess, is an authoritative body structured according to customary law and recognized by statute.<sup>149</sup> These administrative bodies

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some sections of the Bill. If it is a smaller village grouping, then there may be more diverse strategies for landholding? How small a group can act as a 'community' for the purposes of the Bill. If a cluster of ten families living in the same area wish to have 'shared rules' expressed as private rights to their land, can they apply to the Department separately from a larger group around them? Quitrent or individual Glen Grey holdings in the Eastern Cape have in theory been upgraded to private title. But some of these exist within districts where there are also areas of former 'Permission to Occupy' or communal tenure. Which 'shared rules' will shape the community in this area.

143. *Id.* at ch. 2 § 5(1).

144. *Id.* at ch. 6 § 20.

145. *Id.* at ch. 6 § 22.

146. *Id.* at ch. 2 § 5(2).

147. *Id.* § 28.

148. Communal Property Associations Act of 1996 ("To enable communities to form juristic persons, to be known as communal property associations in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution; and to provide for matters connected therewith.").

149. Section 211 of the Constitution provides that "[t]he institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution." Pursuant to the Constitution the Traditional Leadership and Governance Framework Act 41 of 2003 (Framework Act) was enacted to provide formal recognition to traditional councils. This Act introduced two requirements to democratize traditional councils. The first mandates that at least a third of the total number of council members are women. The second, that 60% of the members of the council are selected by the senior traditional leader and 40% are democratically elected from the community. Rural Women's Action Research Programme, *Questioning the Legal Status of Traditional Councils in*

are tasked with specific functions regarding the community's land.<sup>150</sup>

The community must also establish a representative body—the Households Forum—which is made up members of the community and appointees of the relevant traditional council or communal property association and the municipality with jurisdiction over the community.<sup>151</sup> In addition, the Households Forum must be half women, and three members must represent the interests of vulnerable community members, such as child-headed households, the elderly, and the disabled.<sup>152</sup>

The community must also adopt and register community rules by a 60% majority vote of households.<sup>153</sup> After the rules are adopted, the community applies to have them registered with the Director-General of the Department of Rural Development and Land Reform, who reviews them to see if they comply with “the rules of natural justice, the Constitution” and the Bill itself.<sup>154</sup> If the Director-General is not satisfied, they work with the community to remedy the defects.<sup>155</sup> If a community fails to adopt and register its own community rules, a set of prescribed standard rules will be applied, subject to adaptation by the Minister.<sup>156</sup>

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*South Africa*, 1-2 (Aug. 2013), [http://www.cls.uct.ac.za/usr/lrg/downloads/CLS\\_TCStatus\\_Factsheet\\_Aug2013.pdf](http://www.cls.uct.ac.za/usr/lrg/downloads/CLS_TCStatus_Factsheet_Aug2013.pdf). As of yet, the vast majority of traditional councils have not met the requirements of the Framework Act. *Id.* at 2. The legal significance of this failure is not apparent. *Id.* It is also interesting to note that the traditional councils given formal recognition in the Framework Act derive from apartheid law. *Id.* at 1 (*see* Bantu Authorities Act of 1951).

150. Communal Land Tenure Bill 2017, § 29(a)-(h).

151. *Id.* at ch. 9.

152. *Id.*

153. *Id.* § 26. These rules are to regulate:

- (a) the general management and administration of communal land; (b) the nature of rights to subdivided portions of communal land; (c) the alienation or termination of rights other than ownership rights; (d) the allocation of subdivided portions of communal land; (e) the keeping of communal land register; (f) the use of communal land by the entire community, households and persons in general; (g) the sale, donation, lease, encumbrance or any alienation of rights to communal land; (h) the use of communal land by persons or legal entities other than those from the relevant community; (i) administration fees; (j) such matters as may be prescribed; and (k) any other matter the community deem necessary to regulate.

*Id.*

154. *Id.* § 27.

155. *Id.*

156. *Id.*

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The Minister may establish communal land boards with jurisdiction over larger areas, subject to their discretion.<sup>157</sup> These boards would serve primarily administrative functions, helping the Minister to implement the Act and the communities to manage their land.<sup>158</sup> The land boards also have the potential to assist in dispute resolution, though it is unclear in what capacity.<sup>159</sup>

The Bill proposes a system of dispute resolution in which parties first attempt to informally resolve the dispute between themselves.<sup>160</sup> If this fails, either party may refer the matter to the traditional council, communal property association, or Households Forum.<sup>161</sup> If this fails as well, the dispute goes to an independent mediator appointed by the Director-General of the Department of Rural Development and Land Reform.<sup>162</sup> In the event that mediation is unsuccessful, the Minister must designate either an official from within the Department of Rural Development and Land Reform as adjudicator, or appoint an adjudication committee of three individuals, to resolve the dispute.<sup>163</sup> The outcome of adjudication is appealable by either party to the courts.<sup>164</sup> The Bill relies heavily on the capacity of the Department of Rural Development and Land Reform. Several concerns have been raised about whether this is feasible.<sup>165</sup>

The CLTB concluded its public comment period in November 2017 and has been heralded by some as a significant step in the direction of meaningful land reform and an important catalyst for economic security for the rural poor.<sup>166</sup> However, other voices have criticized the proposed

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157. *Id.* § 36.

158. *Id.* § 39.

159. *Id.* § 39(e).

160. *Id.* § 45(1).

161. *Id.* § 45(2).

162. *Id.* § 45(3).

163. *Id.* § 45(4).

164. *Id.* § 45(5).

165. William Beinart, *Africa: Comments on the Communal Land Tenure Bill, 2017*, ALL AFRICA (Aug. 11, 2017), <https://allafrica.com/stories/201708160467.html>.

166. Theo Boshoff, *Land Bill is a Good, if Flawed, Start*, MAIL & GUARDIAN (July 14, 2017), <https://mg.co.za/article/2201-07-14-00-land-bill-is-a-good-if-flawed-start>, stating:

The draft Bill finally opted for the transfer of ownership rights. It makes provision for the minister to transfer ownership of the land a community resides on to the community. The community can choose whether they want a Communal Property Institution (CPA), a traditional council or any other body approved by the minister to administer the land.

legislation for consolidating control over land in the hands of traditional leadership.<sup>167</sup> They worry that it will actually uproot millions of people living on communal land, exacerbating the very problem it is meant to ameliorate.<sup>168</sup> Some have suggested that the real impetus behind the CLTB is an attempt to rally traditional leadership behind the ruling African National Congress (ANC) party.<sup>169</sup>

### *B. The Land Records Act*

The Land Records Act (LRA) is a statutory prototype proposed under the auspices of Good Governance Africa,<sup>170</sup> a non-profit organization dedicated to research and advocacy focused on improving governance across the continent.<sup>171</sup> The LRA would entail a statutory recording (recordal) of all rights not already registered in the formal Deeds Registry.<sup>172</sup> This would include informal land rights, as well as freehold

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Although the land in its entirety is transferred to the community, they can decide internally what legal form individual allocations to members will take, namely leasehold, use rights or full ownership.

From an agribusiness point of view, this is a huge step towards creating an enabling environment in those areas to develop commercial agricultural and associated enterprises. If ownership is transferred, community members can decide to use their land as collateral to obtain the financing needed to build infrastructure and buy the inputs to run a commercial farming operation.

167. *New Land Bill Likely to Uproot Over 17 million People: Report* BUSINESSTECH, <https://businesstech.co.za/news/general/191934/new-land-bill-likely-to-uproot-over-17-million-people-report/>, (last visited Mar. 9, 2019), explaining:

Dr Aninka Claassens of the Land and Accountability Research Centre noted that traditional leaders still hold much of the power in the latest revision, and individuals could now only acquire a deed or title if given permission by a leader.

This extends to communities of over 100,000 people who will lose their rights to land when the bill transfers their individual ownership of land to the broader “community”.

168. *Id.* (“DA MP Kevin Mileham said the law was a move by government to rally traditional leadership around the ANC.”).

169. *Id.*

170. Kingwell, *supra* note 31.

171. *Who We Are*, GOOD GOVERNANCE AFRICA, <https://www.gga.org/who-we-are/> (last visited Feb. 3, 2018).

172. Kingwell, *supra* note 31.

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and quitrent title which have fallen out of step with the Deeds Registry.<sup>173</sup>

The processes of clarifying rights through recordal would involve several interlocking processes. The first stage of enumeration and recordal of existing, unadjudicated rights could be done alongside a census. The second stage of adjudication of rights according to new forms of admissible evidence, including 'living law' and customary law norms, should culminate in recordal in a repository of certified rights, with the issuing of a certificate of a land right showing an adjudicated, legal land right that can stand up as evidence in a court of law.<sup>174</sup>

The LRA would also establish an institution for resolving disputes where rights are overlapping or contested; an office to award new land rights; an independent public protector to hold government to account and enforce compliance; and a surveying entity which would mirror the existing Surveyor General for the spatial measurement of land in terms of the LRA but relying on modern, visual technology and mapping instead of expensive, traditional surveying techniques.<sup>175</sup> This last institution would exist side-by-side with the Surveyor General, creating a parallel system of visual demarcation which, while not meeting the mathematical precision required by more traditional surveying, would produce adequate results at a significantly lower cost.<sup>176</sup> The LRA would provide for this parallelism and allow for progressive changes over time.<sup>177</sup> Disputes would only be appealable to the courts if they could not be solved by the institution created by the LRA for dispute resolution.<sup>178</sup>

The proponents of the LRA argue that it would develop strong rights for off-register landholders, which they estimate constitute sixty percent of South Africa's population.<sup>179</sup> It is designed to protect rights at the level of the family, either individually or collectively, and to avoid conflating the interests of the community with those of the traditional authorities.<sup>180</sup>

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173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* Recent evidence was provided by the public hearings of the High Level Panels in 2017,

Moreover, the proponents insist that the LRA would be relatively inexpensive for the state to operate, as it is a re-engineering exercise rather than the creation of a large new bureaucracy.<sup>181</sup>

*C. The Namibian Flexible Land Tenure Model: An International Perspective*

South Africa's struggle to remedy tenure insecurity is not unique; neighboring Namibia has been working to develop a lasting legislative solution to its own similar socio-political reality since the early 1990s.<sup>182</sup> The first and most obvious solution was simply to extend the existing freehold system, already applicable to about half of the country, everywhere.<sup>183</sup> However, this avenue was hindered by, among other things, a shortage of skills in the private and public sectors required to navigate the complexities of formal surveying, titling, and conveyancing; a lack of regular income; and the requirements of various existing pieces of legislation.<sup>184</sup>

Thus a second system was devised to exist parallel to, and interchangeably with, the established freehold system.<sup>185</sup> This system, initially labelled the Flexible Land Tenure Project, would create two new forms of tenure: starter title and landhold title.<sup>186</sup> Starter title would be a statutory form of tenure registered in respect of a block of land while landhold title, while also statutory, would confer the "most important aspects of freehold ownership but without the complications of full

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which heard a wide range of testimony on the insecurity of rights in former communal areas. *Id.* In the Eastern Cape witnesses spoke of the complete breakdown in land administration and allocation systems contributing to arbitrary changes in land use, often to the detriment of women's rights in land. *Id.* In Mpumalanga one community member testified that "[P]eople continue to suffer because the land is sold . . . . Communal land belongs to the people, it is not tribal land. It is common here in Mpumalanga where I live that traditional leaders sell land to foreigners." *Id.*

181. *Id.*

182. Søren Fauerholm Christensen, *Flexible Land Tenure in Namibia: Offering Registration to Informal Settlers*, NATIONAL SURVEY AND CADASTRE, Denmark (Mar. 18, 2005), <https://www.gim-international.com/content/article/flexible-land-tenure-in-namibia>.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

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freehold.”<sup>187</sup> One of the principal distinctions between the two proposed forms of tenure is that starter title, while registered in the name of an individual (as a custodian for the entire household) is a group-based right in that each household within the block parcel must abide by rule of the community laid down by a community association.<sup>188</sup>

This system was tested in a pilot program from 1995-1996, which focused on addressing practical land surveying and related planning issues.<sup>189</sup> The accuracy of different survey methods was ascertained, along with the time they would consume, the cost of materials, and the skills demanded.<sup>190</sup> Though the government lent its support to the project in 1997, the lack of official resources delayed translating it into actual legislation.<sup>191</sup> Over a decade and a half after political support for the project was secured, Namibia's Parliament enacted the Flexible Land Tenure Act (FLTA) in June of 2012.<sup>192</sup>

The FLTA starts by creating a unit of land management called the “blockerf,” which means simply any piece of land to which the starter title or landhold title scheme is applied.<sup>193</sup> Starter title gives the holder the right to erect a dwelling at a specified location within the blockerf, though it does not define any plot or parcel surrounding the dwelling.<sup>194</sup> It does, however, provide that the size and nature of the dwelling will be specified.<sup>195</sup> Starter title confers the right to occupy the dwelling in perpetuity and is inheritable, alienable, and transferable.<sup>196</sup> It also confers the right to utilize whatever services are provided to the blockerf as a whole, and to be a member of the relevant community association.<sup>197</sup>

Landhold title, unlike starter title, grants the holder full ownership rights to a plot of land.<sup>198</sup> These rights are the same as those held by a common

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187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. Flexible Land Tenure Act of 2012 (Namib.).

193. *Id.* § 1.

194. *Id.* § 9(1)(a).

195. *Id.*

196. *Id.* § 9(1).

197. *Id.*

198. *Id.* § 10.

law land owner, but landhold title holders also possess an undivided interest in the communal property of the blockerf (all of the property not allotted in terms of landhold or starter title).<sup>199</sup> The FLTA requires both forms of title to be recorded in a registry according to parameters set out in the act.<sup>200</sup>

#### IV. ANALYSIS

In analyzing the various legislative approaches to securing tenure, and the theoretical bases upon which they rest, the minimum constitutional standards established by the Constitutional Court in *Tongoane*, *Alexkor*, and *Pilane* comprise the sounding board against which all theories will be tested. From *Tongoane* we know that tenure insecurity is the result of a history in which Africans were systematically dispossessed of land and relocated,<sup>201</sup> granted conditional title to what land they were allocated,<sup>202</sup> and tolerated in “white” South Africa only to the extent they provided a necessary labor force.<sup>203</sup> As it is the purpose of the Property Clause<sup>204</sup> to reverse this trend,<sup>205</sup> we can put forward the minimum standard of tenure

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199. *Id.*

200. *Id.* § 6.

201. *Tongoane*, 2010 (6) SA 214 ¶ 25 (“The forced removals of African people from the land which they occupied to the limited amount of land reserved for them by the apartheid state resulted in the majority of African people being dispossessed of their land. It also left a majority of them without legally secure tenure in land”).

202. *Id.*

203. *Id.* ¶ 26 explaining:

The Bantu Homelands Citizenship Act, 197056 and the Bantu Homelands Constitution Act, 197157 further entrenched land dispossession as a key policy of the apartheid edifice. African people would, as a consequence, have no claim to any land in “white” South Africa. African people were tolerated in “white” South Africa only to the extent that they were needed to provide labour to run the economy. They had precarious title to the land they occupied to remind them of the impermanence of their residence in “white” South Africa.

204. S. AFR. CONST., 1996, §§ 25(6), 25(9).

205. *Tongoane*, 2010 (6) SA 214 ¶ 28 describing that:

One of the goals of our Constitution is to reverse all of this. It requires the restoration of land to people and communities that were dispossessed of land by colonial and apartheid laws after 19 June 1913. It also requires that people and communities whose tenure of

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security as a system in which Africans are systematically granted access to and rights in land, where title is not conditioned along racial lines, and where the total impact is to encourage racial equality and economic empowerment. It is important to note the inextricable relationship between racial oppression and economic predation,<sup>206</sup> which is one of such intimacy that some have argued it is impossible to even speak about land in South Africa without speaking about race.<sup>207</sup> Modern tenure insecurity, as described by the *Tongoane* court, is the product of a calculated effort to undermine black South African economic independence and create a “floating, landless proletariat whose labour could be used and manipulated at will.”<sup>208</sup> Therefore, it is vital to consider the economic implications of

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land is legally insecure as a result of racially discriminatory colonial and apartheid laws be provided with legally secure tenure or comparable redress.

206. See, e.g., Ben Cousins, *The EFF's Land Policies: A Leap in the Dark*, DAILY MAVERICK (11 July 2016), <https://www.dailymaverick.co.za/opinionista/2016-07-11-the-effs-land-policies-a-leap-in-the-dark/#.Wna5LainGCg>, stating that:

If the nature of the South African economy in general, and of the agricultural economy in particular, cannot be understood without consideration of racial oppression, then it is equally true to say that racial inequality cannot be understood apart from the class dynamics of capitalism. These two dynamics are inextricably intertwined, and in South Africa tend to “co-produce” each other. For most black South Africans, race and class location taken together ensure that they are at the bottom of the social pile. For most women, an added disadvantage is unequal gendered relations – the notorious “triple burden.”

207. Lubabalo Ntsholo, *South Africa Can't Speak about Land Without Speaking about Race*, DAILY MAVERICK (20 June 2016), <https://www.dailymaverick.co.za/opinionista/2016-06-20-south-africa-cant-speak-about-land-without-speaking-about-race/#.Wna5a6inHb0>, claiming:

The narratives on land in South Africa would have us believe that the central problem relating to the land and agrarian question is that relating to the reorganisation of the economy in the countryside, and is less to do with race as both a historical and present determinant to access social and economic power, and the centrality of race-based land ownership as a facilitator of inequality. Valid as the argument for agrarian reform may be, it is archaic, treacherous and void of honesty if at the same time it does not deal with the primacy of redress for historical land dispossession as a necessary precursor for comprehensive agrarian reform. The evolution of the land question in this country has been along a very peculiar, racial path; a path unparalleled even by other African experiences of land alienation. Therefore, arguments that seek to relegate race as a key determinant on the discourse on land are dishonest intellectual posturing.

208. PLAATJE, *supra* note 36, (Foreword by Bessie Head).

any proposal to secure tenure.

*A. Individual Titling is Constitutionally Inadequate to Secure Tenure*

Some of the most vociferous proponents of individual titling argue that it provides unparalleled economic security and incentivizes the most efficient and productive use of land.<sup>209</sup> These same proponents like to point out that individual tenure provides solid collateral for a loan, and thus increases the landholders access to capital and economic wellbeing. Some researchers have disputed the validity of these theories, indicating that certain communities did not experience the projected investment and development upon obtaining title.<sup>210</sup> However, for our purposes it is not necessary to debate the economics of individual versus communal title. It is enough to recognize that the *Alexkor* holding demands the formal legal system respect communal title derived from principles of indigenous law.<sup>211</sup> The nature and content of these rights must be determined by the standards of indigenous law, not viewed through the distorting prism of common law.<sup>212</sup> Arbitrarily imposing individual title across areas subject to informal systems of communal tenure would be to deprive communities of indigenous title, amounting in an expropriation of land which would require compensation in order to be constitutional.<sup>213</sup>

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209. Shackelford, *supra* note 136 (citing Karol C. Boudreaux, *The Legal Empowerment of the Poor: Titling and Poverty Alleviation in Post-Apartheid South Africa*, 5 HASTINGS RACE & POVERTY L.J. 309, 314 (2008)).

210. COUSINS ET AL., *supra* note 104.

211. *Alexkor*, 2004 (5) SA 460 ¶ 62. The Court states:

In the light of the evidence and of the findings by the SCA and the LCC, we are of the view that the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law”).

*Id.*

212. *Id.* ¶ 50 (“The nature and the content of the rights that the Richtersveld Community held in the subject land prior to annexation must be determined by reference to indigenous law. That is the law which governed its land rights. Those rights cannot be determined by reference to common law.”).

213. S. AFR. CONST., 1996, § 25(2)(b). This holding will be complicated by the potential

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More fundamentally, individual titling would demand a massive assertion of state resources and power, with the affect that many people who currently live on communal land or possess informal rights of use and access would be forced to relocate or be deprived of the benefits which their communal status affords them. This smacks all-too closely of the oppressive apartheid practices which efforts to secure tenure must reverse. Legislation to secure tenure may provide a pathway by which communities can elect individual titling, but to impose it from above is to perpetuate the fundamental violence of apartheid land policy and to contravene the explicit requirements provided by the Constitutional Court in *Tongoane* and *Alexkor*.

One criticism of the Namibian Flexible Land Tenure Act is that it seems to implicitly view starter and landhold title as steps on the ladder to individual title, necessary more because of a lack of governmental capacity than for their desirability in themselves. If we are to take seriously the vision of the future in which “indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law,”<sup>214</sup> we must resist viewing communal property as an inconvenience to be discouraged, and instead consider what it would mean for it to be an integral and vibrant part of the South African landscape. Moreover, decades of research by experts such as Donna Hornby, Rosalie Kingwill, Lauren Royston, Ben Cousins, Aninka Claasens (among many others) indicates that the web of reciprocal rights and obligations that constitutes the basis of communal title<sup>215</sup> has provided baseline tenure security for many South Africans,<sup>216</sup> despite the fact that most conventional property

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constitutional amendment allowing expropriation without compensation. See, e.g., Ed Stoddard, *Explainer: South Africa Aims to Expropriate Land Without Compensation*, REUTERS (March 4, 2018, 10:16 AM), <https://www.reuters.com/article/us-safrica-land-explainer/explainer-south-africa-aims-to-expropriate-land-without-compensation-idUSKCN1GQ280>.

214. *Alexkor*, 2004 (5) SA 460 ¶ 51.

215. For a review of reciprocal and nested nature of communal land rights see, e.g., Hornby et al., *supra* note 33, at 139-145; Okoth-Ogendo, *supra* note 73, at 96-97.

216. Ben Cousins, *Characterising 'Communal' Tenure: Nested Systems and Flexible Boundaries*, in LAND, POWER & CUSTOM 109, 118 (Claasens & Cousins eds., 2008) (“Contemporary case studies suggest that many occupants of communal land enjoy *de facto* tenure security. This is because existing systems, many of them now informal in character, work reasonably well on a day-to-day basis.”); Affidavit for Benjamin Cousins ¶ 59-61, *Tongoane and Others v. Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC).

law either ignores it or actively subverts it.<sup>217</sup> This indicates that communal title may be rightly viewed as an end in its own right, for pragmatic as well as constitutional reasons.

*B. Indigenous Title Vests at the Community Level*

There has been significant disagreement over whether traditional leaders own communal land, with the members of the community possessing rights of use and occupation under the auspices of the traditional leadership, or whether title vests in the community as a whole. Researchers such as Ben Cousins, Lauren Royston, Donna Hornby, and Rosalie Kingwill have argued for the latter,<sup>218</sup> pointing to evidence that control of land is vested at different levels of the social organization depending on the resource in question, which has been labelled the “nested” quality of communal property under indigenous law.<sup>219</sup> Proponents of the alternative viewpoint, Samuel Khunou in particular, disagree and say that the traditional leaders are the owners of the land, though the community members have rights which protect their interests in communal land of which they cannot be arbitrarily deprived.<sup>220</sup>

From a purely semantic perspective, it is difficult to distinguish the significance of the two viewpoints. In order to actually understand what the theoretical differences entail, it is useful to see how they have inspired concrete policy agendas. As implemented in legislation, namely the CLTB and its predecessor CLARA, the latter viewpoint—which has principally set the policy-making status-quo—has defined community in such a way

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217. Okoth-Ogendo, *supra* note 73, at 96-97.

218. KINGWELL ET AL., *supra* note 33.

219. *Id.* See also, Affidavit for Benjamin Cousins ¶¶ 67-68 in *Tongoane*, 2010 (6) SA 214 (“The rights are layered within one another, and extend upward from the household through the family group, the neighbourhood, the village, and the ward, to the chieftancy, depending on the resources in question... a key feature of indigenous tenure regimes is that access to land and control over land do not coincide, as they do in the common law construct of ownership.”).

220. Affidavit of Samuel Freddy Khunou ¶ 18.5 in *Tongoane*, 2010 (6) SA 214 (“[M]any people interviewed in Mayaeyane did not regard themselves as the legitimate “owners” of land in Mayaeyane. Instead, they recognized the kgosi and the headman as the “owners” of the land who served their interests.”); *Id.* ¶ 20.6 (“[T]he people of Mayaeyane could not dispose of the land or sell it. However, it was important to note that no one (including the kgosi) could arbitrarily deprive them of the use of the land.”).

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as to make it completely subject to the traditional leadership and thus undermining decision-making authority and land administration at the level of the household, clan, and village in favor of that at the very top of the traditional hierarchy.<sup>221</sup> This is at odds both with the findings of many researchers, and the language of the Constitutional Court. In *Alexkor* the Court found indigenous title vested in the community without ever mentioning traditional leaders.<sup>222</sup> There have been reports that some traditional leaders, believing they legally own communal land, have begun attempting to charge individuals for their occupancy.<sup>223</sup> Others have entered into mining deals with private companies without consulting impacted communities.<sup>224</sup> Rather than facilitate security of tenure for individuals in those areas, this trend actually destabilizes it and runs counter to the constitutional mandate.

*C. The Content & Character of Communal Property Rights Are Empirical Matters*

A problematic predicate to the idea of communal tenure reform is the fact that the very definition of 'community' is open for debate. The CLTB adopts a definition of community inherited from apartheid era legislation.<sup>225</sup> The idea that tenure insecurity could be remedied by referencing the very legislation that created it in the first place is almost facially absurd.<sup>226</sup> In addition to its historical and anthropological failings, such a definition of community is untenable from a practical

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221. LEGAL RESOURCES CENTRE, INVITATION TO COMMENT ON THE COMMUNAL LAND TENURE BILL 2017, ¶¶ 2.18.1, 3.1.1 (2017).

222. *See id.* ¶ 2.8.

223. *See, e.g.,* Thiyane Duda, *Op-Ed: Communal Land Belongs to the People, Not to the Chiefs*, DAILY MAVERICK (Apr. 5, 2017), <https://www.dailymaverick.co.za/article/2017-04-05-op-ed-communal-land-belongs-to-the-people-not-to-the-chiefs/#.WmT55ahKuCg>. The author received similar reports first-hand while interning for the Legal Resources Centre in Durban, South Africa.

224. *Id.* *See also* Aninka Claasens, *South Africa's Mining Boom: Double Dispossession for the Rural Poor*, LAND & ACCOUNTABILITY RESEARCH CENTRE (Nov. 18, 2014), <http://www.customcontested.co.za/south-africas-mining-boom-double-dispossession-rural-poor/>.

225. LEGAL RESOURCES CENTRE, *supra* note 221, ¶ 4.15 ("The central problem is that the draft Bill works with the community definition of the Framework Act, thus communities are exclusively defined as groupings under a senior traditional leader.").

226. *See id.*

perspective.<sup>227</sup> Some of these communities could number in the hundreds of thousands, large enough to make the vision of flexible shared property arrangements unlikely to be realized.<sup>228</sup> Experts have pointed out that, if community is defined in such a way, one such community will likely contain several different de facto tenure arrangements, which will make uniform democratic decision-making very difficult.<sup>229</sup>

The Namibian Flexible Land Tenure Act avoids this problem by approaching each blockholder individually and examining the feasibility of implementing a starter or landhold title scheme based on the situation of the land in question.<sup>230</sup> Such a system is more in line with the vision of living customary law set out in *Alexkor* than the rigid, top-down version of community detailed by the CLTB. Any system purporting to establish tenure security and incorporate customary law must be sensitive to the actual practices of the community and its historical situation.<sup>231</sup>

Keeping this principle firmly in mind, policymakers must resist the temptation of delineating strict substantive property rights *a priori*, as doing so may infringe on the actual practices of any given community and thus raise the spectre of constitutional challenge. One of the key challenges to the CLTB is that it artificially concentrates authority in the hands of a centralized elite, contrary to the actual nested nature of many off-register tenure models.<sup>232</sup> If a statutory tenure model is to be successful it must focus on the process by which land is to be surveyed, communities defined, and disputes resolved in accordance with actual practices. It cannot impose a single theoretical or idealized vision from on high, at least not without violating the Constitution. The idea of a recordal of off-register rights, as proposed by the LRA, is just such a procedural mechanism which uses legislation to legitimize and secure rights in the spirit of constitutional caselaw like *Alexkor*.<sup>233</sup>

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227. *Id.* ¶ 4.16.

228. *Id.*

229. *Id.* ¶¶ 4.17-18.

230. See Flexible Land Tenure Act 4 of 2012, § 11 (Namib.).

231. See *Alexkor*, 2004 (5) SA 460 ¶ 57.

232. See LEGAL RESOURCES CENTRE, *supra* note 221, ¶ 4.18.

233. Kingwell, *supra* note 31.

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*D. Property Rights Are Only as Good as the Institutions Which Protect Them*

Floating in the background of any effort to realize secure communal tenure is the intimately connected issue of community decision-making and authority. In Namibia, this problem was dealt with by creating associations, managed by committee, and comprised of all starter and landhold title holders in a scheme.<sup>234</sup> This is not dissimilar in principle to the management structure envisioned by the CLTB, which vests authority in a Traditional Council or a Communal Property Association. Communal Property Associations (CPAs) are enabled by the Communal Property Associations Act,<sup>235</sup> and have garnered harsh criticism for inadequately addressing the purposes for which they were created.<sup>236</sup> Part of the dysfunction stems from the lack of governmental support for CPAs.<sup>237</sup> Clearly, whatever association is used to direct communal land management must be adequately supported, trained, and financed, otherwise the most well-intentioned legislation will flounder for lack of capacity.

Not only have the organizations tasked with administering and managing communal land not been given adequate support, but the government itself has been seriously overtaxed by existing titling efforts.<sup>238</sup> There are concerns that the CLTB will exceed the government's capacity due to the massive burden it places on the Department of Rural Development and Land Reform<sup>239</sup> in a country where the economic outlook is already grim.<sup>240</sup> It goes almost without saying that legislation purporting to secure tenure must be within the practical limits of governmental capacity, or else it is nothing but a paper tiger. As it stands, it seems unlikely the CLTB is a realistic piece of legislation, even if it

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234. See Flexible Land Tenure Act 4 of 2012, § 18 (Namib.).

235. Communal Property Associations Act 28 of 1996 (S. Afr.).

236. See LEGAL RESOURCES CENTRE, *supra* note 221, at ANNEXURE A.

237. Ebrahim, *supra* note 12.

238. Beinart, *supra* note 165.

239. *Id.*

240. Barbara Curson, *Is South Africa Heading for a Debt Crisis?*, THE CITIZEN (Aug. 18, 2017), <https://www.moneyweb.co.za/news/economy/is-south-africa-heading-for-a-debt-crisis/>.

were deemed to be a desirable one.<sup>241</sup> One of the advantages of the streamlined surveying and titling methodology employed by Namibia's FLTA is that it significantly reduces the costs associated with conventional land titling, registering, and conveyancing.<sup>242</sup> It makes a great deal of sense to utilize Namibia's research and benefit from the twenty years of expertise built around this new surveying model.<sup>243</sup>

#### V. PROPOSAL

The working minimum standards that any proposed legislation to secure tenure must meet to comport with the Constitution are: (1) the legislation must systematically grant Africans access to and rights in land; (2) it must not condition title along racial lines (i.e.—confer a lesser form of title to one race than another); and (3) its net effect must be to encourage racial equality and economic empowerment. To this end, I propose that future legislation further the tenure securing process by prioritizing efficient dispute resolution, implementable surveying and rights recording, and a robust starter title scheme to provide an immediate level of security at the household level.

The financial capacity of the organs of state tasked with implementing whatever legislation is enacted pursuant to these objectives is of paramount importance. This means that, in many cases, perfection must be sacrificed for practicality. Tenure insecurity is the product of centuries of colonial and apartheid exploitation, it will not be reversed overnight. What is important is that South African society begin moving in the right direction, both in fact and in perception. This legislation should thus be viewed as a framework act or planning statute—a skeleton for future growth.

A cost-effective surveying and rights-recording methodology is vital for building the foundation for strong tenure security among those parts of South African society whose claim to land has been, for the most part, invisible. I propose combining the years of data and expertise developed by the Namibian FLTA with the idea of a rights recordal as outlined by the

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241. Beinart, *supra* note 165.

242. Christensen, *supra* note 182.

243. *See id.*

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LRA.<sup>244</sup> This would likely entail a government entity tasked with using modern visual technology and mapping to create a surveying database parallel to the traditional surveying system and equal in law, but not necessarily requiring the same mathematical precision.<sup>245</sup> One of the primary objectives of this surveying effort would be to map areas of land held and worked in common. 'Community' would be defined, not by some artificial idea of traditional authority inherited from apartheid legislation or developed *ex ante* by academics but would be derived empirically from what is measured and observed during the course of the surveys.

At the same time the surveying entity is mapping the contours of communal property, it will be issuing starter title to individual households pursuant to its findings.<sup>246</sup> This will provide an immediately more secure claim to the land upon which people are already living, as well as a form of documentation cognizable by law and available to be utilized as collateral for a loan.<sup>247</sup> This theoretical legislation may also want to implement a landhold title scheme, similar to the FLTA. However, in the name of practicality and the best use of scarce governmental resources, this may be something deferred to a later date.

I also propose that land disputes be adjudicated through the system of Magistrates' Courts.<sup>248</sup> These courts are the most readily accessible to rural South Africans, who are most likely to require the adjudication of communal land rights claims. Moreover, while in theory it might seem attractive to create an elaborate system of dispute resolution especially for this sort of claim—as the CLTB proposes doing<sup>249</sup>—it makes more sense to invest scarce resources in augmenting an existing system, with which

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244. See Kingwell, *supra* note 31.

245. *Id.*; Christensen, *supra* note 182.

246. For an overview of Namibia's approach to starter title, see Flexible Land Tenure Act 4 of 2012, § 9 (Namib.).

247. One area that is still problematic is the relationship between the individual (usually the head of household) and the household itself. See LEGAL RESOURCES CENTRE, *supra* note 221, ¶ 4.7.3. The LRC in its comments to the CLTB insists that entire households have claim to land. *Id.* From a practical perspective, however, it is difficult to envision a convenient system for granting starter title to every member of a household.

248. For an overview of the South African Courts' structure, see Department of Justice and Constitutional Development, Republic of South Africa, *Courts in South Africa*, <http://www.justice.gov.za/about/sa-courts.html> (last visited Feb. 3, 2018) [hereinafter *Courts in South Africa*].

249. See Communal Land Tenure Bill of 2017 § 45 (S. Afr.).

people are already familiar, than to divert them into creating something wholly new. However, I also propose that, as suggested by the LRA, specific rules of evidence be promulgated around this variety of claim, particularly to take account of “living law” and customary law norms.<sup>250</sup> A specialist appellate court could be created for the express purpose of adjudicating tenure related claims originating in Magistrates’ Courts around the country.<sup>251</sup> Situating tenure dispute resolution within the court system has a dual purpose. First, and most obviously, it would provide a (mostly) efficient way of achieving final resolution of contested tenure arrangements. But second, and just as important, it could be used to develop a body of communal-indigenous common law which would give effect to the Constitutional Court’s aspirational promise in *Alexkor* that, in modern South Africa, “indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.”<sup>252</sup> Rather than task a special office with cataloguing and recording indigenous property rights, this system would utilize the special genius of all common law systems, which is to generate a body of law from the resolution of individual disputes.

Finally, the above proposals must be augmented by a concerted effort to bolster the dysfunctional Community Property Associations Act so that communities can establish CPAs to manage and administer commonage. Whether this can be done simply through further allocation of resources within the existing legislative structure is uncertain. It may require the promulgation of new legislation to refine governmental support of CPAs. In any case, communal tenure security cannot be achieved if the entities designed to be the community’s apparatus for exercising control over its land are left derelict and in disrepair.

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250. See, e.g., Kingwell, *supra* note 31. Note that this is not unprecedented, South African Courts were first authorized to take judicial notice of indigenous law in 1988 with the passage of the Law of Evidence Amendment Act 45 of 1988, which states that “Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice.” Law of Evidence Amendment Act 45 of 1988 § 1(1) (S.Afr.).

251. South Africa has several specialist courts already, such as the Land Claims Court, the Special Income Tax Courts, and the Labour and Labour Appeal Courts. See *Courts in South Africa*, *supra* note 248. Thus, creating one specifically for the purposes envisioned here would not be unprecedented. See *id.*

252. *Alexkor*, 2004 (5) SA 460 ¶ 51.

## CONCLUSION

South Africa desperately needs tenure reform.<sup>253</sup> It needs tenure reform immediately, and it can more afford imperfection than it can inaction.<sup>254</sup> I propose that short term gains be made by focusing on (1) policies of quick and cost-effective surveying, (2) accessible dispute resolution to simultaneously resolve contested land rights and build a body of law around communal property mores, (3) a starter title scheme to provide a modicum of security to those whose tenure is most tenuous, and (4) systematic investment in CPAs and local governance organizations. These will stabilize the management of communal property, begin the process of formalizing off-register land rights, provide economic security and liquidity to those living and working on land to which they have no documentation at present, and provide a mechanism for the vindication of indigenous property rights in court. Not only will this begin the process of securing tenure for millions of South Africans, it will do so in a way that attempts to fuse indigenous and common law concepts according to the vision of the Constitutional Court.<sup>255</sup>

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253. Ebrahim, *supra* note 12 (“If we do not see meaningful change within the next 10 to 15 years, the majority of the population, which does not have access to land, might grow tired of waiting and might then take the law into their own hands.”).

254. The populist rhetoric among certain quarters advocating for the forcible repatriation of white-owned land by black South Africans is testament to this. *See, e.g.*, Macharia, *supra* note 14.

255. *Alexkor*, 2004 (5) SA 460 ¶ 51.