Part II
THE LAND QUESTION

Community, Property and Security in Rural South Africa: Emancipatory Opportunities or Marginalized Survival Strategies?

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INTRODUCTION

For a large portion of humanity, the opportunity to produce depends on an ability to gain access to land. Despite urbanization and the imperatives of the market economy, it is the ability to at least grow a small crop of staples corn, beans, rice—to supplement other forms of income, such as wage labor or government welfare or pensions, that makes the difference between many a family's capacity to sustain a meager subsistence or to slowly disintegrate. Any project seeking to reinvent social emancipation, especially through a consideration of alternative forms of production, must address this reality. Faced with chronic underemployment and vast inequalities in land holdings, activists and policy-makers in many regions of the world turned, in the course of the twentieth century, to land reform. Despite immense political and institutional difficulties, land reform and its promise of secure access to one of the primary productive resources remains an important part of any progressive agenda outside of the most highly developed countries. Even there, patterns of discrimination and insecure tenure remain central elements in the lives of deeply impoverished communities.

After seven years of democratic governance, the debate over South Africa's land reform program is often reduced to an argument over whether the glass is half full or half empty (DLA, 1999 and Cliffe, 2000: 273–286). Although the promise of the 1994 African National Congress (ANC) election manifesto—a transfer of 30 percent of the land—was clearly not met in the first five years, thousands of families and individuals from the most marginalized sections of society benefited from the new government's threefold land reform strategy: land restitution, land redistribution and land tenure reform. More than 12,000 households received over 266,000 hectares of land under the land restitution program (Brand, 2000), while almost a quarter of a million people in 279 projects received land through the redistribution program

(Hanekom, 1998). However, by the year 2000, with the government's withdrawal of its proposed Land Rights Bill and other policy changes, it became clear that the program was faltering, particularly in the area of land tenure reform (Mayende, 2001) which promised security of tenure to the millions who lived in the most impoverished and underdeveloped parts of the country—the former black "homelands."

While it remains painfully true that the clearest indicator of poverty in South Africa at the turn of the millennium was being black, female and living in a rural area, the land reform program has produced some interesting opportunities for creating alternative ways to produce and to build viable communities. Despite an announced policy shift, in which the government decided to target black commercial farmers instead of impoverished rural communities to be the beneficiaries of continued land reform (Karuik, 2000), the struggle over access to land has continued, forcing the government to promise still greater and speedier reform (Mbeki, 2001). It is the conflict over the political and institutional dimension of these reforms that will be the focus of this study: particularly the creation of a legal form for the recognition of communal property that simultaneously guarantees the property rights of the participants yet demands that the members of this new property-holding institution adopt internal modes of governance that are both procedurally democratic and based on formal notions of gender and social equality.

THE OPPRESSION OF STRUCTURAL POVERTY

One of the major challenges in evaluating these alternatives and their emancipatory potential2 is to clarify the nature of the emancipatory goal under consideration. Given the failings of a century of capitalist development in Africa, and rural South Africa in particular, I want to narrow the goal of emancipation in this context to simply freedom from the oppression of structural poverty. From this perspective, it is dependence, or the lack of autonomy and self-determination in its widest sense that is the core feature of oppression under conditions of formal democracy.

Instead of focusing solely on the nature of the production process, the goal of this study is to consider the potential of a broader notion of emancipation from social, economic, and political dependence as an alternative to the current systems of production in the South African countryside. At its thinnest, this might entail a number of simple freedoms: to employ one's own labor without coercion; to be free from regular hunger and disease; and to be able to take part in making decisions that directly impact one's life and community. At its thickest, this might have the potential of providing a space in which communities might be able to engage the market from a position of relative self-sufficiency while also confronting some of the internal issues

of gender and authority that limit the possibilities of internal, intra-community or individual emancipation.

Although land tenure arrangements and the status of community show a great deal of variation across the landscape, from former "homelands" (bantustans) or communal areas to corporate and commercial farms in vastly different climatic and agricultural zones, the choices open to the vast majority of land reform beneficiaries remain tightly constrained. For the vast majority of rural South Africans, the immediate opportunity is to obtain some form of tenure security. It is hoped that this will ensure access to enough land to be able to adopt a feasible multi-tiered strategy of crop production, animal husbandry and off-farm employment, so as to both sustain themselves and gradually rebuild after the destruction and denial of apartheid that followed a century of colonial dispossession.

DEVELOPMENT, PROPERTY AND ALTERNATIVE FORMS OF TENURE

Even access to land may, however, not be enough. Reporting on their study of livelihood generation and class in KwaZulu-Natal, Michael Carter and Julian May conclude that among other limitations, such as the limited return to uneducated labor and the burden of fetching water and fuel wood, are "financial constraints that limit the poor's ability to effectively utilize productive assets and endowments (e.g. land) which they do have" (Carter and May, 1999: 16). They go on to suggest that an effective policy strategy would be to seek ways to lift the "constraints that limit the effectiveness with which the rural poor are able to use the limited assets and endowments they possess," including the promotion of local micro-lending financial institutions and the delivery of essential services, especially water and energy (1999: 16). The implications for land reform are clear: in addition to providing access to the basic resource, land, there is a necessity to promote at least a minimal degree of rural development to enable poor families and communities to productively employ any new assets they gain access to.

Rural development remains one of South Africa's greatest challenges and the danger that large sections of society "may be stuck in a structural trap of chronic poverty" (Carter and May, 2001: 2002) is more then mere pessimism. It is in this context that the debate over land and tenure reform. including the debate between communal and private ownership, remains central to discussions over the means, mechanisms and institutions necessary to promote rural development. While the relationship between South Africa's impoverished "black" rural areas and the highly developed "white" urban metropoles has long been analyzed in terms of the role the rural areas played as labor pools and in subsidizing the reproduction of the labor force, the role of communal land ownership and the structure of governance—whether traditional authority or democratic local government—in these areas have now come to the fore as central issues in addressing the future.

Although the source of Africa's underdevelopment remains contested, recent attempts to promote development have focused on the question of private property rights. Not only have international economic institutions, such as the IMF and the World Bank, emphasized the privatization of stateheld assets, but they also have increasingly shifted the focus to the future of land tenure, whether through the securing of existing property rights or the division and privatization of the African commons—"in order to promote capital investment and foster higher productivity" (Krueckeberg, 1999:105). Yet at the same time studies of titling and registration schemes have indicated that while "[t]itling by the state is important to prospective investors" who have no legitimate claim to land under indigenous systems, "survey and titling are commonly a means by which elites and dominant ethnic groups strip pastoralists and other unintensive or seasonal users of resources they nonetheless need" (Bruce et al., 1994: 260).

In response, critics of privatization have often turned to the idea of communal tenure as the historic legacy of pre-colonial Africa and as an available alternative to private property. However, it is no longer possible to merely rely on customary or traditional rules of tenure, on the assumption that "preindustrial societies owe their cohesiveness to freely-accepted and equally-shared values"; such romanticism "fails to appreciate that solidarity can be the result of compulsion" (Hopkins, 1973: 27). Furthermore, the notion that the simple recognition of indigenous forms of tenure will reflect the demands and needs of rural communities fails to acknowledge the impact of colonialism on the very construction of customary law. This in turn raises the question of the role of "traditional authorities" in postcolonial societies, particularly in light of the simultaneous recognition in many postcolonial constitutions of traditional authorities, indigenous law and various universal principles of equality and democratic participation.

In South Africa, the constitutional recognition of indigenous law in the post-apartheid constitutions forces a confrontation between these different conceptions, particularly in the context of "indigenous" land tenure. In order to meet the demand among rural dwellers for collective forms of land ownership, the government is confronted with the difficulty of disentangling indigenous land rights from a colonial legacy of indirect rule, under which political sovereignty and land ownership were intertwined (Klug, 1995; Mamdani, 1996). The result of this colonial meshing of sovereignty and land rights was the entrapment of the property rights of individuals, family groups and communities living under communal land tenure systems in an administrative model of customary law (Chanock, 1991: 76). Indirect rule cast the allocation of plots of land within a community as an "official administrative

act" of the traditional leadership (Bennett, 1995: 133). This imposed a system of patronage and political dependency, simultaneously undermining community governance and reshaping the role of traditional authorities in the political process. After colonial authorities constructed a vision of African land tenure under "customary law" in which the most important rights—allocation, alienation, and reversion—were vested exclusively in the political authority embodied by the chief, it was a short step to the assertion that the loss of sovereign powers to the colonial authority made African land rights subject to administrative authority.

The collapse of property rights into the realm of chiefly authority had equally debilitating consequences for the political rights of Africans. Founded in the practices of "indirect rule," first advocated by Theophilus Shepstone and modified by Lord Lugard, the "preservation" of "native lands and traditional authorities" became the justification for the exclusion of Africans from broader political participation (Ashforth, 1990: 35–37). It is these political consequences that led Martin Chanock to conclude that we need to think both about land rights "as central to the nature of the modern African polity" and the role of, and rule of, law in African states. As a result, these important rights, economic and ultimately political in character, remain insecure for so long as they are subordinate to an administrative regime that offers landholders no rights against the state (Chanock, 1991: 82).

This historical outcome raises serious questions about the recognition of indigenous land law in the post-apartheid context. In order to uphold the spirit of the new constitution and to simultaneously revitalize indigenous law, the new state must ensure that those communities and individuals who wish to continue to hold land within the framework of an indigenous land ethic are able to determine the contours of this form of tenure without administrative interference based on colonially constructed notions of the content of indigenous tenure. Communities may then be able to reinfuse indigenous tenure with community norms and practices, rather than remaining dependent on administrative fiat. This process holds the potential of freeing "customary" legal concepts and rules from their colonial moorings and bringing formal legal notions of indigenous tenure into line with more recent understandings in the social sciences. Of particular importance is recent work in history and legal anthropology (Maddock, 1996) emphasizing the extent to which the legal framing of "customary tenure" is shaped by its construction in a context dominated by particular, culturally specific, les it notions of property and ownership and the way colonial imperatives shaped the particular content given to customary tenure (Berry, 1993; Mann and Roberts, 1991).

TENURE REFORM AND THE CREATION OF A CONTESTED INSTITUTIONAL SPACE

When the Communal Property Association Act was introduced in South Africa it was heralded as the "most progressive piece of legislation yet tabled by the government," as it "sends a clear message to non-governmental organizations, local authorities, parastatals and society in general about what the government understands by the concept of democratic control" (Streek, 1996). Although the CPA Act was adopted to address a range of difficulties associated with land restitution and redistribution,3 its adoption of constitution-making as a means of resolving these problems reflects the power of the constitutionalist paradigm in the new South Africa. The statute requires the beneficiaries of either group, land claims or government land reform programs, to choose a "constitutional structure" through which they must both constitute themselves as a community and collectively hold and control their primary resource-land. Among the immediate difficulties raised by the different programs for the return and redistribution of land was the question of how the beneficiaries of these programs were to be identified and how they would legally hold the land they received. While a call for the nationalization of land had been made and discredited early in the democratic transition, there was an initial push by the old regime during the transition—reflected in the passage of the Upgrading of Land Tenure Rights Act4—to emphasize individual freehold title as the preferred option (Cross and Haines, 1988). However, recognition that rural claimants continued to seek some form of communal control or ownership threw the spotlight back onto "traditional" or "customary" forms of tenure, which remain, in some form, both the practice and aspiration of many African communities (Small and Winkler, 1992; Cross, 1992). The difficulties are, however, enormous. To adopt "customary" forms of tenure raises questions about the nature and sources of "customary law," including the role of chiefs and the status of women and commoners in those communities (Holomisa, 2000). While the exact nature of "traditional" or "indigenous" tenure is thrown into doubt by both the romanticization of some and questions over its manipulation during the colonial period, the possibility of providing a procedural mechanism for the creation of community-designed forms of tenure seemed on its face to satisfy both the admirers of custom and those who are committed to democratic participation.

While those who fought for the recognition of property rights in the South African Constitution may have conceived of such rights in universal terms as primarily rights to protect individuals from a predatory state, the final property clause explicitly refers to communities having rights in land, thus recognizing communal property rights as a constitutionally legitimate form of property.5 When read in light of the Constitution's recognition of customary law and traditional leaders,6 the prospect of communal landholding and its link to forms of "traditional" governance creates a particular context within which conflicts over the definition of community and local governance are immediately brought into question. As discussions on the powers of the chief over land indicate, there is a wide range of opinion as to the types, extent, and nature of the chief's power over the land under customary law; however, the relationship between governance and land is clearly established (Kerr, 1990: 29-43). Simultaneously, the Constitution's promise of restitution, including the return of land to dispossessed communities,7 raised the immediate problem of recognition—who is to receive control over such lands and who is to be empowered to make decisions about the future use and development of these lands? Given a context in which many rural households are in practice female-headed, this proves an extremely delicate question.

While the anti-apartheid struggle was premised on claims for democracy and equality-particularly racial equality-the relative success of the claim for gender equality was by no means preordained. Although many anticolonial movements espoused the equal role of women during their struggles, in many cases the post-colonial state either failed to pursue this promise or actively reasserted more particularistic notions of gender relations in the postindependence period. It was this concern that brought South African women from across the political spectrum together in the multiparty Women's National Coalition. While this body provided a basis for the assertion and relative success of gender claims in the making of the interim 1993 Constitution, the ANC's Women's League, in staging a sit-in at the negotiating forum, won the requirement that each delegation at the negotiations have a woman as one of its two negotiating council representatives. As a consequence, South Africa is the first case where a constitution-making body was formally constituted by an equal number of men and women.8 At the same time, the Women's League continued to press for greater participation within the ANC, winning a recommendation from the ANC's national working committee that one-third of all ANC candidates in the April 1994 elections be women (Saturday Star, 16 Oct. 1993: 6).

These gains were not unilinear. Despite such breakthroughs in an otherwise deeply sexist society, and despite the popular incantation of the democratic movement's vision of a "non-racial and non-sexist" South Africa, women active in the negotiations process had to fend off a direct challenge resulting from the claims of traditional leaders and their demands for the recognition of indigenous law. Traditional leaders represented within the constitution-making process initially sought to shield customary law from the equality provisions of the constitution.9 Following the Zimbabwean model, they proposed a constitutionalization of the existing dual legal system so that customary law and general South African law would be parallel legal

systems, neither empowered to interfere with the other (Currie, 1998: 36). These claims for the recognition of indigenous culture led to an attempt to include provisions in the interim bill of rights recognizing "customary law" and regulating the contradictions between indigenous law and other "fundamental rights." Although it was rejected, one proposed draft of the interim bill of rights granted "any court applying a system of customary law" the power to determine the extent to which customary law undermines the equality provision and to decide when and to what extent these rules—even where they discriminated against women—should be brought into conformity with the constitutional requirement of equality.10 However, in the end, and as a product of the steadfastness of numerous women in the ANC in particular, the interim Constitution came down in favor of gender equality, making indigenous law "subject to regulation by law," implying its subordination to the fundamental rights contained in the constitution, and gender equality in particular.11

Gender equality was, as a consequence, formally recognized in the interim bill of rights, and the interim constitution included specific provisions for the establishment of a Commission on Gender Equality "to advise and to make recommendations to Parliament or any other legislature with regard to any laws or proposed legislation which affects gender equality and the status of women."12 In addition, as part of the de Klerk government's general attempt to pre-empt negotiations, South Africa ratified the International Convention on the Elimination of All Forms of Discrimination against Women in January 1993, binding the South African state to particular international obligations in this area. The successful inclusion of the principle of gender equality into the interim 1993 and subsequent "final" 1996 Constitutions was thus the product of the interaction of local women's mobilization against gender discrimination and the increased recognition of gender equality as an internationally accepted norm of human rights and constitutionalism.

Thus, while the Constitution provides on the one hand for the recognition of traditional leaders and their role in the context of customary law, on the other hand it also makes both the role of traditional leadership and customary law subject to the Constitution.¹³ Hence, despite the historic recognition of the equal status of indigenous law and the inherited colonial common law, this was only achieved through their mutual subjugation to the universal values of the Constitution. The legal victory of equality over "tradition" must however be understood in the context of a continuing political process in which the status of traditional leaders remains fluid. So, for example, when a helicopter landed at the installation ceremony of Chief Patikile Holomisa in April 1999, and disgorged Constitutional Affairs Minister Valli Moosa, Safety and Security Minister Sidney Mafumadi and President Mandela, what was claimed to be merely the installation ceremony

of a local chief was transformed into a moment of major constitutional and political significance—indicating a new level of recognition for traditional leadership. This then is the context in which the Community Property Associations (CPA) Act, and in particular its requirement of gender equality, was conceived and is being implemented. On the one hand, there has been increasing recognition of the political significance of traditional authorities and indigenous law. On the other hand, there has been the formal triumph of universalism.

THE COMMUNITY PROPERTY ASSOCIATIONS (CPA) ACT

The constitutional recognition of property rights, customary law and traditional authority, as well as communal property and gender equality, defined the terrain within which Mandela's government pursued its land restitution and redistribution goals.¹⁴ The political and symbolic importance of these goals is reflected in the fact that the first piece of legislation passed by the new democratic Parliament was the Restitution of Land Rights Act. 15 Having provided for the recognition of land claims and a process for the ultimate return of land, the government now faced the problem of defining the means and institutions through which the communities who would inherit the earth would be constituted.

While it is essential to recognize that colonial dispossession and apartheid held dramatic consequences for rural communities and "traditional" forms of land tenure, it is also important to acknowledge the impact of resistance and engagement by these communities in response to colonial imposition. Many of these communities responded actively to the emergence of colonial markets, and, until their exclusion, competed favorably against white farmers in the market place (Bundy, 1979). Many other communities and individual family groups hung onto the land throughout the colonial and apartheid eras, often resisting eviction or adopting strategies of outward compliance with changing tenure arrangements so as to remain on the land (van Onselen, 1995). It is this tenacity, reflected most clearly in the struggles of communities who resisted forced removals (Platzky and Walker, 1985) or labor tenants who clung to the land (TRAC, 1988), that must give pause to the notion that people do not value or want access to land. Furthermore, it now has been clearly demonstrated that access to land and natural resources remains of important economic value to rural livelihoods (May 2000), even in those former "homelands" where land degradation and overcrowding have vastly reduced agricultural capacity (Shackleton, Shackleton, and Cousins, 2000). The dilemma then is to imagine an institutional arrangement that holds both the potential of providing a more secure form of tenure to rural people and provides a means by which rural communities may protect their resources from being stripped by political elites or other

external interests and yet remains dynamic enough to allow for the democratic resolution of important and often conflictual intra-community tensions.

Furthermore, for many communities, which had been physically broken and dispersed in the process of forced removal, this act of constitution would be premised on the very definition of who was to be included as beneficiaries of the restitution. Other communities, which still maintained a toehold on the land, would be left to define the ways in which their resource would be used and its benefits distributed among acknowledged members. As a consequence, the government, in recognizing that land was to be transferred to groups of people, ill-defined, conflicted or merely possessing very poor resources, was forced to design at least a process through which these communities could be constituted. This then provided the impetus for the form the CPA Act took.

The central feature of the CPA Act is the requirement that the beneficiaries of restitution or land reform adopt a constitution, defining themselves and the means by which they intend to govern their "new" resource. At the same time, the Act imposes a set of universal requirements through the inclusion of both constitutional principles and a general outline of the issues that must be addressed in a constitution before it will be fit for registration. The statute requires both a specific procedural process—including drafting, adoption, and registration processes—and substantive provisions for future governmental monitoring, regulation, enforcement and even conflictresolution assistance. The set of constitutional principles included in the Act provide specific guidance for the formulation and adoption of five "universal" principles: (a) fair and inclusive decision-making processes; (b) equality of membership; (c) democratic processes; (d) fair access to the associations property; and (e) accountability and transparency. Furthermore, the law provides that in order to qualify for registration the constitution must address a list of matters included in a schedule to the Act, including most significantly provisions for defining: (1) membership in the community; (2) the property rights of members; (3) how members will be represented in the community's decision-making process; (4) methods for exiting the community, including the disposition of property rights in cases of expulsion, departure or death; and (5) how the constitution may be changed and/or the association dissolved and its assets distributed. Finally, the constitution must include both mechanisms for dispute resolution and for defining and applying disciplinary measures against members of the community. It is these final requirements in particular that bridge the divide between what may be understood in some circumstances as merely a contractual agreement for the management of joint property—such as a trust or sectional title (or condominium) agreement—and a constitutional system of governance, in which powers are created, defined and limited.

It is this distinction, between a legal mechanism for the co-management of jointly held property on the one hand, and the creation of a system of collective governance over a community's primary productive resource on the other hand, that suggests the emancipatory potential inherent within the Community Property Association form as well as the source of resistance to this form, which has come from traditional authorities in particular.

GOVERNING THE COMMUNITY COMMONS: CPA CONSTITUTIONS AND CONTROL OVER THE LAND¹⁶

While the CPA Act assumes that communities will produce their own constitutions through a process of intense democratic participation, marked by the empowerment of individuals and groups previously marginalized by a combination of "tradition" and apartheid rule, the practice has been more ambiguous. This ambiguity is evident in the constitutions of 100 of the approximately 150 CPAs registered in the first three years. Of these 100 constitutions, sixty are nearly identical versions of two particular models. While forty of these sixty are close replicas of what may be defined as the "Gugulethu model," the remaining twenty are nearly identical versions of a model that seems to have been developed and applied in one particular region, the Free State province. The remaining forty of the first 100 registered CPAs include examples ranging from some that clearly evince specific popular input-particularly in the demarcation of disciplinary offences-to others that have clearly been the product of highly intensive education and training programs conducted by teams from NGOs and legal organizations.

Despite these variations, concern over control and the future stability of these new communities of landholders is widely reflected in the provisions adopted by communities for communal governance. Although the Act and the "model" constitution promoted by various NGOs involved in facilitating community constitution-making emphasize democratic procedures, in both the variations on the model and in more particular examples, the emphasis is on controlling the composition and powers of the governing body. One of the more explicit methods adopted by the dominant model is to determine the number of representatives that may be elected to the governing committee from different possible interest groups or power blocs within the community. The prevailing Gugulethu "model" specifies that 75 percent of the committee shall be members of the association; that representatives of traditional leaders shall not exceed 40 percent of the committee; that at least 50 percent of the committee shall be permanently resident in the community; and that at least 40 percent of the committee members shall be female. ¹⁷ This explicit carving up of influence on the committee reflects a keen awareness of particular trends. First, there is clear concern that the influence of non-members and non-residents who, in the case of widows

under customary law may include distant male relatives, be kept in check. Second, the residence requirement will also limit the influence of migrant members of the community who may "normally" live in an urban area but retain significant contact and influence in the rural community. Most significant, however, is the attempt to limit the influence of traditional leadership—in one case stating that 60 percent of serving members may not be members of the chief's family (#4)18—as well as the attempt to improve women's participation in decision-making by requiring that 40 percent of the committee be female (#92). Of equal interest is the fact that, in many of the cases where the model form has been adopted, the only modification to the model has been in the construction of the governing committee. Here the question of gender representation is quite clearly at issue.

The most striking thing about these particular modifications to the standard model is that they occur in cases where the only modification to the standard form is on the issue of the composition of the governing committee and in each case the most significant modification is in relation to the standard form's guarantee of a particular percentage of women on the committee. While in some cases the percentage merely gets reduced—although in one example the drop to 20 percent was accompanied by a simultaneous increase in the restrictive percentage requiring 90 percent of the committee to be land claimants (#21)—in most of these cases the percentage specification gets dropped completely. Instead, there is either a general statement that the association "shall have a committee which shall be gender balanced" (#71, #6, #22, #12, #18, #3, #92), or that, even less specifically, "all future appointments of Committee members shall be done with due consideration of the principles of representation as stated in the Act" (#15, #16, #10, #95). What becomes clear in these cases is that the participants in the constitution-making process have been prepared to accept the general framework of the model constitutions, but have clearly understood the import of the clauses defining specific percentages for the purpose of representation on the governing committee. Here they have acted to modify the standard model so as to control outside influence—through increasing the percentages of the committee that must be members of the association—while simultaneously reducing or even completely cutting out the guaranteed representation of particular percentages of women on the committee. Thus, despite there being little evidence that these communities actively participated in constituting or defining themselves in very specific ways during the constitution-drafting process, there is clear indication that where the model form challenged existing gender relations, this challenge was noticed and explicitly diluted. What is significant, however, is the fact that by accepting the CPA form and its requirements of formal equality between members, these same communities may have introduced into their very structures of governance the seeds of future challenges around questions of participation and gender representation.

Although the legislatively defined structure of the CPA and its implementation has involved an attempt to mediate between the existing power structures-including traditional authorities-and demands for more "universal" forms of democratic representation, including the equal participation of women, this clearly remains an area of difficult negotiation. Despite the confidence of some officials in the Department of Land Affairs that traditional leaders, for example, are being accommodated through the inclusion of clauses "recognizing" their role in the community-accompanied by the declaration that of course Chiefs did not historically "own" the land as some have claimed—there is evidence that it will be much more difficult to deflect the influence of traditional authorities within many communities. Some constitutions now include, in their preambles, an acknowledgement of the existence and role of traditional leaders within the community. Even though they recognize the role of traditional authority, they continue to define themselves and the functioning of their governing committees in the democratic form prescribed by the Act.

Expressing community concerns about the introduction of these new legal entities, James Ngcobo, a community representative from KwaZulu-Natal argued that the

land trusts that we are required to establish in order to access land have the effect of institutional chaos in communities. Most communities fail to identify the position and tasks of these structures in relation to existing structures. Amakhosi [traditional leaders] are challenging the establishment of these legal entities established to govern land issues in tribal areas and argue that the function of land ownership and administration is theirs. Tribal councils in tribal areas are suspicions about their future if these structures succeed in taking over their functions and roles, which earned them a degree of respect from their subordinates. (Ngcobo, 1997: 8)

Even where the constitutions specifically limit the presence of representatives of traditional leadership on the governing committee, there are concerns that their influence will overshadow all others. Again, James Ngcobo notes that the

ex-officio status of the Amakhosi in the land trusts is vague, because once they are in the land trusts they will be part of decision-making and their word is final. Does the Inkosi [chief] have the right to influence the decisions of the land trust? If so, then his status is not ex-officio, and the land trust is not independent. If not, then what are his powers? Even if the Inkosi understands and accepts his ex-officio status, does he have the right to approve the decision of the land trust before it is implemented? What if he says, "No you can't do that?" Does the land trust have to take him

to court? Agree with me—the role of Amakhosi is still unclear. (Ngcobo, 1997: 9)

Another government official commenting on the question of the role of the Amakhosi in relation to land reform in general argues that

[w]e have learned in the implementation process that it would be completely foolhardy to sidestep the Amakhosi. Confront them, appease them, abdicate them, walk the tightrope with them-yes-but you cannot ignore them. Whether we euphemistically refer to members of tribes, or communal associations, or whatever, our reality is that the implementation of land reform impacts very centrally on the institution of Ubukhosi, and that they are impacting on the implementation of our programme in a very central way. In KwaZulu-Natal, the vast majority of land reform initiatives are underpinned by Amakhosi or Izinduna [headmen]. (Clacey, 1997: 6)

In a growing number of cases, including in the case of the Gugulethu community whose draft constitution came to serve as the model CPA constitution, conflicts between traditional authorities and those committed to the formation of a CPA have often led to an impasse in which the attempt to establish a CPA fails. In the case of the Tshezi communal area documented by Lungisile Ntsebeza, the attempt to establish a CPA was eventually abandoned in the face of resistance from the local chiefs "under the influence of key traditional authorities in Contralesa [the Congress of Traditional Leaders of South Africa] and the Eastern Cape House of Traditional Leaders," despite the fact that it would delay and possibly frustrate a desperately needed development project initiated by the Department of Trade and Industry to boost local tourism (2000: 299).

In fact, resistance from traditional authorities in various parts of the country has effectively hampered the spread of CPAs. In KwaZulu-Natal, where numerous land trusts established as a means to protect community property in the period before 1994 have been recognized as similar entities under the CPA Act, conflict over the nature of decision-making and authority within these communities remains high. As a result very few new CPAs have been formed in KwaZulu-Natal. Research undertaken by the Legal Entity Assessment Program (LEAP) in the Muden district of KwaZulu-Natal demonstrates some of the difficulties of governance faced by communities in a situation similar to the CPA communities. The three communities reported on—the Emsi Lonsdale Community, the Vukile/Impala Community and the Ntabenzima Trust (Whitecliff farm)-all face a common set of problems that are probably fairly typical.¹⁹ Although there was fairly coherent community organization in the struggle to obtain access to land, in the form of the Muden Land Committee, the separate community trusts established since land was secured have had very uneven experiences and to a large extent have lacked the capacity to produce either effective governance or the development initiatives expected by the beneficiaries. While in the case of Vukile the spirit of the communal agreement seems to be alive, there remains a high degree of confusion about the exact terms of the trusts or the contents of the trusts or constitutions adopted by the communities. Some of these difficulties relate to the problem of language—the trusts or constitutions have not been translated into Zulu-but there are also indications that despite trust or constitutional provisions that assign authority to the elected committee, many of these issues are instead taken to the traditional authorities, who remain the effective power in the area. Although the local development NGO-the Zibambeleni Community Development Organization—is a source of organizational capacity, communication between Zibambeleni and the governing committees established by the trusts is very weak. Instead, Zibambeleni works very closely with the Tribal Authorities and deals directly with the communities rather than through their formal governing structures. This weakness in community governance is reflected in the evaluations that conclude that there needs to be a restructuring of the trusts and clarity established about the role of the Muden Land Committee. In fact, it is Zibambeleni that is represented on the regional council rather than representatives of these communities, while local power has remained securely in the hands of the traditional authorities who in this area seem to retain a high level of legitimacy.

In some areas difficulties over governance have been exacerbated by the conflict over local government, particularly the right of traditional authorities to participate ex-officio in local government bodies20 and the definition of local government boundaries. Traditional authorities have, in particular, opposed any attempt to define boundaries that do not coincide with their own jurisdictions. Significantly, even though some argue that the CPAs have no business taking over the functions or role of local government and that the governing committees are merely there to administer jointly held land, active CPA governing committees will naturally become involved in development planning and service provision. This function is, however, limited by the CPA Act (section 12), which requires a majority vote among members before the committee may exercise any significant power over the association's central resource—land. Before the committee may sell, encumber, or in any way affect the land rights of the community, the committee must obtain permission from the community through a special or general meeting—some communities even go beyond the legislative requirement by specifying that a special meeting needs a quorum of 65 percent of members, or must achieve a heightened majority before any decisions of this sort may be made.

Now, after a number of years of experience in which a multitude of problems have been identified, many are suggesting that the CPA law requires

further amendment so as to empower the state to more directly administer what have at times proved hollow institutions (Pienaar, 2000: 323). These suggestions, however, fail to recognize that the potential of the CPAs lies less in their immediate ability to drive local rural development and more in the space they create for continued participation in social and political conflicts that surround the attempt to create viable common property regimes—a process that must be recognized as being time-consuming, messy and contested in character (Cousins, 1995). In this regard it is important to acknowledge that a range of legal remedies are available "in the constitutions of entities, the CPA Act, the provisions of the common law and statutory law which regulates the conduct of trustees and voluntary associations, in addition to ordinary contractual and delictual civil remedies and criminal law sanctions" (Pienaar, 2000: 323). While problems of access to legal resources may be part of the explanation, the failure to resort to these multiple legal remedies suggests that the difficulties faced by these new legal entities goes beyond questions of legal technology. Rather, it is the confrontation elicited by the very emancipatory potential of this form that has generated the degree of tension that has accompanied their implementation.

Despite numerous attempts to placate traditional authorities, through recognition in preambles or inclusion in the governing committees, the chiefs have remained extremely wary of the CPA Act. This opposition has come to the fore in a number of encounters between chiefs and the Department of Land Affairs. For example, in a meeting on 24 March 1998 between chiefs and Dr. Sipho Sibanda of the Directorate of Tenure reform of the Department of Land Affairs, the chiefs argued that they "see the CPA as undermining their powers and as an instrument meant to divide the tribe. They wanted to know why land should be transferred through the CPA" (Nzuza, 1998: 16). In response Sibanda told the chiefs that there were three criteria regarded by the government as "fundamental and non-negotiable for the acknowledgement of a traditional authority: (1) equality in terms of gender and women's constitutional rights; (2) democracy; and (3) due process" (Nzuza, 1998: 16).

Tension over these criteria became even more intense after the government distributed a draft Land Rights Bill²¹ in early 1999. The Bill, designed to provide security of tenure in communal areas—the former "homelands," where "tribal" land officially "owned" by the state remained under the control of traditional authorities—included the same set of criteria.²² Justified as an attempt to address the degeneration of land administration in these areas as well as a fulfillment of the constitutional imperative to promote tenure security, the Bill proposed a system of decentralized management of land rights which would be held by people who could establish occupation, use or access rights to land and who henceforth could not be dispossessed of such rights without their consent, or, failing that, by receiving compensation.

Furthermore, the Bill proposed the creation of a system of land rights management which would include: (1) "land rights holders structures"; (2) land rights boards-staffed by traditional leaders, municipal councilors and respected community leaders—at the district council level; and (3) a land rights officer, an employee of the Department of Land Affairs at the magisterial district level who would represent the Minister of Land Affairs, who would remain the nominal owner (Sibanda, 2000: 308). The land rights boards would, according to the Bill, "act as a watchdog, review matters affecting the protected status of local rights holders and, where necessary, refer decisions for consideration to the land rights officer," while the land rights officers would be empowered to "investigate infringements of the law, serve notices, prepare cases and institute proceedings in the magistrate's court to obtain redress for rights holders" (Sibanda, 2000: 308).

Despite Sipho Sibanda's argument that the bill posed no threat to traditional leaders, as the rights holders were empowered, if they so wished, to choose traditional authorities to manage their rights on a day-to-day basis, in fact the bill aimed to change fundamentally the de facto relationship between traditional leaders and their subjects in regard to control over land. While traditional leaders are concerned about retaining their powers to allocate land, to adjudicate over land conflicts and to have a say in the management of the community's land resources more generally, the bill empowers rights holders to choose what form of authority they wish to accept in overseeing land management, and implies that, in the case of conflict, the holders of land rights would have their rights adjudicated by the local magistrate after intervention by the land rights officer, who would be the government's representative at the local level. Thus, although the government claimed that there was nothing for traditional leaders to fear in the proposed bill, the reaction of the traditional leaders was vociferous. Within a matter of months the government publicly withdrew the draft bill and the newly appointed minister of land affairs began to talk of the role of tribes and hence traditional authorities in land management, going so far as to suggest that the land could be transferred from the state to "tribes, communities or persons who are other long-term occupiers of state land" (Merten, 2000).

While the withdrawal of the Land Rights Bill seems to have been a victory for those traditional authorities who feared their loss of jurisdiction over land matters, the debate is by no means over. Although the new minister seemed concerned about placating traditional authorities, the continuing crisis over rural land management and its impact on rural development, particularly as a consequence of the lack of secure tenure, has brought these issues back onto the government's agenda (Mayende, 2001). Although some critics feared that the government was about to abandon policies that seemed to be concerned about empowering the rural poor, turning instead to a reliance on market forces, such a dramatic change does not seem to have materialized.

Instead, the Department of Land Affairs is once again exploring how to address the issue of tenure security in the communal areas and thinking about how best to engage traditional authorities in a debate that will facilitate the achievement of these goals.

PROMISES AND DANGERS

Despite the promising outcomes of the early engagement between the landless and property owners on the one hand, and between claims for equality and assertions of traditional authority on the other, the future of rural communities—especially their internal social relations and access to the resources needed to overcome a history of structural poverty—remains in question. Although some communities have gained access to land and the institutional opportunities exist to establish new forms of communal governance, the need to build local capacity and the weight of existing sources of power remain major obstacles. Although traditional authorities that retain legitimacy among rural communities may in fact have a positive role to play in local governance, their further empowerment, through suggestions that land could be placed in the hands of tribes rather than in those of separate legal entities as well as the withdrawal of the Land Rights Bill, raises important questions about the security of tenure, women's rights, and the future of democratic participation in rural communities. In this context the existence of the CPAs, while still small in number and under threat of being revised from above or engulfed by the opposition of traditional authorities, provides an institutional space within which struggles may be waged and, in time, strategies pursued to further the emancipatory goals for which so many South Africans fought. Alternatively, if these fledgling institutions are abandoned the law may prove to be no more than an elaborate façade covering a postcolonial version of the reserve: creating geographic locations from which many of the most marginalized of South Africa's citizens will continue to wage multi-strategy campaigns of survival—a few livestock, a small patch of corn, a space to gather limited natural resources, a shelter and a place from which to venture out to confront the inequities of life on the urban fringe.

Notes

- 1 See ZA NOW, Weekly Mail and Guardian, 7 September 2000, reporting on a Statistics SA report entitled "Measuring Poverty in South Africa," which states that "being black, being a woman and living in a rural area is a clear indicator of poverty."
- 2 I take this notion from the argument that "[r]eality, however conceived it may be, is considered by critical theory as a field of possibilities, the task

- of critical theory being precisely to define and assess the level of variation that exists beyond what is empirically given" (Santos, 1999: 29).
- 3 It has been argued that in South Africa communal land holding systems, prior to the CPA Act "provide[d] little or no protection for the individual members of the community" and that the person—government minister or chief-holding legal rights in the land had "wide powers to deal with the land as they pleased without consulting the community living on the land." Furthermore, in "most cases communities arranged the rights to the land it held on an informal basis without any legal protection" (Gilfillan, n.d.: 1). On the experience of community trusts and some of the difficulties associated with the power of trustees, see Walker (1997).
- 4 Act 112 of 1991.
- 5 See 1996 Constitution, sections 25(6) and 25(7).
- 6 1996 Constitution, sections 211(1) and 212(1).
- 7 1996 Constitution, sections 25(7) and 25(6).
- 8 Unfortunately this was not the case in the elected Constitutional Assembly.
- 9 See Technical Committee on Constitutional Issues, First Supplementary Report, 15 June 1993: 3-6.
- 10 See Section 32(2) of the proposed chapter on fundamental rights, Technical Committee on Fundamental Rights During the Transition, Tenth Progress Report, 1 October 1993.
- 11 See S. Afr. Const. 1993, section 181.
- 12 S. Afr. Const. 1993, section 119(3).
- 13 1996 Constitution, section 211(3).
- 14 By the end of 1998 the three legs of land reform—restitution, land tenure reform and land redistribution—had begun to deliver land. While 54,218 claims had been lodged with the Land Claims Commission before the December 31, 1998 cut-off date, only 26 claims had been finalized, enabling 11,359 beneficiary households to take transfer of 167,534 ha of land. On the land redistribution side, 16,252 households gained access to 219,214 ha in 185 projects during 1998. See DLA, 1999: 89-90.
- 15 Act 22 of 1994.
- 16 This section is based in part on a review and analysis of the first 100 CPA constitutions registered with the Department of Land Affairs. My sincere thanks go to the DLA for providing copies of these constitutions for my research.
- 17 See Communal Property Association Constitution: Draft, A Guide to Establishing Legal Entities (Esme Joaquim, 3 April 1998).
- 18 See the list of Registered CPAs with date of registration in Appendix One at the end of this chapter.

- 19 See Legal Entity Assessment Program (LEAP), Report on the Emsi Lonsdale Community (1999); Report on the Vukile/Impala Community (1999); and Report on the Ntabenzima Trust (1999).
- 20 See African National Congress v. Minister of Local Government and Housing, KwaZulu-Natal 1998 (3) SA 1 (CC).
- 21 See Land Rights Bill, 3 June 1999 (draft).
- 22 Section 2(f).

Appendix One Registered CPAs, with date of registration (cited in text by number).

- 3) The Monyamane Communal Property Association, Apr. 29, 1997.
- 4) The Skeifontein Communal Property Association, June 3, 1997.
- 6) The Lwalanemeetse Communal Property Association, July 21, 1997.
- 10) The Katjebane Communal Property Association, Aug. 27, 1997.
- 12) The Sizanani Farmers Communal Property Association, Sept. 26, 1997.
- 15) The Bethania Communal Property Association, Dec. 23, 1997.
- 16) The Mtintloni Communal Property Association, Dec. 23, 1997.
- 18) The Mahlambandlovu Communal Property Association, Feb. 10, 1998.
- 21) The Diratsagae Communal Property Association, Mar. 4, 1998.
- 22) The Baroka Communal Property Association, Mar. 12, 1998.
- 71) The Selowe Communal Property Association, July 7, 1998.
- 92) The Bedrog Communal Property Association, Oct. 15, 1998.
- 94) The Thusanang Communal Property Association, Nov. 4,1998.
- 95) The Masikule Community Property Association, Nov. 4, 1998.
- 98) The Rietkuil Agri-Village Communal Property Association, Jan. 6, 1999.

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