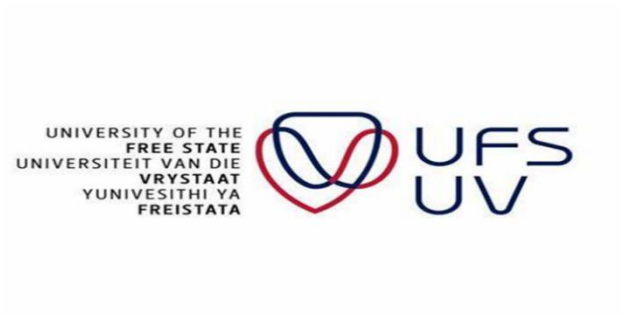

A CRITICAL ANALYSIS OF THE LAW RELATING TO COMMUNAL LAND RIGHTS WITH SPECIFIC REFERENCE TO PERMISSIONS TO OCCUPY

By

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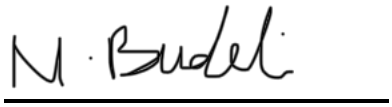
DECLARATION

I, Mukonazwothe Budeli, declare that the Master's research mini-dissertation that I herewith submit at the University of the Free State is my independent work and that I have not previously submitted it for qualification at another institution of higher education.



Signature

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CHAPTER ONE: INTRODUCTION

1.1 INTRODUCTION

Land means so many things and is valued differently by different people. It is the basis of so many livelihoods: families' territories, ethnic groups, clans, or nation-states; an investment that people may sell and buy; and a place where people have deep connections, a sense of security and meaning. It is only unfortunate that there have been so many disputes, warfare and contestations that follow the land.[1] *The Constitution of the Republic of South Africa* has guaranteed equal rights to access land for all citizens. Section 25(5) of the *Constitution* provides that the government must take reasonable legislative and other measures within its available resources, to foster conditions that enable citizens to have access to land equally.[2] Different forms of tenure have been recognised in South Africa for many years. More attention has been paid to statutory land tenure than communal land tenure. Under statutory tenure, ownership rights to land and property are protected and can be registered in the Deeds Office. This is unlike the rights to occupy that people have in communal tenure.[3]

Being unable to register one's rights to property can lead to a number of problems, such as arbitrary deprivation and expropriation of land or rights to land, which the Constitution prohibits.[4] People who are given permission to occupy and do not have their rights registered at the Deeds Office can experience legal uncertainty regarding their land rights. This can, however, be avoided if people are awarded more secure rights to the land they occupy. The legislator should have attended to this problem due to the provisions of section 25(6) of the *Constitution,* which determines that:

A person or community whose tenure of land is legally insecure because of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. The

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1 Brent *et al.* 2016: 8.

2 The *Constitution of the Republic of South Africa*, 1996. I am stating this provision to say that there must be conditions that encourage the development of laws that will enable everyone in South Africa to have access to land.

3 Beinart *et al*. 2017: 14.

4 *Constitution*:sec 25. With what I have seen happening to people who have a permission to occupy land, they are usually deprived access to their property only because they have no ownership rights over the land they occupy. People end up letting go of the land as a result.

security of tenure rights, such as permissions to occupy land that the government should upgrade, would fall under the security of tenure category of the land reform process. However, the land use and land reform processes since the promulgation of the *Constitution* have been very slow.[5] Similarly, the plight of holders of permission to occupy has not received a lot of attention.

1.2 RESEARCH PROBLEM

Land can be owned effectively and privately in South Africa through statutory tenure which is secure. It is also important for people to register such land because all information about the land should be recorded in the Deeds Office.[6] Permission to occupy (PTO), on the other hand, is a personal right that allows a right holder to use or be an occupant of rural land. However, as only real rights may be registered in terms of section 63(1) of the *Deeds Registries Act* 47 of 1937, it is not possible to register this right against the land at the deeds office or to obtain a title deed by the occupant or the person using the land. The right to occupy land in this manner is a remnant of old Apartheid land policy and legislation.[7] Because this right is not formally registered, it is sometimes not easy to determine the validity of a PTO or the rightful holder of a PTO. It is also problematic to establish a certain location for the specific land allocations and get the relevant registers for the occupied land. The Ingonyama Trust Board in KwaZulu-Natal started a movement to invite everyone who holds PTOs to convert their rights to long-term leaseholds. Still, the High Court found it to be unconstitutional because it was deemed an arbitrary deprivation of rights.[8] The land reform process, especially this aspect of security of tenure has been slow in South Africa, and the State targets are not being met. The legitimacy of PTOs is currently upheld by the *Interim Protection of Informal Rights Act* 31 of 1996. However, other legislation should have been in place long ago to address this specific area of security of tenure.[9] This is frustrating to many black citizens who are living in poverty, with inequality and unemployment. What is holding back the land reform process is the

5 Brent *et al.* 2016:13.
6 Beinart *et al.* 2017:43.
7 Pienaar 2014: 464
8 Van Schalkwyk & Gattoo, “Where do mining rights, permission to occupy, and long-term leasehold agreements fall on the food chain?”, https://www.cliffedekkerhofmeyr.com (accessed on 12 April 2023).
9 Pienaar 2014:493.

weak social tenure rights that have been reproduced by land reform.[10] The rightsholders of PTOs are in a similar insecure position. This study will investigate the insecurity of PTO rights as well as discuss some solutions to alleviate the current uncertainty surrounding PTOs.

1.3 RESEARCH QUESTIONS

- What is the nature of the right that provides permission to occupy communal land?
- What legislation established and governed PTOs?
- How does ownership in terms of a title deed differ in comparison to PTOs?
- How did the introduction of The White Paper of 1991, The 1996 *Constitution* and the land reform process influence PTOs?
- What is the current legal position of PTO rightsholders as decided in case law?

1.4 RESEARCH MOTIVATION

The *Constitution* provides for the legal framework for South Africa's democracy with one of the core elements being racial dispossession of land. Colonial dispossession of the land took much of the 19th century and gave rise to resistance and wars. Small and overcrowded native reserves were established, which were confirmed by the adoption of the *Natives Land Act,*[11] which, together with the *Native Land and Trust Act,*[12] maintained 87 per cent of the land for occupation and ownership by white people. In the 1950s, the land reserves were to be divided into ten homelands for the main African languages in South Africa by the Apartheid policies. The traditional leaders appointed by the government were heading the homelands, making up 60 per cent of the homeland's legislature's membership.[13]

In different areas that consisted of the pre-constitutional South Africa, eleven different land control and tenure systems were developed. The systems are related to four national states, self-governing territories, and the rest of the country. There was complexity and diversity in the tenure systems. The systems also got overwhelming

10 Allsobrook 2019:408.
11 *Natives Land Act* 27/1913.
12 *Native Land and Trust Act* 18/1936.
13 Claassens & O'Regan 2021:155.

as thousands of subordinate legislative measures were issued on the authority of principal legislation. This was deepened by the fact that tenure forms were insecure, personal and permit-based. As a result, large-scale insecure land was prevalent. This added to the already existing challenge of customary law tenure forms which exist in large areas of South Africa. This led to the existence of two main tenure forms in South Africa, which are private or Western-style tenure and customary law tenure. Over time, an additional transitional tenure was then developed. This mixture of statutory and customary law tenure forms developed in response to the needs and demands at a smaller level.[14]

Black land tenure in South Africa was divided traditionally into rural and urban land before 1991. Rural land is governed by the *Native Land Act* 27 of 1913 and the *Development Trust and Land Act* 18 of 1936, which were applicable to the 13 per cent of South Africa that belonged to black people. Urban land related to areas, whether urban or rural, was within the jurisdiction of the South African Development Trust (SADT). Rural areas were divided into three main categories, which were SADT land, self-governing territory land (KwaZulu, Kangwane, and Qwaqwa), and Transkei, Bophutatswana, Venda, and Ciskei land (TBVC land). Land was further divided within these divisions into rural and urban. The first provision of the division of South Africa into land that was meant for black ownership was first given by the *Native Land Act*. The acquisition of and occupation of land by blacks was provided in the *Development Trust and Land Act*.[15]

In the above-listed areas, the *Black Administration Act*[16] gave the key authority and enabled policy implementation regarding land administration. The Act also gave rise to the enactment of other legislation that dealt with regulation and land tenure rights. It was only in accordance with the *Native Land Act*, the *Black Administration Act*, and the *Development Trust and Land Act* that permissions to occupy were issued for areas scheduled for black occupation. Confusion was created when the self-governments and the TBVC states were created and when they took over some tenure rights and customised them into their form of tenure administration. This resulted in two parallel

14 Pienaar 2014:379.
15 Van Wyk 2012:43-45.
16 *Black Administration Act* 38/1927.

streams of land administration over land tenure rights that are less formal, which were the SADT administration and the self-governing and TBVC states administration.[17]

The *Group Areas Act*[18] regulated the acquisition, alienation, and occupation of land in the rural and urban areas where blacks were prohibited from acquiring land rights by stipulating which part of the Republic could be occupied by which race.[19] There has been an extraordinary transformation since 1994 when major land reform took place. Since this transformation, there has been continuous implementation of land reform policies that address disparities in land tenure and create necessary awareness of the current notions of land rights.[20]

1.5 RESEARCH METHODOLOGY

This research will be conducted by use of the doctrinal research method. The research will be conducted by researching black letter law. A doctrinal research methodology is used by way of analysing case law and statutory provisions that exist already. It creates law by rational deductions and legal reasoning. It is desk-based, and it is done using an electronic device like a laptop, internet sources, internet legal databases, and library databases. A researcher verifies a particular hypothesis that they have about the law in which they want to research. This methodology will be used so that there can be an interpretation of the law as a set of self-sustaining principles. This will be done by using sources of law, which include case laws, reports, academic literature, statistics, and domestic and international legal instruments that speak about the law of permission to occupy. The sources that will be looked at will give information on what land tenure is and how it is divided into statutory land tenure and communal land tenure. The sources will be used further to investigate the depth of communal land tenure, including the rights involved as opposed to statutory land tenure. More attention will then be placed on the concept of permission to occupy.

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17 LexisNexis Digest, “Permission to occupy”, https://www.ghostdigest.com (Accessed on 12 April 2023).

18 *Group Areas Act* 36/1966.

19 Van Wyk 2012:44.

20 LexisNexis Digest, “Permission to occupy”, https://www.ghostdigest.com (Accessed on 12 April 2023).

This research aims to investigate the rules and regulations implemented in the law of property in communal lands. It is deeply invested in establishing the difference between statutory land tenure and customary land tenure. It aims to show the difference in tenancy between landholders who have a title deed and those who have PTOs. The problem that this difference has in the practical world is that the benefits of holding the two are different. Landholders who have a title deed over their land have more advantages, and they enjoy more than those who have PTO's. There is a lot of inequality on the land being held in terms of different legal rights by people. This research will investigate the statutory background of PTOs, the legal development that has taken place relating to PTOs, relevant case law dealing with disputes relating to PTO and how this legal uncertainty may be alleviated.

1.6 CHAPTERS OUTLINE

Chapter One introduces this paper and provides a summary of what is to be expected in chapters two, three, four, and five. It focuses on the background of the paper, the research problem, a brief content of the information to be given in the chapters mentioned above, the method that will be used in conducting the research, and the time plan of the research.

In **Chapter Two**, I will discuss the general meaning of land tenure and the South African land tenure systems, which include statutory land tenure and communal land tenure. It will give a brief discussion of what statutory land tenure is and a more in-depth discussion of communal land tenure with a specific focus on the legal nature of PTOs. This will help show the different tenure system and clear the confusion that people have since most people do not know the difference. It will also lay a foundation to the reader's mind so that the reader may understand the concept of PTOs and communal tenure better.

In **Chapter Three**, I will discuss the statutes and case laws that govern communal lands. This chapter will focus on the statutes that have been put in place to govern how people should occupy and control communal lands. Some of the most important legislations to focus on are the *Natives Land Act* 27 of 1913, the *Upgrading of Land Tenure Rights Act* 112 of 1991, the *Communal Land Rights* Act 11 of 2004, and the Interim *Protection of Informal Land Rights Act* 31 of 1996. I will also look at case laws

that contributed to shaping how communal lands are controlled. This investigation will include which current land reform projects address the legal uncertainty of PTO rightsholders as well as what the current legal position of PTO rightsholders is as decided in case law? Since PTO is a statutory right, it is important to know how this statutory right was brought to life. This can only be done through the discussion of statutes that have been put in place and have led to the establishment and the government of PTOs.

In **Chapter Four**, I will address the difference between the rights awarded when a person is given permission to occupy and when a person is given a title deed. I will then discuss the difference between ownership and communal land tenure with specific reference to PTOs. It is important to discuss the rights that people have over their land and other properties because people own things and occupy land without knowing the rights they have to do so. In compiling this research which is also meant to provide knowledge to people, it is trite to educate people about the rights awarded to people who are given a permission to occupy land.

Chapter Five will provide for the land reforms that have been put in place to address the legal uncertainty of PTO rightsholders. And the land reform strategies that are not enforced yet but are being looked at recently. Since people have lost land due to past laws, it is important for them to know what measures have been put in place as an attempt to get the land back. It is also important to know if the measures are working. This chapter will give a detailed discussion on this.

Chapter Six will focus on the decided cases that gave rise to the legal positions that are being looked at recently about the rightsholders of PTOs. Case laws develop the law, so I will be discussing a few case laws to see if the law governing PTOs has been changed or developed by case laws.

In **Chapter Seven** I will focus on concluding the paper and give my recommendations. The recommendations will include a discussion on the movement from communal land tenure to ownership. This chapter will summarise the whole paper and also give ideas of what can be done to help people turn their PTOs into ownership.

CHAPTER 2: THE NATURE OF THE RIGHT THAT PROVIDES PERMISSION TO OCCUPY COMMUNAL LAND

2.1 INTRODUCTION

South Africa provides two diverse immovable property regimes that exist alongside each other: the system of common law land ownership, which is individualised,[21] and the system of communal land tenure. The system of common law land ownership is based on common law principles[22] . In contrast, the system of communal land tenure is based on the use of land by communities in terms of customary law[23] principles, rules and values which are shared by the community and develop over time. These two systems are managed differently. This is also seen in that common law land ownership can be registered in the Deeds Office, whereas communal tenure cannot be registered. The system of registration that is being used presently does not provide for the registration of communal land rights. This results in official information that relates to communal land tenure being currently insufficient and unreliable because it is not formally registered anywhere.[24] Understanding how black people and communities interact with land and other kinds of property under customary law is crucial when having a conversation about communal land tenure. In the historical and

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21 The concept of individuality indicates the idea that the owner of a thing can control that thing exclusively and enforce it against the whole world, and the fact that there is one kind of ownership that exists which can either be exercised by a sole owner or by co-owners. The characteristics of the individuality of ownership are sometimes drawn back to Roman and Roman-Dutch law. See in this regard Badenhorst *et al*. 2006:92.

22 The common law principles of land ownership are found in the Roman-Dutch law and the English law. South African property law was influenced by Roman-Dutch law and English law. The early Roman law had no exact concept of ownership. The concept of dominium developed later when the concept of ownership was still vague. When the concept of ownership emerged, it was regarded as absolute. See in this regard Brits *et al.* 2019:38-39. Because of the economic, social, and political changes that have taken place throughout the ages, ownership today does not have the same functions that it had in Roman times, during the Roman-Dutch law. See in this regard Badenhorst *et al*. 2006:91.

23 Customary law was developed by the Colonial Government to facilitate and entrench the colonial agenda in managing and controlling colonised people to push them closer to the colonial and neo-colonial legal, cultural, and economic whole. It consists of two forms, which are, living customary law and official customary law. The courts have recognised the co-existence of the two forms. For example, in the case of *Bhe v Khayelitsha Magistrate* where it was held that that the official rules of customary law sometimes differ as compared to what living customary law is. Living customary law comprises of actual customs or practices of the indigenous community whose customary law is under consideration. It usually consists of customary law practices that are unwritten and regulate people's day-to-day life. Official customary law is the law applied by state institutions and the courts. It is mostly found in legislation and codes of customary law, textbooks, and court precedents. Maithufi *et al*. 2014:24-33.

24 Pienaar 2014:20.

social definitions of ownership, it was found that only people who use and occupy land under common law can have ownership, and people who use and occupy land under customary law cannot. It is sometimes difficult to describe forms of communal tenure, and this is because of the tendency that people must interpret these communal tenure forms through a common law lens.[25] This chapter will start by giving a general meaning of communal land tenure. It will then briefly explore what constitutes statutory land tenure. Lastly, the main discussion of communal land tenure will receive more focus in this section. This will be done to ensure that the reader knows what kind of right he/she has if they are holders of a PTO. It will also educate people who have an interest in the area. At the last chapter of the research, the ready will have been aware of PTOs starting from the nature of the right.

2.2 THE DEVELOPMENT OF LAND TENURE IN DIFFERENT PERIODS

Land tenure is a dense field surrounded by multiple old laws and proclamations.[26] Some people value land tenure, and others see it as something that is not valuable but that they need because people need a place to stay. Land tenure then enables the exercise of other rights in this regard.[27] Land tenure embodies the right to family life and the right to live per one's religious beliefs and culture.[28] Land tenure is an umbrella term which incorporates both communal and statutory systems, each with exceptional features and challenges. Subsequently, I will explore by referring to different timelines that distinguish specific development of the land tenure concept.

2.2.1 The early years (1652 – 1910)

South Africa is frequently taken back to the colonial period.[29] The whites had a tradition of considering territorial segregation of Africans and Europeans as the parting of Africans from control as a natural policy. The natural policy was set in 1652 at the Cape by the Dutch East India Company within 50 years of the establishment of a

25 Mabasa & Mabasa 2021:67.
26 Beinart *et al*. 2017:40.
27 The rights that can be exercised are the real rights (ownership) and personal rights (permission to occupy).
28 Pienaar 2014:381.
29 Ndlovu-Gatsheni & Ngcweni 2021:16.

trading station.[30] During the time of colonisation of South Africa, first by the Netherlands and then by Britain, customary law and land tenure were the creations of African leaders and colonial officials that reflected the contemporary situation. When customary law was created, colonial rulers could not understand the aspects of sovereignty and territoriality. Several types of authorities and four sets of land claims and their products were marked as communal tenure, which was then merged into the development of customary law.[31]

The Dutch cattle farmers started migrating into the interior of South Africa in 1700. They first found thousands of Hottentots and Bushmen and later found millions of Zulu and Bantu. The Hottentots were hired as domestic servants and farm labourers. Although the bushmen were unwilling to abandon their way of living, they were forced by the superior White weaponry to abandon their land. The Dutch cattle farmers advanced the land and put the Bantu on the eastern side of Africa and the Zulu in the Natal. Several wars broke out between the whites and the Bantu. When the wars were ongoing, the whites realised that there was no longer an endless supply of unoccupied land. They then tried to find new grazing land to evade the Bantu by moving to the northwestern side of the new land, where new provinces were established. The new provinces were the Orange Free State and the Transvaal.[32]

Another form of tenure was introduced in 1732 by the old Cape Colony, which was individual but not private. The quitrent tenure[33] was introduced under the *Glen Grey Act*[34] and some previous subsequent proclamations. There has always been an exaggeration of the significance of the *Glen Grey Act* since it was introduced in about half of the former Ciskei districts and seven Transkei districts. Still, it was never thoroughly implemented in any of them. The state's initial plan was to transfer them into quitrent areas.[35]

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30 Daniels 1989:328.
31 Peters 2009:1317.
32 Daniels 1989:328.
33 A quitrent tenure is a form of land tenure which was allocated by the Director General of the Department of Agriculture/Development Aid for residential, arable, farming or trading sides, to the authority of the relevant minister. Under this tenure, holders were given the right to possess land for eternity, but they did not have alienation rights. The holders were not allowed to sell or mortgage the land. They could, with the permission of the Chief Commissioner in the area, let land. See in this regard Jaichand 1997:13, 14.
34 *Glen Grey Act* 25/1894.
35 Beinart *et al*. 2017:22.

In 1836, the Mfengu community which was created. This community had run away from the eradication in a holocaust by Shaka Zulu, who was a king of the Zulu tribe. The Mfengu community resided with the Xhosa people and witnessed a war in 1835 and 1836 between the Xhosa and the white farming community. The war was about rights to land across the border of the Cape Colony.[36] The Dutch cattle farmers were in charge in 1852 when the British Parliament decided that some colonies were not economically advantageous anymore and resigned from authority in the Cape Colony and Natal. The land was then distributed equally to the inhabitants of the new republics.[37] Black people got used to demarcating lines drawn by the European colonists, although they were ignored. Subsequently, natives became more in white areas. Most of the natives became squatters on private land and paid rent to landlords, while others were buying land in white areas.[38] This development continued further in the union years discussed below.

2.2.2 The union years (1910 – 1961)

The new quitrent allocations ended in 1920.[39] The quitrent allocations ended because the Ciskei quitrent villages were being re-planned for betterment planning. They were seen to be ecologically vulnerable and congested, and it was not easy to administer them.[40] There was a high demand for land by people who needed to occupy and use it to such an extent that additional allocations were made under the permission-to-occupy system. A lot of African people acquired land privately. These holdings expanded and were severely reduced by the *Land Acts*.[41]

In the 1930s, the colonial administration established customary law and authoritative restatements with the help of a few anthropologists like Isaac Schapera. The early mission and colonial attitude towards what they believed to be communal landholding was deeply embedded in ancient cultural presumptions that set individual private ownership as the highest tenure.[42] Two misconceptions were formed during the

36 Daniels 1989:330.
37 Daniels 1989:328.
38 Daniels 1989:330.
39 Beinart *et al*. 2017:22.
40 Wotshela 2014:727.
41 Beinart *et al*. 2017: 22.
42 Peters 2009:1317.

colonial period and used to describe tenure. According to Mabasa, the first misconception was the Western concept of ownership, which is applied universally, and the second was that the colonised societies were too underdeveloped and could not have the concept of ownership used in how they interacted with the land.[43] The second concept allowed colonisers to deny African societies their rights to the land because it was unowned and treated as *res nullius*[44]. Customary tenure was then described as communal by colonial writers. It is argued that this view is inaccurate since it suggests that labour and produce are shared in customary land tenure, which is not the case.[45]

Pienaar[46] refers to these two misconceptions as a dual tenure system since Western tenure and customary law tenure are the main tenure forms practised alongside each other. The quitrent tenure system evolved in South Africa. This form of tenure system became more hybrid. It consisted of customary and statutory forms of tenure that developed naturally in response to specific needs and demands at a basic level. The quitrent and statutory tenure systems were mistakenly understood to have operated on a racial basis. This understanding was that there has always been private tenure for whites and blacks in a communal tenure system.[47] In most forms of customary tenure, the primary rights were found in the families. Traditional authorities[48] were given strong rights to administer and allocate land to people.[49] They were not in all respects communal, and chiefs did not directly control them.[50]

A large area of the land was held with the private title. At the same time, there was a high possibility that most landholders were not registered at the Deeds Office because of the sizes of the sites in the former homelands, the farms transferred, and the small

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43 Colonial writers desired to avoid the two misconceptions and decided to formulate an extremely firm idea that customary tenure was communal. The term was right if it was used to mean that the claims to land were being equally shared by communities and that the land rights were based on certain political communities' membership, or when individuals cannot dispose of property in the same way that a common law owner would. See Bennett 2015:337.

44 *Res nullius* is an ownerless property or an unowned thing. In this context, *res nullius* means that the land was not owned by anyone. This term originates from the Roman-Dutch law. It describes things that are not the subject of rights for anyone. See Erlank 2015.

45 Mabasa & Mabasa 2021:68.

46 Pienaar 2014:379.

47 Mabasa & Mabasa 2021:85.

48 The chief and his council.

49 Beinart *et al*. 2017:15.

50 Mabasa & Mabasa 2021:85.

informal settlements.[51] In the past, land that was allocated to a family in a Black settlement belonged to the family occupying it, and it was capable of being inherited. The right to occupy and use land allocated to a family could be given to another person if the person was a family member who occupied such land and not from the chief.[52] Krige[53] gives an example of this in his article when talking about land tenure in Phalaborwa. He states that in 1937, there was no land allocation except when it was done as a formality for newcomers. He states that there was a lot of land that could be taken by anyone who wanted to, but the initial labour of clearing it was difficult. If someone took the land, it could not be taken by anybody else when the owner is not present. If ever the chief wished to take such land, it was seen as if the chief was kicking the owner out of the area. Chiefs continued to have more powers over land as the years went by. Their powers grew more during apartheid. I have made a detailed discussion below.

2.2.3 The pre-constitutional years of the Republic of South Africa (1961 – 1994)

In matters of property and land, the legacy of apartheid is said to be arguably the most noticeable in the tenure arena. Tenure was dependent on factors and considerations that were usually located outside the usual scope of property law.[54] In 1982, some of the private land was integrated into homelands where it was difficult to make the rights fully private. This was when Ciskei became an independent republic, which the South African government recognised. The land was seen as a property of the family which is held by unilineal descent groups[55] symbolised by the family name.[56] The concept of unilineal descent groups moves away from the formal, legal idea of land title as expressed in the common law. Legal rights in individual quitrent were different from legal rights in areas of freehold tenure[57], and the element of land rights in permission

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51 Beinart *et al*. 2017:15.
52 Beinart *et al*. 2017:16.
53 Krige 1937:362.
54 Pienaar 2014:378.
55 Unilineal descent is a system used to trace kinship through one gender. It has two types, which are patrilineal descent where the lineage is traced through males and matrilineal descent where the lineage is traced through females. Two types of unilineal descent groups are lineages and clans. Dawa, "What are unilineal descent systems and how do they differ from bilateral descent systems?" https://www.researchgate.net/publication/360080140 :1 (Accessed on 26 March 2024).
56 Beinart *et al*. 2017: 22.
57 A freehold tenure system is a system that focuses on the individual ownership of land where the land has been registered at the Deeds office. The freehold tenure forms part of the Western cultural

to occupy and customary systems. Quitrent tenure was surveyed, either registered or fully recorded at the Deeds Office and had holders that had stronger formal legal rights than those who had permissions to occupy.[58]

In 1991, the South African land tenure was dreadfully complex. This included the approach to land tenure being racially based, but the network of tenure forms was naturally location-specific, uneven, and distinct. This meant that different forms of tenure succeeded in different areas constituting the pre-constitutional South Africa and resulted in eleven different land controls and tenure systems. The tenure systems related to the self-governing territories, the four national states and the rest of South Africa. Within the national states where land was located, the complexity of land tenure increased. Not only was it complex and diverse, but it was overwhelming as thousands of subordinate legislative measures were issued on the authority of principal legislation. The complexity of land tenure was deepened by the fact that tenure forms were dominant in the national states and self-governing territories, and some black spots in white South Africa were insecure, permit-based, and personal. The white spots that were insecure, permit-based, and personal were small areas in the white settlement which was insecure and could only be accessed by people who had a permit. This is why there were many insecure tenures in South Africa.[59] Although apartheid came to an end and there were constitutional provisions made, I haven't seen how tenure has been improved to favour PTOs. With the discussion I made below, it will be visible that the enactment of the *Constitution* has brought no betterment at all.

2.2.4 The Constitutional Era (After 1994)

The *Upgrading of Land Tenure Rights Act*[60] changed the rural quitrent in the Eastern Cape. The Act fulfilled its aim of upgrading land rights and giving people ownership when the Ciskei was dissolved and restored to the Eastern Cape province in 1994.

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and economic systems which possess individual ownership. The land upon which freehold tenure is held is regarded as a negotiable commodity. Under the traditional system, people are given security in that every family has the right to a plot of land. The right is protected in perpetuity. See Margeot 1987:534.

58 Beinart *et al*. 2017:23.

59 Pienaar 2014:379.

60 *Land Tenure Rights Act* 112/1991.

The result was that more sustainable individual rights were granted to male household heads over the primary residential and arable sites.[61] The policy was made to restrict this to the heir, who was usually the oldest son. The surveyed land had certificates akin to titles that were issued and given to holders but had a condition that stated that the land could not be sold or bought.[62] People who moved from white-owned farms were allocated land in quitrent areas and given a permit to occupy and use the land.[63]

There are several different tenure systems in the former homelands and on land which have now been transferred from white occupants to other occupants of different races like blacks and coloureds. It is essential to look at various types of tenure recognised presently and how they are changing.[64] The security of tenure is also essential for the largely African rural communities, which are among the poorest and need to have their rights protected and carried aside.[65] I will now turn my focus onto two land tenure forms which are statutory land tenure and communal land tenure. The two land tenures are being discussed to give an idea to the reader of where PTOs fall. This is because I have realised, after having conversations with people in rural areas that they have little to no knowledge about the different types of tenure.

2.3 COMMUNAL LAND TENURE

There has been, and still is, a system of complementary interests held at once. This system is referred to as communal land tenure or customary land tenure[66] since it is an essential concept of customary law. Communal land tenure is defined as a set of rules and norms that govern the allocation, access, use, and transfer of land and other resources in a community.[67] Different areas have different customs, which affect how communal land tenure has been evolving differently in each of these areas. In this process, some communities have ignored it, and some have accepted it.[68]

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61 Beinart *et al*. 2017:37.
62 Beinart *et al*. 2017:38.
63 Beinart *et al*. 2017:40.
64 Beinart *et al*. 2017:40.
65 Beinart *et al*. 2017:14.
66 In this research, I will be referring to it as communal land tenure.
67 Mailula 2011:79.
68 Mailula 2011:79.

There has been a misunderstanding of the concept of communal land tenure, and some legislation[69] has caused even more misunderstanding among people. Communal land tenure has been described as land that belongs to the community that has a traditional leader as a trustee of the land.[70] Pienaar and Du Plessis have described communal land tenure as land that belongs to a traditional leader who could allocate land to people in a rural area in need of land to occupy and use. In communal land tenure, a traditional leader is described as the ruler of the people and of the land. He makes decisions after consulting with the traditional council.[71] Subsequently, I will provide for a discussion of communal land in different developmental stages below.

2.3.1 The historical development of communal land tenure

2.3.1.1 Pre-colonial conception

It is imperative to look into the pre-colonial conceptions of communal tenure and how these land tenure systems were influenced by apartheid, colonial states and notions of private property before considering the modern notions of communal tenure.[72] In pre-colonial customary law, the land was absolute, and it could not be bought or sold or exclusively owned by one person. A traditional authority had the power to control land and distribute a right to occupy and use the land to individuals.[73] Pre-colonial systems were not close to being stationary and were altered over so many years by the government's proclamations and controls. A system of Permission to Occupy (PTO) was slowly introduced in most of the customary tenure areas. In this system, a written certificate from the magistrate's office was given the occupier's name and a rough measurement of the land allocated was made.[74]

Communal tenure practices were described in distinctly different terms. The concept of communal tenure as being necessarily communal was rejected. As stated above,

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69 The *Communal Land Tenure Bill* of 2017 for example.
70 Pienaar & Du Plessis 2010:74.
71 Pienaar & Du Plessis 2010:74.
72 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023).
73 Mabasa & Mabasa 2021:74.
74 Mabasa & Mabasa 2021:88.

collective ownership was bestowed on a whole group, and the whole community made decisions. Reciprocal rights and obligations that bind together and bestow power in community members over land were created by social relations. This means that in determining who is granted access or control over land, rights and obligations that come from relationships between people must be considered.[75] This was also said to be descriptive without looking at the theories underlying the systems. The said descriptive analysis was always done within the Roman law theoretical framework, with the prevalence of ownership rather than the property itself being the central point.[76]

Communal tenure was seen to be inclusive and socially embedded. Land tenure has been communal and individual and can be viewed as a system with complementary interests that are held simultaneously by different people. This means that communal tenure systems are grounded on the idea that families and individuals have relative rights to the same agricultural and residential land. The families and individuals must negotiate access to common resources. These resources include land for grazing, rivers, or forests.[77]

The communal land tenure approach that was being used was based on the fact that land relations in terms of customary law are relational. This means that they are the relationships that people have with a piece of land. This is unlike the powers that people have over the land they own.[78] The connection that existed between tribesmen and the land was so strong that it exceeded the connection between the land and the

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75 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023).

76 Du Plessis 2011:49.

77 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023).

78 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023).

chief. A man was given land for residential and agricultural purposes after getting married. Land that was not allocated to anyone was used for grazing.[79]

2.3.1.2 The settler years (1652-1910)

Communal land tenure was initially derived from the time when the settlers and the indigenous communities made contact for the first time. There was a lack of understanding of the customs and values that were practised differently about land and how their attitude was towards a sense of survival. Land disputes were forcibly settled when the early settlers of the Cape, the San and the Khoi came into contact. The San and Khoi were hunter-gatherers and pastoralists[80] who had no specific territory. The colonial authorities did not well understand the social and structural structures of these communities.[81]

In the 1770s, the borders of the settler community in the Cape were expanded towards the east resulting in them meeting the AmaXhosa. Communities with similar forms of land tenure were found by the settler farmers who travelled northwards. This concept of communal land tenure was unknown to the individualistic idea of land control mostly known by the settlers. This was so even though individual land ownership was not encouraged in the Cape, and the English and the Dutch granted long-term leases.[82]

The institution of communal land tenure was interfered with through legislation and sometimes through propaganda from the 1800s. The interference was more predominant in the Cape and Natal, while the other parts of South Africa had little interference.[83] In 1811, Sir John Cradock became a governor and had the Cape

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79 Pienaar & Du Plessis 2010:74.

80 A pastoralist is a person who farms, breeds, and takes care of animals, especially in Africa and Australia. They are sometimes referred to as cattle or sheep farmers. Pastoralists can be best described under the process of pastoralism where domesticated herd animals are being cared for. Pastoralists are known for gathering and hunting. As they herd animals during the day for grazing land, they pick fruits and nuts. They feel a sense of ownership over resources through herding, as they develop relationships with their families with certain herds. They consider their herds as the property that belongs to the family which can be passed down from generation to generation, mostly from fathers to sons. See Hasty *et al*. 2022.

81 Pienaar & Du Plessis 2010: 75.

82 Land was initially only given to European farmers in loan, in the Cape. The leeningplaats (farms given in loan) were developed in 1675 when conditional land titles were granted. A fifteen-year quitrent was then introduced in 1732. In 1943, freehold tenure was developed. Perpetual quitrent and the use of freehold tenure were developed in 1813. See in this regard Carey Miller & Pope 2001:241-248.

83 Pienaar & Du Plessis 2010:76.

administration exercise sovereignty over disputed lands. The permanent British occupation of the Cape resulted in several economic measures made to inspire the economy and incorporate it into the imperial design. Unfortunately, these measures affected communal land tenure relationships. In 1813, there were loan places converted into quitrent tenure, which was a form of new tenure for new grants to land. When an annual rent was paid, the right-holder was given an irreversible title to land, which gave him an entitlement to use, control, and dispose of the property freely.[84]

A proposal was made in 1883 by the Natives Laws and Customs Commission for everyone to receive titles to land to keep them loyal to the Crown. The Cape Government was against the proposal and did not give ownership to black people in the white areas.[85] The Natal Governor was made the trustee of all the land in the Natal and the Supreme Chief of the Zulu tribe. It was seen to be unrealistic for tribes to reorganise themselves in 1864 by Governor Pine. He was of the view that white farmers were unable to keep up with black farmers who had slave women to work in the fields. A resistance to his statement built up and he used it as an excuse to divide the land granted to the Zulu farmers.[86]

Almost everyone left their communal land and settled in towns and urban areas by 1894.[87] To persuade them to return to their original areas, the government promised to grant them a secure form of tenure, namely leasehold and quitrent. The *Glen Grey Act* of 1894 was enacted, and the traditional communities' land was surveyed and registered. This system was still not accepted by the people who were being persuaded because they believed that the system was restricting them from a certain piece of land. This was because of a huge failure to take up titles because people were unwilling to pay the costs of titling and surveying.[88] The quitrent was faced with a few problems, including, that there was no observation done to the cultivated land, the difference between commonage and arable land became blurred, and titles inherited were not registered.[89]

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84 Van Der Merwe 1989:668.
85 Pienaar & Du Plessis 2010:76.
86 Pienaar & Du Plessis 2010:77.
87 Pienaar & Du Plessis 2010:76.
88 Cousins 2007:296.
89 Cousins 2007:297.

Land was sold to the black communities by the British in 1902 without formal transfer to keep the land in the Crown land. Black people could buy land from white farmers in 1905 after the High Court held that everyone had the right to purchase land. In 1910, when the union was established, a lot of black people had lost their land or were not living in their traditional communities anymore.[90]

2.3.1.3 The union years (1910-1961)

Colonial administrators held substantially misleading perceptions of communal tenure systems. These misconceptions were being undertaken by colonial powers to retain and codify a communal tenure system that would suit their interests best. One of the main misconceptions colonial administrators supported was that common tenure described a wholly collective system of land void of individual interest notions.[91]

However, this characterisation of communal tenure systems as collective contradicted the nuanced and complex ways in which the interests over land varied between more exclusive rights and interests and more collective rights and interests. Another tendency of colonial officials was to interpret communal tenure through the lens of the common law of their own countries. The common law concept of ownership deeply impacted how colonial officials observed communal tenure. It resulted in them characterising the exclusive and absolute concentration of interests in land in a particular individual as opposed to customary systems.[92]

Colonial powers did not recognise the concept of ownership in the communal tenure system. Consequently, the colonial powers declared ownership outlandish to communal law tenure. It was then assumed that there must always be a person who owns the land, even in situations where rights have never been defined. There was an

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90 Pienaar & Du Plessis 2010:78.

91 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023).

92 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):5.

attempt to describe communal tenure arrangements as a partial form of trust law in which chiefs would hold land on behalf of their tribe. This was so because communal tenure would not be lent to the concept of exclusive ownership.[93]

The colonial State was aided in its system of indirect rule by this legal manipulation of communal tenure. The colonial State then improved and altered traditional leaders' powers by granting them far-reaching and extensive powers in relation to land. Traditional leaders were promised political support by colonial officials if they were to cooperate with the Crown and furthered its colonial objectives. When there were traditional leaders who refused to cooperate, they were replaced by other leaders who could be persuaded.[94] In these areas where the chieftaincy was powerful, the chiefs played a role in allocating and administering land and may also claim authority or ownership over the land.[95] Colonial officials widely embraced the characterisation of communal tenure as a form of trust.[96] In 1951, roughly 35 per cent of African people lived on farms owned under freehold tenure and were not under traditional leaders. Many of them lived as tenants who had elements of customary rights to land.[97]

2.3.1.4 The Pre-Constitutional and the Constitutional Era

The characterisation of communal tenure, which the colonial officials widely embraced as a form of trust, was later employed effectively by the apartheid state to further marginalise black people in the homelands by forming the South African Development

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93 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):5.

94 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):5.

95 Mabasa & Mabasa 2021:93.

96 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):5.

97 Beinart *et al*. 2017:18.

Trust (SADT) and trust arrangements that were similar.[98] The existence of exclusive rights was also provided through the donation and inheriting of residential and arable land. The apartheid government tried to prevent this through regulation. The rights held by people in communal tenure create strong rights in land, and they are equivalent to ownership. It is just unfortunate that they are different.[99]

The intention of Proclamation R188 of 1969, issued under the powers conferred on the State President under the *Native Administration Act* and the 1936 *Land Act*, was to control the operation of the land tenure in black areas. Two forms were labelled: the quitrent tenure with surveyed land and the permission to occupy with unsurveyed land. There were strict rules set for right-holders, including one man, one lot, constraints on plot size, a fixed system of male primogeniture to control inheritance, and no land to be given to women. Officials had the power to take land and cancel permission to occupy and quitrent titles.[100]

The communal land tenure system was distressed by problems in rural South Africa in the early 1990s.[101] Amending legislation for the administration of land was issued by some territories after 1991. Customary law was applied in some parts of rural KwaZulu Natal. Coloured people reserved some coloured areas for occupation in the Northern Cape, Western Cape, and the Free State. The South African land tenure racially based approach resulted in an uneven, dense system that embodied several forms of land control for different areas.[102] Official state interference required an all-encompassing reform of land-related matters. From 1991 to 1994 preliminary work was started for the full-scale tenure reform. The official interference was aimed at the

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98 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):5.

99 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):6.

100 Cousins & Claassens 2004:142.

101 Cousins & Claassens 2004:143.

102 Pienaar & Du Plessis 2010:80.

reform of land measures by publishing a land policy[103] and circulating some legislation proposed by the policy.[104]

After 1994, communal tenure systems were layered with different people or groups with different interests and rights over land and resources. Communal tenure practices highlighted that exclusive use by individuals or families was ignored and undermined by colonial and apartheid states. Individuals and families had more rights and interests in residential and agricultural land than is generally thought. In these places, people had unrestricted access to the use of and occupancy of the land. This is not the same with the communal nature, where the rights of individuals and families must use resources are common. These exclusive rights are found in the right of a household to return to residential land after evacuating the area. This would be so if the household had informed the headman of their intention to return.[105]

Based on the circumstances around a particular area, communal tenure systems are flexible enough to change and adapt constantly. This means that they are similar to the concept of living customary law, which is also adaptable to change and adapt with time. A living customary system has been seen as a hybrid system that consists of rules, laws, and practices.[106] There has been an isolation of land held in communal tenure or under traditional councils in several places, including the platinum belt of Northwest Province, the Anglo-American Mogalakwena platinum mine in Limpopo, and the Somkhele coal mine in KwaZulu-Natal.[107] Control was granted effectively over all the customary land of KwaZulu-Natal to the Zulu king by the *Ingonyama Trust Act*[108] after its enaction.[109] Some customary landholdings have been tried by the Trust's

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103 The 1991 White Paper which is to be discussed in Chapter 5.
104 Pienaar & Du Plessis 2010:81.
105 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):6.
106 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):7.
107 Mabasa & Mabasa 2021:90.
108 *Ingonyama Trust Act* 3/1994 (KZN).
109 Mabasa & Mabasa 2021:90.

Board to be changed into leaseholds. This requires payments and implies that the land is owned by the Ingonyama Trust or by the king. This will be discussed in detail in Chapter 3.[110]

Presently, land administration is a bit messy, with institutional relationships filled with ambiguity, uncertainty, confusion, and ongoing power plays. This makes a large part of the land tenure insecure in communal areas. The basic legacy of previous interventions in the communal land tenure system rights is the second-class status of land rights in law providing few protections from random decisions by people in authority over the allocation and use of land. The consequence of previous policies of control from the government is the fractional breakdown of the legality of group systems of land tenure.[111]

2.3.1.5 The current setting of communal land tenure

In the former homelands, referred to as communal areas by the post-apartheid government according to types of communal land, almost a third of the South African population resides there. The government of South Africa has not been able to develop policies and laws that capture the nuanced ways in which relations of communal tenure are being experienced and regulated every day. Due to this, most people who live in such areas have land rights that have not been realised. This means that their land rights are not fully recognised.[112]

Mabasa states that the Presidential Advisory Panel on Land Reform and Agriculture provides that the land administration systems and the traditional communal land are under the jurisdiction and control of Amakhosi and their traditional councils. The traditional leaders argue that the Western legislative framework that is currently being imposed does not appreciate the interplay of individual and group rights and how these

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110 This is in Chapter 3, topic 3.7. titled "The *Ingonyama Trust Act* 3 OF 1994".

111 Cousins & Claassens 2004:143.

112 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):3.

live together in a manually beneficial, harmonious, and inclusive fashion rather than in a comparative manner.[113]

This means no principal or national land administration framework for communal land tenure landholdings will exist. Even though these duties fall under the Department of Rural Development and Land Reform or the Department of Co-operative Governance, systems and responsibilities have not been sufficiently developed.[114] Traditional councils and local customary arrangements continue to operate. Sometimes, they are assisted by government officials. However, this happens without formal authority to administer and regulate land rights in a way that would complement and coincide with the recently used system of deeds registration.[115]

There are parts of the communal tenure where a heritage of powerful chieftaincy was reinforced during the Bantustan era. The traditional leaders in these areas play a role in allocating and administering land and may sometimes claim strong authority or ownership. Some communities and individuals who assert their rights to their lands may challenge this. For example, in the Eastern Cape and KwaZulu-Natal, communities have challenged traditional leaders' authority. Flexibility in interpreting customary law that accepts living customary law as currently practised has been accepted.[116] In customary systems, historical examples and recent expressions of living customary law confirm the rights of landholders. Customary rights were overlaid in many districts by government proclamations and PTOs.[117]

The law of South Africa embodies preceding notions, modes of landholding and occupation by black people, such as the right to occupy land, which cannot be registered by law. Some legislation has been put in place to protect people who own land[118]. In communal tenure, most transactions for land are not recorded in writing and are therefore not covered by the *Alienation of Land Act*.[119] Sometimes, communal tenure is associated with a trust where a traditional leader acts as a trustee, and only the usufructuary rights are enjoyed by the tribe members. However, this did not

113 Mabasa & Mabasa 2021:91.
114 Beinart *et al*. 2017:52.
115 Beinart *et al*. 2017:53.
116 Mabasa & Mabasa 2021:93.
117 Mabasa & Mabasa 2021:94.
118 The *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19/1998, the *Property Practitioners Act* 22/2019, and the *Sectional Titles Amendment Act 13 of 2022* to name a few.
119 *Alienation of Land Act* 47/1937.

effectively incorporate the true nature of customary tenure, partly because not all landholders had the same redress as trust beneficiaries in circumstances where the traditional leader abuses their powers. Tenure is different in customary law, and it can be held by multiple persons simultaneously concerning the same piece of land. Even though traditional leaders are given the right to have powers to control the way land is allocated to beneficiaries and how it may be used, individuals within those communities will have the right to benefit from the land they hold. It can then be said that customary tenure seems to be a system of complementary interests held simultaneously. Since customary tenure does not give rights to ownership, it is vital to use words such as power, rights, and interest.[120]

An analytical scheme has been employed to check the landholders of communal land, which poses three questions. The first question relates to the identity of the interest holder, such as an individual or a traditional leader, in their capacity as a ward member. The second question relates to the content and nature of the interest, which can be divided into control and benefit. Control means the power to determine the beneficiaries of a piece of land and the time and way the benefit can be exercised. Benefit means a right to use and enjoy the land. The third question relates to how a particular piece of land is used. This is whether the land is for residential or agricultural purposes.

In most cases, there is a direct connection between the purpose of the land and the individuals occupying it. People's powers, rights, and interests often make direct connections. This gives an understanding of customary tenure without looking at the absolute individual or communal ownership model.[121] With the belief that knowledge on the development of communal tenure has been instilled in the mind of the reader, I will then provide below the status and the rights that people have gotten from the development I have just discussed.

2.3.2 The status and rights of individuals under communal land tenure

It is inaccurate to say that individuals have little or no say in customary tenure. They have the right to ask for areas for grazing their stock on communal pastures. This is

[120] Mabasa & Mabasa 2021:69.
[121] Mabasa & Mabasa 2021: 70.

only held by individuals associated with a ward head[122] through the affinity of cognition. Land scarcity is growing to such an extent that it will be impossible for an outsider to get acceptance from a ward head without a pre-existing relation to a ward member. When an individual requests a plot of land, they will usually, in most cases, receive a residential plot as well as a plot meant for farming. Upon being made landholders, these individuals will exercise exclusive rights over their plots, which traditional authorities can enforce. With this right, individuals and their families will be entitled to access sufficient land to meet their subsistence needs. Only the head of the family holds this right, and his dependents do not have a direct claim against the traditional authority.[123]

A landholder's rights to a plot can be lost if the plot has been abandoned for a long time. The plot will then become available and distributed to a new applicant. Land that is not being used productively can be redistributed by traditional authorities due to shortages of land and the increasing pressure that traditional authorities have.[124] Some communities are required to pay tribal levies by traditional authorities. These amounts are charged by traditional authorities whenever there are different expenses that the community members are expected to contribute to. When members have not paid for these expenses, they will be denied access to basic entitlements consequently, or they will be prevented from burying their family members. These basic entitlements include obtaining proof of address.[125] The modern legal framework prioritises traditional authorities and gives them preference at the expense of ordinary people.[126]

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122 Every village is divided into traditional wards under a hereditary headman authority. In some villages, senior ward headman acts as the headman of the village, with several traditional headmen gathered together under them. Khunou 2017:11.

123 Mabasa & Mabasa 2021: 1.

124 Mabasa & Mabasa 2021:73.

125 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):20.

126 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):30.

The identities and livelihoods of rural residents are affected by the South African traditional authorities' conception of land reform. In most jurisdictions of traditional authorities, residents are denied citizenship due to the claims of ownership over communal lands made by some of these traditional authorities. This perception of traditional leaders owning communal land is being contributed to by politicians and state officials. These authorities are granted ownership of the outer boundaries of communal land by the South African government's policy approach to communal land tenure. This is equivalent to handing over the whole land of villages to traditional authorities.[127]

These traditional leaders continue to act as if they are empowered to administer communal land. Sometimes, it gets to extreme instances wherein traditional authorities present themselves as the sole representatives of the community, with powers to make any decision about the community land with little or no consultation. It should be noted that this does not occur in all communities but in most communities on land rich in minerals. As stated, the politicians support the acts of the traditional leaders. This pushes them to act the way that they do, knowing that the law is in support. They embrace being custodians of customary law and believe they can determine its content. This results in communities struggling to hold them accountable.[128]

Some traditional leaders defend their actions by claiming that customary law empowers them to wield their powers and make such decisions on behalf of their communities. Sometimes, communities vehemently disagree, arguing that such authority was never granted to traditional leaders by customary law. When traditional authorities exercised their land allocation powers in a manner that went beyond the types of powers granted by customary law, residents in impoverished rural areas

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127 Mabasa & Mabasa 2021:110.

128 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):19.

struggled to maintain their claim to property. Exercising these powers amounts to illegal land sales in some communities.[129]

Mabasa is of the view that the Communal Land Tenure Policy of 2014 makes sure that traditional authorities will be beneficiaries of communal land tenure. She further states that the policy provides for registering outer boundaries of communal land in the name of traditional councils, which traditional leaders mostly control.[130] When it comes to communal land, the 2018 Human Rights Commission can be interpreted to say that residents in communal areas are vulnerable as there is are high chance that they may lose their land at any time because of the issues of land tenure in communal areas that are unresolved.[131] As much as people can get these rights and have the status they have over communal land, it is important to know if the rights can be registered, and how, if they can be.

2.3.3 Registration of Communal Land Tenure Rights

In the case of *Nedbank Limited v Molebaloa,*[132] the execution of selling a family home was considered to satisfy a debt subject to a mortgage bond. The respondent had gotten a loan from the applicant by a mortgage bond. Where the respondent was primarily residing could not be executed for various reasons. The applicant then applied for the respondent's secondary property to be registered in the Deeds registry. It was discovered that the respondent did not merely own the secondary property since it was a family home. The respondent's family members were occupying the home. The court held that the respondent was not the owner of the family home, but he held ownership as the head of the family in terms of customary law. It was held that the deeds registry does not cater to this ownership form. The court held that it is well

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129 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):19.

130 Mabasa & Mabasa 2021: 17.

131 Sibanyoni, "South African Human Rights Commission submission to the Joint Constitutional Review Committee regarding Section 25 of the Constitution, June 2018", https://www.sahrc.org.za/index.php/publications/submission-on-legislation/2011-2018?start=12 (Accessed on 31 July 2024):15.

132 *Nedbank Limited v Molebaloa* (37780/2015) [2016] ZAGPPHC 863 (12 August 2016):par. 27.

known that individual and family tenure rights in rural areas are not reflected in the Deeds registry. The judge then quoted Pienaar who provides for the problems caused by not reflecting tenure rights concerning communal land. He states that the only system that can be registered is the system of individualised common law ownership, not communal land tenure, which makes it unreliable. The information above is detailed enough for people to understand about the first kind of land tenure, below, I will make a detailed discussion about the second type of land tenure. The discussion will give the difference between the two land tenures and also answer the question, 'on which tenure does PTOs fall?'.

2.4 STATUTORY LAND TENURE

The colonial authorities and missionaries, relating to Cape and Natal, established some freehold settlements for Blacks in the 19th century. This allowed land to be held with title, and to date, that land is still held with title in some cases. They introduced freehold land tenure. This enabled the Black people in South Africa to purchase land in private tenure until 1936. Since 1991,[133] every South African has been able to purchase any land privately owned and registered at the Deeds Office anywhere in the country.[134] Individual ownership as a land tenure system became a norm in South Africa in the nineteenth century. The Roman-Dutch common law system viewed ownership as a theoretically absolute right compared to other private rights. Still, it was also divisible based on the solid essential rights to use and fruits. The main element of the right of ownership is the right of disposal, representing the prevailing land tenure system. The system of land tenure that prevailed is the system of individual ownership.[135]

Ninety per cent of the areas in South Africa are represented by land registered at the Deeds Office. Most of this area is owned by families, individuals, and companies privately. The great majority of land in the urban areas and farmlands that were reserved for white ownership are also owned privately. Land owned by the State is

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133 Read in this regard the *Abolition of Racially Based Land Measures Act* 108/1991. The Act provides aims and objectives one of which is to amend some laws to have members of a certain group on the use and acquisition of land restrictions abolished.

134 Beinart *et al*. 2017:2.

135 Carey Miller & Pope 2010:15.

also registered at the Deeds Office. This includes land that state-owned enterprises, municipalities, provincial governments, and national departments own. Under statutory tenure, it is vital to register land individually so that the area, ownership, boundaries, purchase price, and the date of the last transaction are recorded.[136] This sort of record was an effective system that ensured that land rights were adequately secured.[137] Statutory tenure in South Africa has land information by registration as part of the land administration system. Land administration is the combined process used to determine, record, and distribute information on the tenure, usage, and value of land in the context of developing land policies and suitable land management. There is a land administration system that is well-developed in termds statutory tenure, unlike informal land rights and communal land tenure in rural areas.[138] Subsequently, I will discuss one such form of statutory tenure, which is the focus of this research, namely, Permission to Occupy. This form is discussed to give clear knowledge so that people can understand the right that they hold. It has come to my attention that a lot of people are occupying land thinking that they have full ownership whereas they only have a permission to occupy. The discussion below will clear the confusion that people have, and expand the knowledge of people who have a slight idea.

2.5 PERMISSION TO OCCUPY

One of the successful systems that was used under communal land tenure is the PTO system. A PTO is defined as a personal right that allows the use or occupation of a user over rural, unsurveyed land. Property ownership under this system cannot be transferred to the user.[139] The land could be used against an annual rent which had conditions. This gave a holder the right to use arable or residential sites. People didn't need to consult with traditional leaders, but it was advisable. The land held under a PTO could be subdivided, transferred, or leased after getting permission from the relevant functionary. However, it could not be used for real security purposes. This is

136 Mabasa & Mabasa 2021:86.
137 Beinart *et al*. 2017:43.
138 Pienaar 2013:20.
139 Shepstone & Wylie Attorneys, “Status of permission to occupy”, https://www.wylie.co.za/Articles/Read/144/Current-status-of-permission-to-occupy (Accessed on 25 July 2023).

because real security considers ownership of a property, whereas PTOs do not give ownership.[140]

The PTO was a statutory modification of traditional communal tenure. After consultation with traditional authorities, the magistrate allocated some parcels of land to people. These allocations protected occupations against payment of fixed amounts. It was only with the permission of the magistrate that arable or residential allotments could be leased, sublet, transferred, or disposed to black people. Compared to quitrent, this tenure was informal and less rigid because it was not surveyed. This tenure system resembled protected occupation rights only and did not constitute ownership.[141] A PTO is meant to confirm in writing that the land occupied was allocated lawfully to the applicant. A PTO has generally accepted that the personal rights it confers are like real rights, even though it does not give real rights to the holder. Therefore, a PTO is still considered a valid right that has not yet been converted into any other kind of right. Its legality is still as it was before.[142]

Section 7(3) of *Regulation Gazette 140* provides that no one shall be permitted to occupy more than one site for residential purposes or more than one site for trading or professional purposes unless the Secretary has authorised it. It further provides that no one may get an interest in more than one site for residential purposes and more than one site for trading or professional purposes within the township unless authorised by the Secretary. Section 7(4) of the same Gazette provides that a person without the approval of the Chief Bantu Affairs Commissioner cannot occupy a site for residential purposes within the township when they already have residential rights somewhere else in a scheduled Native area.[143]

2.6 CONCLUSION

Communal tenure is entrenched in many South African's everyday existence. The government has always been directly or indirectly involved in interfering and amending

[140] Pienaar 2021:7.
[141] Pienaar 2014:147.
[142] Shepstone & Wylie Attorneys, "Status of permission to occupy", https://www.wylie.co.za/Articles/Read/144/Current-status-of-permission-to-occupy (Accessed on 25 July 2023).
[143] GN 140 Government Gazette 1962:6(293).

communal land tenure. The story of communal land will never end. It appears as if it will just continue to exist with misunderstandings. This chapter began by giving a general meaning of land tenure and some examples of land tenure. It has shown that two systems are operated alongside each other. Although the systems have similar rights, the property rights remain unequal. The rights in the statutory land tenure are registered and can be owned individually. I discussed the two land tenures to help people understand the difference as I built a base of the research. I do not see the need to differentiate the two tenures. In my opinion, everything should have been under one land tenure which allows everyone to have ownership rights over land, this would have cleared every confusion in people's minds and in the law system.

Meanwhile, the rights in communal land tenure cannot be registered and are not held exclusively. In my view, this brings differentiation and unfairness. It gives one group a superior status than another group. The individuals and communities in communal land tenure areas are living with the fear of losing their land since they are so vulnerable. They have no choice except to cling tenaciously to their land rights and pray that the traditional authorities would not abuse their influence over them. This, however, is not guaranteed since the traditional authorities feel that they have been given enough power by the politicians and legislation to act in any way they like concerning land. Much attention was given to communal land tenure as the centre of attention of this article. A brief discussion followed on what a PTO is and how it relates to the nature of the right that provides permission to occupy communal lands. More information will be given about this in the chapters ahead. The research will focus on the PTO proclamations in KwaZulu-Natal, but it will not be limited to it. The following chapter, Chapter 3, will build up to this article and provide the legislation that governs the land held under communal land with the concept of permission to occupy.

CHAPTER 3: THE ESTABLISHMENT AND GOVERNMENT OF PTOs BY LEGISLATION

3.1 INTRODUCTION

Property law in South Africa still rests on the foundations laid by Roman law, even under the democratic Constitution. Legislation and case law have, and still influence property law.[144] Clarifying landholding rights in older and new customary/PTO areas is important.[145] In the time when the sophisticated scheme of planning in respect of land reserved for the occupation of whites was being maintained, a separate system of land use was introduced by the 1913 and 1936 *Land Acts*, improved by the *Black Administration Act* 38 of 1927, the *Community Development Act* 3 of 1966 and the *Group Areas Act* 36 of 1966, were active on land allocated for use by black people. Black people were allocated land in the scheduled areas as per the *Black Land Act* 27 of 1913. The black people could only be accommodated in urban areas as temporary contract workers and sojourners. These areas were extended to released areas by the *Development Trust and Land Act* 18 of 1936. Black people did not have the right to purchase land in these areas and were obliged to utilise land administered by tribal authorities.[146]

In 1996, three important Acts were passed by the ANC government to protect the land of those who did not have formal titles. The *Interim Protection of Informal Land Rights Act* 31 of 1996 (*IPILRA*) was especially aimed at the former homelands. The *Extension of Security of Tenure Act* 62 of 1997 provided security potentially. The *Prevention of Illegal Eviction Act* 19 of 1998 was made to make sure that people who occupied land informally in urban areas had some protection from being removed.[147] Chapter 2 provided land tenure and focused on this research's most important tenure system, communal land tenure. It gave a brief meaning of what the statutory land tenure system is while trying to differentiate it from communal land tenure. It then introduced a PTO. This was to give an idea of what the research will be about and ensure that the reader understands the origin of a PTO as the centre of this research. My main

144 Mabasa & Mabasa 2021:64.
145 Beinart *et al*. 2017:66.
146 Van Wyk 2012:43.
147 Mabasa & Mabasa 2021:95.

concern in this chapter is to address the legislation that was put in place to develop communal tenure. More emphasis is placed on the PTO under the communal tenure system. The purpose of this chapter is to establish statutes that make provisions for PTOs and to have a clear understanding of PTOs through statutory provisions. This will work as a base for the upcoming chapters. I will discuss some legislation and how they have helped shape PTOs.

3.2 *BLACK LAND ACT* 27 of 1913

The introduction of this Act brought about the first serious intervention.[148] This Act was the first to formalise the limitations on black land ownership. It also laid a base for apartheid and territorial segregation. Because people had a wrong belief that differentiating between races that are not similar was primarily required, the Act introduced ethnic differentiation.[149] This was seen through section 1(1) of the Act, which provided that a native[150] is not allowed to enter into an agreement, any acquisition, or servitude over a land with any person who is not a native. It further provides that any other person who is not a native may not agree to purchase, acquire, or have any servitude over a land that a native owns. It seems as if the provision aimed to have territorial segregation, which was based on race and prohibited natives from acquiring or occupying land. This was a wall between non-black and black landholding. It is clear from this section that the Act aimed to introduce territorial segregation based on race, where natives were not allowed to acquire or occupy land. A barrier was being placed between black and non-black landholding.[151] One of the aims of this Act was to stop black land ownership and regulate communal land tenure, which conflicted with individual land tenure.[152]

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148 When land was being dispossessed, black people lost their food security and source of income. The biggest thing that they lost was their economic independence and their dignity. They have been since then discouraged from owning land. This led to a more legalised and structured impoverishment by enacting the *Black Land Act* of 1913. It was evident at that time that the State was beginning to act against the independence of black people in mining and commercial farming. This intervention would become more powerful with the passing of the Act of 1913. See in this regard Modise & Mtshiselwa 2013:363.

149 Kloppers & Pienaar 2014:680. Explain the ethnic differentiation further.

150 According to the *Black Land Act* 27/1913, a native is a male or female who is a member of an ethnic race that was the original or earliest occupier of an area of Africa and further includes persons or companies that have within them a controlling interest that is a native.

151 Kloppers & Pienaar 2014:681.

152 Pienaar & Du Plessis 2010:79.

Black people[153] were allowed to have possession or settle on the land-only in scheduled areas, which were created in terms of the Act. Any black person outside these areas had to return to his/her land of origin.[154] Section 1(2) of the Act provided that from the day and after the Act has been enacted, only a native can buy or in any manner acquire land in a native-scheduled area or acquire directly or indirectly any land or have any right over the land except when approved by the Governor General. Agreements that contravened this provision were deemed null and void, and a fine was imposed or imprisonment without hard labour for not than six months as a way of punishment. The Act also provided that a commission should be established to make sure that areas where black people were not allowed to acquire land were identified.[155] Scheduled areas were then designed, and there was 8% of the land that was reserved for black people. Sharecropping contracts[156] that were between white landowners and black farmers were then prohibited. This resulted in a loss of income for black people and added more economic hardship to them.[157]

As a result, a lot of people were just moving around South Africa, looking for a place to live. People were in misery, there were a lot of deaths of people and cattle, and eventually, there was impoverishment. Fundamentally, the scheduled areas had stretches of communal land that could not ensure a livelihood that would be sustainable for the people occupying it.[158] As stated above, this is the Act that brought about segregation based on race, and as a result, natives were not allowed to have ownership of land. It was only after getting approval from the Governor General that a native could own land. This Act indirectly influenced the issuing of PTOs. The rights of black people over land did not last for long because of the introduction of the *Native Trust and Land Act* discussed below.

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153 These black people were natives.

154 Pienaar & Du Plessis 2010:79. By place of origin, I mean the areas where they were the earliest occupiers.

155 Kloppers & Pienaar 2014:681.

156 Sharecropping has been linked to a tax. Under this contract, tenants are allowed to choose their labour supply to equate their marginal disutility of labour with their comparative share of the marginal product. Sharecropping was then seen as a form of land tenure which was not sufficient. See in this regard Allen 1985:30.

157 Kloppers & Pienaar 2014:682.

158 Pienaar & Du Plessis 2010:79.

3.3 *NATIVE TRUST AND LAND ACT* 18 OF 1936

This Act was introduced in 1936 and was subsequently renamed the *Bantu Trust and Land Act* and the *Development Trust and Land Act*.[159] It provided for the formation of the South African Native Trust which was an agency of the state meant to administer trust land and to have the land administered for the benefit, settlement, material welfare, and support of natives of the Union.[160] It was enacted to provide more land for black settlement. It was foreseen that the problem of squatting caused by insufficient land problems in the scheduled areas would be addressed by the Act.[161] The government was able to create a trust[162] which would be used to buy more land (released areas) for the enlargement of scheduled areas. Black people could settle in that area, but they could not have ownership of the land. This land was not enough to accommodate everyone. It was then decided that the then Minister of Black Affairs would have to register the land in his name. Regardless of whether there was proof of the community's ownership, the communal land was registered to the Deeds Office as state land.[163]

This simply means that the Act abolished individual black people's land ownership, and trust tenure was introduced through the establishment of the South African Development Trust (SADT). The SADT was responsible for the purchase of land in released areas for black settlement.[164] In terms of section 25 of the *Black Administration Act 25* of 1938, Proclamation R188 was issued. It regulated tenure in a form the Government supposed to be true by affording two types of tenure namely quitrent on surveyed land, and permission to occupy on unsurveyed communal

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159 Pienaar & Du Plessis 2010:79.

160 Kloppers & Pienaar 2014:682.

161 Both the *Black Land Act* of 1913 and the *Development Trust and Land Act* 18 of 1936 enacted strict requirements regarding the squatting of black people on land owned by white people. Articles 6,7 and 8(1)(a) of the former Act were repealed by section 50(1) of the latter Act because they were disused. Chapter IV of the *Development Trust and Land Act* strongly provided for the removal of squatters and labour tenants. Labourers were only officially preferred by the 1930s. The operation of this chapter was suspended by the Government because it had no alternative accommodation for people who were being removed from white farms. The proper procedure for the removal of squatters only began when the *Prevention of Illegal Squatting Act* 52 of 1961 was enacted. The Act allowed the Minister to remove black people from public or private land and empowered local authorities to develop resettlement camps and villages for the concentration of squatters. See in this regard Davenport 1990:434.

162 The South African Development Trust (SADT).

163 Pienaar & Du Plessis 2010:79.

164 Kloppers & Pienaar 2014:682.

land.[165] This Act was a critical turning point in the development of land rights in South Africa, especially in the former Transvaal.[166] Section 2(1) of the Act allowed some areas of land to be transferred to the Native Trust for administration by the Trust. Land which was reserved for the occupation of the natives and land within the scheduled native areas was conferred in the Trust. A South African Native Trust Fund[167] was established with funds used to acquire and develop Trust land. This was being done to advance the interests of natives in scheduled native areas and to develop the moral, material, and social well-being of natives in the Trust land. The Act also gave the Trust power to acquire land for the settlement of natives. This land was limited to approximately 13%.[168]

White-owned farms that were newly purchased were settled under chiefs. It was more accessible and more likely to qualify for traditional land through ethnic organisations. When the *Bantu Authorities Act* of 1951 laid the foundation for homelands and local administrations controlled by chiefs, the process was greatly extended.[169] In achieving the Act's objectives, section 13 gave trustees the power to confiscate native land outside a scheduled area for any reason which would endorse public welfare, for public health reasons or be in the interest of the public. The land confiscated was compensated for with the price determined by the land's fair market value, any necessary improvement's value, and a sum of inconvenience value.[170] It is evident from the above that the practice of PTOs continued when this Act was introduced. When black people were moved to the scheduled areas, they were still not allowed to own land because the land was registered under the State and chiefs. A black person could then not have ownership over land but would be given a permit to occupy and use the land.

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165 Pienaar & Du Plessis 2010:79.
166 Beinart *et al*. 2017: 18.
167 The *Representation of Natives Act* 18/1936 compliments the *Natives Act* 18/1936 and created the Native Representation Council. The Council is advisory and experimental with 16 elected Natives. It had given a special opportunity for Native self-expression. Its main duty was to think through the Native Trust Estimates of revenue and expenditure that are presented to it yearly and to decide on matters that concern the Native people and make recommendations to Parliament. The money that was derived from the Native taxation is recorded under revenue, in addition to all the money granted by the Parliament for the acquisition of land or for land development. Revenue is also obtained from sources in Native territories like rents, leases, and several small items. See in this regard Heaton 1945:75.
168 Kloppers & Pienaar 2014:683.
169 Beinart *et al*. 2017:18.
170 Kloppers & Pienaar 2014:683.

3.4 THE *GROUP AREAS ACT* 41 OF 1950 AND *GROUP AREAS ACT* 36 OF 1966

The *Group Areas Act* of 1950 was used to remove people by force by the National Party government from designated white areas. The primary role of this Act was to control the ownership of immovable property and the use and occupation of land based on race. Another aim was creating group areas, the immovable property's acquisition control, and the occupation of the land and premises. Three groups were established – a native group, a white group, and a coloured group. The Act created group areas elected for the exclusive ownership and use of members of a particular group. People who were different from a specific group area were considered disqualified. These persons were prohibited from occupying land or premises without a permit. They were also banned from owning immovable property in such areas.[171]

The *Group Areas Act* 36 of 1966 complemented the *Group Areas Act* of 1950. The Act aimed to unite the law related to the creation of group areas and to control the acquisition and occupation of immovable property. The Act is similar in a few sections to the one enacted in 1950. For example, three groups were formed by the 1966 Act – the Bantu, the white, and the coloured groups. According to section 13 of the Act, acquiring immovable property in controlled areas is prohibited. Such regions have restrictions directed to their occupation, provided by section 20. This reflects the provisions of sections 4 and 5 of the 1950 Act. As provided in the 1950 Act, a person who did not belong to a specific group was prohibited from occupying land or premises in a specified area without a permit. Exceptions were put in place in section 20(2) for such a provision. Only people were *bona fide* servants or employees of the state; a *bona fide* student attending a school in a controlled area, or a *bona fide* visitor for less than ninety days of a person residing in that area.[172]

The President was given power by Section 23 to declare through the Government Gazette an area meant for the exclusive occupation by a member of a specified group. Combined with this section, sections 26 and 27 were against the acquisition or occupation of property by disqualified people in group areas. Police officers were given the power by section 43(1)(a) to enter premises without a permit when investigating

171 Kloppers & Pienaar 2014:684.
172 Kloppers & Pienaar 2014:685.

suspected offences and to examine them when necessary.[173] It was restricted for an owner of land to alienate or subdivide his land or grant absolute rights or any occupation rights to any other person. Except for some areas, which included the scheduled black areas, coloured peoples' settlements, and black residential areas, the whole of the Republic was considered a controlled area. Land could not be acquired in a controlled area as it is restricted. These provisions were made to limit the transactions of land and real rights over land unless a permit was issued.[174] The status that black people had in owning land, which was started by the *Black Land Act* and continued by the *Native Trust and Land Act*, was continued by the *Group Areas Act* but in a different way. As these Acts continued to be enacted, none of them was making provisions that allowed black people to own land. This Act made it worse by making sure that a particular group could only occupy a particular space. The issuing of PTOs continued. It fortunately got to a point where the racially based land measures were abolished. This will be dealt with below.

3.5. THE *ABOLITION OF RACIALLY BASED LAND MEASURES ACT* 108 of 1991

This Act aimed to amend or repeal some laws to have some ethnic or membership of a particular group on the use and acquisition of land restrictions abolished; to provide for the justification of some racially based regulatory systems; to control standards and norms in residential areas; and to create a commission under the Advisory Commission on Land Allocation that would focus on connected matters.[175] Mr FW de Klerk released Mr Nelson Mandela and had a meeting on how to end racial segregation. As a result, this Act was enacted. To achieve its aim, the *Native Land Act* and related laws were repealed by section 1 of this Act. The *Native Trust and Land Act* was repealed by section 11 of this Act. In section 12, there were transitional measures regarding how the South African Development Trust would be phased. The Trust had to facilitate the transfer of land from the Trust to state departments or other institutions created for the transfer of land since it owned most of the native land. The *Group Areas*

[173] Kloppers & Pienaar 2014:686.
[174] Silberberg & Schoeman 1983:164.
[175] *The Abolition of Racially Based Land Measures Act* 108/1991.

Act of 1966 was repealed by section 48 of the Act. The *Group Areas Act* was abolished immediately with all its amendments.

Due to this abolishment, all South Africans could freely occupy and own land anywhere in the country. It was the first time that non-whites were allowed to own land after almost 80 years of being prohibited. This Act brought an end to the unfair treatment blacks were receiving regarding owning land.[176] This Act abolished the misery that black people had in the inability to own land. It abolished the *Group Areas Act* and made it possible for black people to own land. But it unfortunately did not abolish the whole procedure and rules of PTOs. This means that, although black people are allowed to own land, we still have a system that is different and unequal. . Although the system was unequal, an Act was passed to try and upgrade tenure to make the system better. This Act will be discussed on the topic below.

3.6 *THE UPGRADING OF LAND TENURE RIGHTS ACT* 112 OF 1991 (*ULTRA*)

This Act made provisions for the upgrading of, among other things the permission to occupy and of quitrent to ownership if the land was deliberated in terms of surveyed land. It also provided for the transfer of ownership of land to the community by way of tribal resolution.[177] This legislation is preceded by the false impression that traditional leaders have primary powers to acquire land, as opposed to the role of custodianship that they are supposed to play. Under this Act, traditional authorities attained the power to alienate land. Still, they were subject to a 10-year moratorium on alienating land to third parties without a court order giving them authority. They could also acquire ownership over land after getting consent from the minister and completing other registrations. Upgrading land to freehold was hard because there was an obstruction in the former independent homeland on which the *ULTRA* applied. These were the Transkei, Bophuthatswana, Venda, and Ciskei (TBVC).[178]

There are chiefs and traditional councils that control land and initiatives on developing land on behalf of communities while dominating the interests and consent of landholding families.[179] The white government gave the private tenure among African

[176] Kloppers & Pienaar 2014:687.
[177] Pienaar & Du Plessis 2010:81.
[178] Mabasa & Mabasa 2021:75.
[179] Mabasa & Mabasa 2021:90.

people a thought towards the end of apartheid. The African population had always voiced their wish to hold land in private tenure since the time of opposition to the *Natives Land Act*. The government allowed a 99-year leasehold in the township areas to some of the black urban population in 1978 under the *Blacks (Urban Areas) Amendment Act* 97 of 1978. This was then gradually changed to freehold once surveys were carried out after the *Black Communities Development Act* 4 of 1984.[180] Emphasis was placed on upgrading to private titles in urban townships. The *ULTRA* offered private tenure in rural areas to some of the categories of PTO black landholders. It also provided for upgrading people's land rights and making a register of land rights in the area.[181]

The *ULTRA* was partially implemented because the policy direction was far less clear. This was partly because the geographical areas and types of land included in the Act were unclear. The TBVC were omitted. The PTOs were not included in upgrading, although they were the standard form of landholding. At that time, legislation was proposed that provided for communal tenure. Unfortunately, the legislation was not passed.[182] The applicability of the *ULTRA* was only allowed in the rural areas. This led to much implementation in the rural areas. Surveying and registering land had been complex. The government had planned to have legislation that would regulate these areas.[183] Although this Act allows for PTOs to be upgraded, it does not solve the whole problem that I have with the issuing of PTOs. As it is, this Act can only upgrade PTOs in surveyed land.

3.7 THE *INGONYAMA TRUST ACT* 3 OF 1994

A new customary and PTO tenure pattern emerged in KwaZulu-Natal (KZN). In 1994, on the first democratic elections eve, the Kwazulu-Natal Legislative Assembly enacted the *Ingonyama Trust Act* 3 of 1994, to which every land in the former KZN homeland was transferred. This was part of the bartering that got KZN into the national settlement and first general election, including the Zulu king recognition.[184] The Ingonyama Trust

[180] Beinart *et al*. 2017:33.
[181] Beinart *et al*. 2017:34.
[182] Beinart *et al*. 2017:35.
[183] Beinart *et al*. 2017:37.
[184] Beinart *et al*. 2017:23.

Act was established to manage the land owned by the former KwaZulu homeland government before the commencement of the Act. Currently, the trust manages approximately 2.8 million hectares of land in KwaZulu-Natal. The Act was enacted by the KwaZulu Legislative Assembly and established the Ingonyama Trust. The Trust land was vested in the Zulu monarch King Zwelithini as a trustee on behalf of the community members defined in the Act. The Act was amended in 1997 to create the Ingonyama Trust Board to manage the land following the Act.[185] As the sole trustee of the Ingonyama Trust Board, the Zulu king has control over the KZN's communal land. This has given a few traditional leaders powers over land, which is above that of the Minister of Rural Development and Land Reform.[186]

According to section 2(4) of the Act, the Ingonyama must administer land following Zulu customary law. As per section 2(8), the Ingonyama must not interfere with the existing rights or interests of the land.[187] The homeland tenure system was continued, with PTOs issued in some areas under the management of the local chiefs. The trust opted to allocate land in the form of leases and stopped issuing PTOs. The system was designed largely for businesses and commercial property at first, but it has been gradually extended to sites for settlement in some areas.[188] The Trust Board has attempted to change some of the customary landholdings into leaseholds, which will require payment and suggest that the king of the Ingonyama Trust owns the land.[189] It has been argued that PTOs and customary sites give a more secure right to land than leases. One consequence of leases is that if the rental is not paid, the landholder can be removed from the land.[190]

Although the Trust has wide-ranging powers to manage the land registered under it, several provisions in the Act protect the land rights of the beneficiaries of the Trust. The *Ingonyama Trust Act* provides in section 2(2) that the land that formed part of the KwaZulu homeland previously would be held in trust by the Zulu king for the material

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185 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):9.

186 Ndlovu-Gatsheni & Ngcweni 2021:228.

187 Mabasa & Mabasa 2021:90.

188 Beinart *et al*. 2017:23.

189 Mabasa & Mabasa 2021:91.

190 Beinart *et al*. 2017:23.

welfare, benefit, and social well-being of the members of the tribes and communities living on the land. Section 2(5) of the same Act provides that the Ingonyama shall not hinder, lease, pledge, alienate or otherwise dispose of any said land or any interest or real right in the land. This will be so unless the king has obtained the prior written consent of the traditional authority or community authority concerned.[191]

Section 2(8) states that the Ingonyama shall not disregard any existing rights or interests. Legal protection is therefore granted to people with occupation, use, and access rights on the land that the Trust manages. The Trust recognises people's substantial rights over the land it manages.[192] The Trust has recognised that people living on the Trust land have more rights than the right to occupy or live on the land. However, it seems as if the Trust fails to recognise that people living on the land have substantial rights to use it in several ways, like communal land for grazing. Despite the protective provisions and the statements contained in the Act, the Trust has been subject to a great deal of argument for its failure to protect the land rights of people living in the land it manages. The Trust has had problems with its ongoing conclusion of long-term surface lease agreements with mining companies. In terms of the lease contracts, it signs lease agreements with mining companies to enable mining activities that are mostly occupied and used by local communities.[193]

The agreements are sometimes concluded without proper consultation, which can lead to deprivation of use rights and access to land. The Trust has upheld that it acted according to the law. Section 2(5) of the Act gives the Trust the obligation to get the written consent of traditional councils before it authorises mining or development

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191 Clark & Luwaya, “Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa”, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):9.

192 Clark & Luwaya, “Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa”, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):9.

193 Clark & Luwaya, “Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa”, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):10.

activities. The Trust has argued that written consent is the only requirement that should be met to conclude a lease over Trust land. This can mean that councils hold the power to make decisions. The approach, however, undermines the customary consultation requirements that often exist in communal tenure systems. For example, a study of customary land law was conducted in Msinga by the Institute for Poverty, Land and Agrarian Studies (PLAAS). The study found that it is insufficient for an outsider seeking access to land to receive the approval of a traditional leader. It was further found that the Inkosi or Induna cannot quickly approve an outsider seeking land access.[194]

When land is being restricted, there must be an inclusion of the consultation of the potential neighbours of the outsider applying for the land and the ibanda (a council of local men who are old enough to be wise). Communal land tenure systems, therefore, require a broader consultation before land rights can be granted to outsiders. Despite this, the Trust has continued to issue lease agreements to mining companies. This action threatens the land rights and livelihood strategies of rural communities. The Trust has been criticised for its lack of transparency by the Parliament Portfolio Committee of Rural Development and Land Reform, which is mandated to hold the Trust to account. There are serious concerns that parliamentarians have raised about the revenue received by the Trust and the apparent failure on the part of the Trust to reroute its revenue back to its beneficiaries.[195]

In July 2014, King Goodwill Zwelithini announced that he wanted to allegedly make a large land claim on behalf of the Zulu nation. He claimed that he would be managed by the Ingonyama Trust Board (ITB), which was the result of an agreement between the Inkhatha Freedom Party and the National Party during the last days of apartheid. The ITB intends to obtain more land through the proposed new land claim in the KwaZulu-Natal, Free State, Eastern Cape, and Mpumalanga. Some traditional

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194 Clark & Luwaya, “Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa”, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):10.

195 Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Clark & Luwaya, “Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa”, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):10.

KwaZulu-Natal and Eastern Cape leaders have stated that they intend to lodge restitution claims. The claims may be invalid because most were dispossessed before the *Restitution Act's* cut-off in 1913.[196]

In November 2017, the *Ingonyama Trust Act* was declared unconstitutional by the High-Level Panel appointed by the Parliamentary Speakers' Forum. The panel recommended that the *Ingonyama Trust Act* be amended or repealed. The panel believes that the Ingonyama Trust Board has disobeyed the Act and has noted a few issues that could validate the need to repeal or amend the Act. One of the issues is that, as had been pointed out by the panel on several occasions, the trust acts as the absolute landowner and fails to get community consent on issues concerning land. This contravention of the Act and customary law needs to be observed. The board has threatened tenure security for communities trying to get PTOs converted into lease agreements. The trust has failed to obey the *Ingonyama Amendment Act* of 1997 provisions which provides that local government must regulate land in black urban areas.[197] This Act has so much potential to end the issuing of PTOs. It is only unfortunate that the intention is to turn PTOs into leases. I believe that leasehold would bring about the same results that a PTO has.

3.8 *COMMUNAL PROPERTY ASSOCIATION ACT* 28 OF 1996 (CPA)

A plan was put in place for this Act to be a primary form of landholding for farms or state land transferred to communities through the restitution and redistribution processes. The land is held in private title by beneficiaries, who collectively form a committee to allocate and manage the land. Chiefs or tribal authorities were not required. This constituted a new form of landholding, although customary landholding elements were incorporated.[198] The Department of Rural Development and Land Reform's (DRDLR) intention to exclude Communal Property Associations[199] (CPAs)

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196 Weinberg 2015:16.

197 Ndlovu-Gatsheni & Ngcweni 2021:228.

198 Beinart *et al*. 2017: 4.

199 The Communal Property Associations in South Africa were developed by the *Communal Property Association Act* 28/1996. See in this regard Sebola & Mamabolo 2020:1. The Act provides that it aims to allow communities to create juristic persons that will be known as communal property associations to purchase, manage and hold property on a basis agreed to by the community members in terms of a written constitution; and to provide connected matters (*Communal Property Association Act*:1).

from forming in the homelands has shocked a lot of people. The notion that new CPAs must not be developed in areas where traditional councils began to inform the government of policy after the *Status Quo* Report on Traditional Leadership and Institutions had been published.[200] The report noted traditional leaders' objections to CPAs based on their claim that only traditional leaders are the rightful landowners in the former homelands and that having CPAs challenges their authority. Denying the development of CPAs in former homelands shows that the government aims to have titles transferred to traditional councils as opposed to other land-holding individuals or entities.[201]

As a requirement, land reform, restitution, and redistribution programmes beneficiaries who would like to acquire, hold, and manage land as a group are supposed to establish legal entities enabling them to do so. The entities had to lodge some land-holding practices on the ground, most of which were focused on groups. The Communal Property Associations (CPA) was created to develop the legal entity suited for this objective. The CPA Act established this and has made a provision on how they are registered and how they are to be run and made provision for the government oversight to impose ordinary members' rights who have rights as part of the group.[202]

During the political transition, agreements were reached. These agreements took nationalisation off the table while simultaneously locking the government into a market mechanism for redistribution through a willing-buyer, willing-seller model.[203] Redistribution was then focused on providing a legal framework for people who wanted to buy white farms under the willing-buyer, willing-seller model. The *Communal Property Associations Act* permitted quasi-communal groups to secure legal rights to land purchased under the settlement/land acquisition grant (SLAG) mechanism. Through the redistribution process, the mechanism was found insufficient to get land under the willing-buyer willing-seller model. A CPA program was proposed to respond

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200 Weinberg 2015:15.

201 Weinberg 2015:16.

202 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):17.

203 To be discussed further in Chapter 5.

to this problem and attempt to coordinate land redistribution by giving SLAG grantees a framework for getting their grants to buy farms.[204]

Democratic principles with fair and inclusive decision-making processes are used to operate the CPA. As per the CPA Act, a written constitution must be developed collectively by the CPA members, which will be based on principles of democracy, non-discrimination, inclusion, and equality. These are features of democracy which make the CPA essential as an alternative available to land reform beneficiaries. Unfortunately, the CPAs have not been complying with the requirements of the CPA Act sometimes because of the financial and administrative mismanagement that it has had. Some rights of vulnerable groups, such as women, are at risk due to the abuse of power by some of the CPA members. Some traditional authorities have resisted the establishment, legitimacy and functioning of the CPAs because the leaders believe that the CPAs challenge their authority in communal areas.[205]

This is because there is no effective oversight and institutional support from the government. The Department of Rural Development and Land Reform has acknowledged that it did not provide enough support to the CPAs. It stated that it would direct more capacity, resources, and training toward the CPAs and establish an institutional home for them. However, the problems that the CPAs had led to the government withdrawing its support as it currently exists.[206] As the CPA is a form of landholding for land transferred through redistribution and restitution, it can be used to solve the PTO problem. If the Government is to plan it right, this land that is being taken back can be sold to people who would want to use and/or occupy it. Ownership can be granted to such persons and rule PTOs. This would be a start to ending the issuing of PTOs.

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[204] McCusker *et al* 2016:105.

[205] Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):17.

[206] Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):18.

3.9 *INTERIM PROTECTION OF INFORMAL LAND RIGHTS ACT* 31 OF 1996 (*IPILRA*)

The South African customary land tenure system is regulated in terms of the *IPILRA*.[207] The *IPILRA* was passed by the Parliament in 1996 to give effect to the constitutional obligations in section 25(6) and (9) of the *Constitution*. With no permanent legislation to protect customary land rights, the *IPILRA* had to fill the gap. The intention of its enactment was for it to act as a holding measure to ensure that there is temporary legal protection for people without formally recognising land rights. This was to be done when the government was developing more comprehensive legislation that protects and regulates communal land tenure.[208] The *IPILRA* covers people who are right holders to land under the *Upgrading of Land Tenure Act* but who were recorded in the land rights register. *IPILRA* was meant to protect people against the deprivation of their rights to land.[209]

Section 2(1) of the *IPILRA* provides that an individual may be deprived of their informal rights in land in terms of the community's custom and usage after meeting certain requirements, where land is held on a communal basis. The community must compensate the affected individual who retains informal rights and whose land is being disposed of.[210] Section 2(4) provides that no person may be deprived of their right to land except through the *Expropriation Act*, any other expropriation legislation, or customs recognised by a majority in a community.[211] According to this section, only the majority of holders of the rights in land that are present or represented in a meeting to discuss deprivation can decide to dispose of that right. Several due process protections relate to any meeting convened to consider the deprivation of informal rights in land in the *IPILRA*. This includes giving the affected people sufficient notice and giving them reasonable opportunities to take part in such meetings.[212]

Informal rights of land have been broadly defined in section 1(1)(iii) of *IPILRA* as the right to use, occupy or access land which falls under any of the former homelands

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207 Tlale 2020:2.
208 Tlale 2020:3.
209 Weinberg 2015:12.
210 McCusker *et al* 2016:103; Tlale 2020:2.
211 Tlale 2020:2.
212 McCusker *et al* 2016:103.

(TBVC) or was South African Development Trust land previously. The customary land rights were mentioned as one of those that fall within the scope of this definition, including customary rights to arable or residential land and the use and access to shared resources. The definition also included the rights of the beneficiaries of the arrangements created by the law passed by the Parliament. This included people in land registered under the Ingonyama Trust or the Lebowa Minerals Trust. Lastly, it included people who had a PTO previously, as well as beneficial occupiers who had been occupiers of land since the beginning of 1993.[213]

As per the protections in *IPILRA*, individuals or corporations that seek to acquire or use land in communal areas must negotiate with those individuals or families who hold the informal land rights directly. Even though there are essential protections in the Act, it has several limitations. The deprivation of informal land rights has minimal protection provided by the Act. The Act provides no legal certainty about the nature of the rights it seeks to protect and seems to have been used to secure rights in only a few cases. Awareness between government officials and the people they are supposed to protect is deficient.[214] Communities are given the right to deprive individuals or families of their holdings by a majority vote according to the community's custom and usage by the *IPILRA*. Compensation can only be provided when the land is being disposed of. A family member may not be covered by *IPILRA* or qualify for compensation if they were deprived of land due to a change in land use agreed by a community. This was provided to rescue some flexibility in land use in customary areas.[215] This Act tried to protect the rights that people have in land. This includes the rights of people who hold land under PTOs. It is only unfortunate that this Act is limited in some ways. I think it would have been much better if this Act could protect the rights of people who hold land under PTOs to such an extent that it makes it mandatory for the State to survey

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213 Clark & Luwaya, “Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa”, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):8.

214 Clark & Luwaya, “Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa”, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):9.

215 Beinart *et al*. 2017:29.

the land. At least this way, it would be much easier for PTOs to be upgraded into ownership.

3.10 *COMMUNAL LAND RIGHTS ACT* 11 OF 2004 (*CLRA*)

The *CLRA* aimed to provide tenure with legal security by transferring communal land to communities and providing for the democratic administration of communal land. The management and administration of communal land were to be exercised by land rights boards and land administration committees appointed for the benefit of the community members as per sections 22(2) and (4). To complete this, a prediction was made that the Department of Land Affairs would control a broad land rights inquiry, after which a determination of the boundary and size of the land would be made.[216]

Another aim was to secure the tenure of individuals and communities through a two-stage process and by affording structures and entities to manage and control rights. The first stage involves a process in which insecure old-order rights are transformed, replaced, or replaced by new-order rights. In the second stage, these rights are registered and recorded. Old-order rights are formal or informal, registered or unregistered rights which result from pre-constitutional legislative measures and are recognised by the law. Before the old-order right is transformed, a land rights inquiry must be undertaken to determine the nature of the rights that exist, who holds such rights, how it is exercised and the scope of the right.[217]

This Act provides for a land administration committee representing the community. It is responsible for allocating and registering land rights, promoting and safeguarding the community's interests, establishing and keeping relevant registered, etc. It also provides for the land rights board, which ratifies the decisions related to the disposal of communal land. In a community with a traditional council, the duties and powers of a land administrator committee may be performed and exercised by such a council. The traditional council must then comply with sections 22(4) and (5), which provide for the representation of vulnerable community members.[218]

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216 Pienaar 2013:22.
217 Pienaar & Du Plessis 2010:84.
218 Pienaar & Du Plessis 2010:85.

When *CLRA* was passed, it was highly contested, with several civil society groups asking questions about its constitutionality in parliamentary portfolio committee hearings. Four rural communities legally challenged it on different grounds of constitutional invalidity, so the Act was never implemented.[219] When this Act was passed, it alarmed many activists and academics because it gave chiefs greater authority over land and failed to improve tenure security for ordinary or vulnerable people. It fixed a view that South Africa had people who were either citizens with full rights or subjects in communal areas.[220]

The main concern that many rural communities had was that the *CLRA* would have undermined the security of their tenure because it granted extensive powers to traditional leaders and councils, including control over the use, occupation, and management of communal land. The Act revived the pattern of economic and political conquest that existed in the apartheid's Bantustan system. The Department of Land Affairs stated that chiefs would make decisions for the people, which would be customary for them, even though the evidence of history disagrees with this.[221]

The *CLRA* gave provisions for transferring title in communal land to communities subject to different conditions. For the community to qualify for the transfer of title, the community would have to draw up and register a set of tenure rules for it to be recognised as a juristic person capable of owning land. The community boundaries will have to be surveyed and registered, and all the people residing in the community to be subjected to a rights enquiry to investigate the nature and extent of the existing rights and interests in land. The Act created land administrators who would, on behalf of the community, enforce rules and exert ownership powers.[222]

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219 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):11.

220 Beinart *et al*. 2017:15.

221 Weinberg 2015:14.

222 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):11.

According to section 21(1) of the *CLRA*, traditional councils recognised in terms of the *Traditional Leadership and Governance Framework Act* 41 of 2003 are allowed to act as land administration committees. It was uncertain whether communities could choose the entities that acted as the land administration committee. The Department of Land Affairs claimed that communities were able to choose between their traditional council or some other entity. The Department of Provincial and Local Government claimed that the existence of traditional councils would automatically become the land administration committees.[223]

What deepened the issue was the fact that the *CLRA* failed to provide a clear set of procedures for how the community should make such a choice. Therefore, traditional leaders and councils got powers over land that was granted to them by the Act. This undermined the tenure security of people who were living in communal areas and had a relationship with traditional leaders that ranged from good to distant and hostile. The Act also strengthened traditional leaders and councils politically when the relationship between them and the elected local government officials remained unresolved and frequently tense.[224] Traditional leaders and councils would have been granted wider powers over land than provided for in customary law and would have undermined the local Indigenous accountability structures. This would make it difficult for ordinary people to hold traditional leaders accountable.[225]

The Act was challenged in court on several grounds. In October 2008, the North Gauteng High Court[226] declared fifteen fundamental provisions of the *CLRA* invalid

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223 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):11.

224 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):11.

225 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):12.

226 *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*, Case No 11678/2006, North Gauteng High Court, Pretoria, 30 October 2009, unreported.

and unconstitutional, including those governing the transfer and registration of communal land, The Minister's determination of rights, and the establishment and composition of the land administration committee. Therefore, the provisions were struck down on substantive grounds.[227] When the decision was referred to the Constitutional Court in 2010 for confirmation, the *CLRA* was entirely struck down on the basis that the incorrect public consultation process had been followed in its journey through Parliament. Even though the Constitutional Court did not agree to deal with the substantive issues raised by the applicant committees, the grave outcry against the *CLRA* indicated that people in communal areas opposed traditional leaders having total power over the land they used and occupied.[228] Instead of securing tenure enough to have the land secured, this Act gave too much power to the traditional leaders. The result of this is to have more PTOs. This Act was unfortunately struck down in 2010 by the Constitutional Court. I believe this is unfortunate because the Act would have helped in solving what I find to be a problem with the issuing of PTOs. I believe that PTOs lead to poverty and they have a sense of inequality. This is because people with PTOs cannot hold their land or houses as security. This limits them from doing this like taking out a loan or having a mortgage bond. This is in a sense unfair because people with ownership can enjoy this right without a hustle.

3.11 *SPATIAL PLANNING AND LAND USE MANAGEMENT ACT* 16 of 2013 (*SPLUMA*)

The important role of municipalities and cities in shaping the future of societies lies in land and use management. This is legally governed by the planning laws that control the lawfulness of structures. The planning framework produces planning instruments that form the economies and influence the political and social life in towns and cities. The land use management framework went through a big transformation when the regulation of land use planning and management was transferred from provinces to

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227 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):11.

228 Weinberg 2015:14.

local governments.[229] Finally, a single national piece of legislation in South Africa that creates a predominant framework for spatial planning, land use management, and policy for the whole country, including informal and rural settlements, has been enacted. This is the *Spatial Planning and Land Use Management Act* passed by Parliament in 2013.[230]

The Act is aimed at giving a framework for special planning and land use management in South Africa; to afford the development, efficient, equitable, and inclusive spatial planning at the different spheres of government; to provide a framework for the coordination, monitoring, and review of the spatial planning and land use management system; to afford a framework for principles, standards, norms, and policies for spatial development planning and land use management; to encourage huge uniformity and consistency while applying the procedures and making decisions by authorities responsible for land use development and decisions applications; to provide for the creation, operations, and functions of the Municipal Planning Tribunals; to provide for the enforcement and assistance of land use and development measures; and any other connected matter.[231]

Spatial plans connected with zoning schemes are the basis of the planning system. However, zoning[232] has received much criticism as a land use management tool. It has been said to be socially and exclusionary, environmentally, and economically unstable.[233] More problems are the absence of surveyed communal land and urban property's costly registration and transaction.[234] Land use management implements mechanisms for spatial plans and policy and realises the principles in practice. *SPLUMA* utilises land use schemes based on zoning as an essential tool.[235]

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229 Msuya 2023:46.
230 Nel 2016:79.
231 *Spatial Planning and Land Use Management Act* 16/2013. These goals are reflected in the development principles, namely, spatial sustainability, efficiency, spatial justice, spatial resilience, and good administration. In addition to these principles, *SPLUMA* develops a spatial planning system that incorporates spatial planning, policy, and land use management, especially at the local government level. See in this regard Nel 2016:80.
232 Zoning defines the rules regulating the time and location that people and institutions can or cannot build and work in our towns, cities, and suburbs. By so doing, it sets a restriction on the location and the method of how people live, play, work, and exercise their rights to citizenship. See in this regard Nel 2016:82.
233 Nel 2016:79.
234 Msuya 2023:45.
235 Nel 2016:80.

Before the enactment of the *SPLUMA*, every province had a set of acts governing land use within its boundaries. *SPLUMA* incorporated all the provincial acts under one national legislation. *SPLUMA* was passed to create a new framework that will govern the planning permissions and approvals, determine lawful land use, and set parameters for new planning developments. It was necessary to have the law after the repeal of planning laws in the apartheid era,[236] which left the laws uneven, inconsistent, and complicated. This Act sought to grow a comprehensive, practical, and uniform system of planning that promotes economic and social inclusion. This Act authorised the Department of Rural Development and Land Reform (DRDLR) to pass regulations. The Minister of Rural Development and Land Reform issued *SPLUMA* Regulations under section 54 of *SPLUMA*.[237] The new law was passed after there were so many disagreements. This is because of the powers this Act and its Regulations offer traditional councils. Traditional councils have powers related to planning and land use governed by regulations 19(1) and (2) of the *SPLUMA* Regulations.[238] Regulations 19(1) and (2) reads:

> (1) A traditional council may conclude a service level agreement with the municipality in whose municipal area that traditional council is located, subject to the provisions of any relevant national or provincial legislation, in terms of which the traditional council may perform such functions as agreed to in the service level agreement, provided that the traditional council may not make a land development or land use decision. (2) If a traditional council does not conclude a service level agreement with the municipality as contemplated in sub-regulation (1), that traditional council is responsible for providing proof of the allocation of land in terms of the customary law applicable in that traditional area to the applicant of a land development and land use application for that applicant to submit it following the provisions of these Regulations.

Traditional councils are authorised to give proof of customary land allocation to anyone who lives in that traditional area and has applied for land use and development. It will then be possible for traditional councils to define the content of customary law. A

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236 The Acts that were repealed included the *Physical Planning Act* 88/1967, *Removal of Restrictions Act* 84/1967, the *Physical Planning Act* 125/1991, the *Less Formal Township Establishment Act* 113/1991, and the *Development Facilitations Act* 67/1995. In 2015. See in this regard Msuya 2023:47.

237 Msuya 2023:47.

238 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):16.

potential for local land allocation to be taken over by traditional councils will be created. Suppose it is assumed that traditional councils are the only structure with the power to decide what the content of customary land rights should be. In that case, it will challenge the customary laws and practices of many rural communities. Land allocation and management occur at multiple levels for many of the communities. Local customary law is consequently characterised as a layered system instead of a system that centralises power in traditional councils.[239]

Without provincial legislation, many local municipalities have implemented draft municipal bylaws as a base for land use management. While established by model bylaws, municipalities are free to adjust their planning bylaws to meet local circumstances, which leads to adaptations between municipalities and provinces. Many settlements in South Africa are still spatially destroyed with a high extent of spatial exclusion. The municipality has excluded most areas under traditional authorities from land use management, just like informal settlements and townships, which were previously excluded. *SPLUMA* needs land use schemes to make provision for the permission of the incremental introduction of land use management and regulation in slums, informal settlements, and areas that were not previously subject to land use schemes.[240]

People have questioned the constitutionality and the right of traditional councils to be legally granted land planning and land use powers in terms of service-level agreements with municipalities. This is because the *Constitution* has no provision about the traditional council and its exercise of governmental powers.[241] It was held in the case of *Certification of the Constitution of the Republic of South Africa*[242] that the *Constitution* of 1993 would have said so if traditional leaders were supposed to have

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239 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):16.

240 Nel 2016: 81.

241 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):16.

242 *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC).

governmental powers and functions. It was only stated that there should be a recognition of traditional leaders' role, institution, and status. This is how traditional leaders are recognised in the *Constitution*, which is[243] subject to customary law. There is a failure in the Regulation to clarify how the traditional leaders will be held accountable for the land use management powers and functions that they fail to perform in respect of a service level agreement or for the responsibility of providing proof of customary land allocations.[244] This Act can be used to shape the land and use management. It can make it mandatory for the land to be surveyed and made secure. It can be made mandatory for tenure to be upgraded into ownership. The power of changing the status of land ownership and PTOs in South Africa lies in this Act.

3.12 CONCLUSION

There are still properties in South Africa that are held in PTOs. This section outlined the laws that influenced communal land tenure and the permission to occupy such land in South Africa. As this section has shown, there have been several laws developed by the government to regulate land tenure and PTOs. In the past, land bought from whites was meant to expand the land the Bantustans had and to subdivide some of it into small farms for individuals. The Acts such as the *Native Trust and Land Act* and the *Group Areas Act* divided people according to their race. The non-whites were not allowed to own land, and they were also not allowed to occupy land of a group they did not belong to without a permit. The *Natives Land Act* stopped the acquisition of non-urban land by blacks outside scheduled reserve areas. The *Development Trust and Land Act* controlled the vesting of title to reserve land in trust and limited black people's rights of residence in white areas. Blacks were left landless due to the segregation between blacks and whites before 1950.

When the *Group Areas Act* was enacted, a complete national system of racially based controlled land rights was formed. The *Land Act* was abolished in 1991 by the *Abolition*

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243 *Constitution*:sec. 211.

244 Clark & Luwaya, “Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa”, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):17.

of Racially Based Land Measures Act. It freed the non-whites and gave them an allowance to buy and own land as titleholders anywhere they wished. However, the government has not yet been able to enact laws that speak directly to communal land and PTOs. This only applied to land registered in the Deeds Office, not the PTO landholding. The passing of the *ULTRA* was to make provisions for both urban and rural land. The following chapter will discuss the inequalities suffered then and are still being sustained by landowners due to landowning differences. An Act was published in 2013 to create national legislation for managing land use and planning cities and towns. This Act was designed to redesign cities and towns and secure the future. Some of these Acts will be explained further in the coming chapter to further show how they have influenced communal land tenure and the development of PTOs.

PTOs are often found in former rural areas. The Ingonyama Trust Board decided to request all PTO holders to convert their PTOs into long-term leases. Some PTO were converted, and rental payments have been received from the tenants. This hinders PTO holders from moving forward into having strong rights. The conversion of PTOs was put on hold after the National Assembly's Portfolio Committee on Rural Development and Land Reform had questions about the program. This was then taken to the Pietermaritzburg High Court for the conversion to be declared unlawful. The Act discussed above does not solve the problem that I have, as I have stated a couple of times above. As long as PTOs are still being issued, the land will continue to be insecure, and there will still be poor people. With all the Acts that I have discussed above, I think none of them developed the status of PTOs for the better. This is because I hold the belief that developing PTOs for the better can be done by giving it the same status as ownership.

CHAPTER 4: THE INEQUALITIES OF RULES APPLIED ON PERMISSION TO OCCUPY AS OPPOSED TO TITLE DEEDS

4.1 INTRODUCTION

Roman-Dutch and English law heritage has produced the South African property law concept. This system is formed by a principle that holds that landholding of the highest form is through real rights held by an individual with respect to an object. Forms of landholding other than individual tenure are also recognised in Roman-Dutch law. It has been provided in the *Deeds Registries Act* 47 of 1937 that real rights can be registered in the Deeds Registry. This gives holders the right to protection and remedies that can help them resist interference with their property.[245] Most societies, clans, tribes, and other groups have observed private property. They then concluded that the great end for men entering a society was to secure property. In the legal institution of occupation, the origin of property is sought, whereby rights over objects that can be physically controlled are acquired.[246]

Different rights are awarded to people who occupy and use land. Some people are awarded real rights, and some are awarded personal rights. The difference between these rights forms the foundation for the law of property division into the law of obligations and the law of things. There is a practical significance in the difference between the two rights as different consequences are found in real rather than personal rights. Historically, the difference between the two rights was taken from the Roman procedural difference between *actiones in rem* and *personam*.[247] Roman-Dutch law writers of the sixteenth and seventeenth centuries and glossators have written extensively about the difference between the two rights.[248] How most people in South Africa hold and occupy land, mostly with customary property relations, significantly differs from common law in its origin of property and the rights people have in real estate.[249]

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245 Mabasa & Mabasa 2021:61.
246 Van der Merwe & De Waal 1993:3.
247 If a lawsuit is directed to determine the title of property (in rem) it must be files where the property is found, and it can only be enforceable there. A judgment in personam can be enforceable against a person wherever they are. Derived from Hill & Hill “The People's Law Dictionary”, https://dictionary.law.com/ (accessed 20 October 2024).
248 Van der Merwe & De Waal 1993:35.
249 Mabasa & Mabasa 2021:61.

The current property ownership system is mainly based on individual ownership and does not include the reality of the indigenous law system.[250] The case of *Nedbank Limited v Molebaloa*[251] illustrates that the de facto reality of life in a large part of South Africa is disconnected from private law property rights. According to customary law, people occupying a family home effectively enjoy the right to be co-owners. This is not the same in private law, wherein occupiers' rights are dependent on the wishes of the owners who are registered. If the rights of the occupiers had been registered in the Deeds Registry as co-owners, they would enjoy much stronger rights and be able to defend themselves if ever they were being removed from the property. It is recognised by the Deeds Registry that unrecorded rights can be enforced. Brits state that original modes, such as marriages in a community of property and prescription, can create or have real rights acquired.[252]

This article will show how there is inequality between the rights awarded to people in possession of title deeds and those with PTOs. There are currently acute levels of spatial inequalities, with people living in the former homelands being worse than those living in other parts of the world. This inequality has increased social unrest because of the increase in rural-urban migration and informal settlements.[253]

4.2. THE RIGHTS AWARDED IN THE LAND TENURE SYSTEMS

4.2.1. Real rights and personal rights

First, the step of protecting rights is taken by classifying them.[254] There have been two main theories established historically about the theoretical difference between real and personal rights. The two theories are the personalist theory and the classical theory. The nature of the personalist theory is derived from the importance it gives to persons against whom a particular right operates. This theory entails that a real right is absolute

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250 Brits 2018:348.
251 *Nedbank Limited v Molebaloa*.
252 Mabasa & Mabasa 2021:77.
253 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):29.
254 Beinart *et al*. 2017:54.

and prevails against the whole world. A personal right is comparative in that its enforcement can only be against a particular person who is the other party to an obligation. The nature of the classical theory is derived from its accordance with the difference from Roman law. According to this theory, the only difference between a real right and a personal right is the object of the right. The primary concern of real rights is the relationship shared between a person and a thing, and the nature of personal rights is the relationship shared between two persons.[255]

A person with real rights is afforded control power over a thing, and a person with a personal right is afforded a claim against a person who is a party to an obligation.[256] The fact that some interests of a person who holds a real right are protected more than those of a person with a personal right does not mean that a real right is more absolute than a personal right.[257] I will discuss the two rights separately below.

4.2.1.1. Real rights

An object of a real right is a thing which is bound to the owner of the right. A direct connection is established by a real right between a persona and a thing, and the person who owns the thing has control over the thing within the limits of his right. As a rule, a real right holder's power of direct control is protected against other legal objects' interference.[258] A real right holder has the power to control a thing as an object.[259] Real rights can be enforced against everyone because they are absolute. A holder of a real right can claim his thong from any person in possession of it in terms of the *maxim ubi rem meam invenio ibi vindico*. The absoluteness of a real right can be found in the notion of ownership as the most comprehensive power in respect of a thing. Except for co-ownership and trust ownership, two or more people may have full ownership over the same thing simultaneously.[260]

Ownership is the widest real right, and it can be differentiated from limited real rights, which do not give rise to such wide powers. An owner cannot have ownership simultaneously with limited real rights over the same thing. The union of limited real

[255] Van der Merwe & De Waal 1993:36.
[256] Van der Merwe & De Waal 1993:37.
[257] Silberberg & Schoeman 1983:40.
[258] Silberberg & Schoeman 1983:38.
[259] Silberberg & Schoeman 1983:42.
[260] Van der Merwe & De Waal 1993:7.

rights and ownership in one person terminates the limited real rights.[261] Although real rights are seen to be absolute because of their enforceability against every legal subject, they should be overemphasised for two reasons. The first reason is that there are exceptional circumstances where real rights cannot be enforced. Secondly, personal rights are supposed to be respected by everyone because an infringement against it is actionable in law since personal rights are protected by the doctrine of notice.[262]

As already mentioned above, real rights have basic features, which are (a) its object is a corporeal thing; (b) a holder has direct power over a thing; (c) real rights are absolute; (d) these rights mostly get preference in terms of insolvency; (e) when there is a conflict between two people, the *maxim prior in tempore potior in iure* is applicable; (f) there are certain measures of publicity that follow a transfer of real rights; and (g) juristic facts like prescription, transfer, accession and occupation can give a flow of real rights which are not dependant on an agreement between two parties entering into a contract. These criteria cannot be applied to classify a right which has not yet been classified since they are derived from positive law to interpret a prototype of a real right. Roman law recognised a numerous clause of real rights, which are dominium (ownership) servitudes, mortgage, pledge, and perpetual quitrent, due to them not being in favour of burdening land with several land burdens.[263] Real rights are registered in the Deeds Office. This offers the rights some protection.[264]

4.2.1.2. Personal rights

A person with personal rights becomes bound to the owner of the right so that a particular performance can be rendered. The performance can be to do or not to do something. The performance then becomes the object of the personal right. There is never a direct legal connection between a holder of a right and a thing.[265] It is only based on a special legal relationship (e.g. contract and some other good and sufficient

261 Van der Merwe & De Waal 1993:8.
262 Silberberg & Schoeman 1983:42.
263 Van der Merwe & De Waal 1993:38.
264 Badenhorst *et al*. 2006:65.
265 Silberberg & Schoeman 1983:38.

cause) where a personal right can usually be enforceable against a particular person or association of individuals.[266]

4.3 THE DIFFERENCE BETWEEN OWNERSHIP AND PERMISSION TO OCCUPY

4.3.1 Ownership

Ownership is one of the cornerstones of any legal system. This concept was established long ago, and it influences the relationships between community members and determines the nature of relationships formed between legal subjects and things.[267] It is difficult to define ownership simply since it is based on different points of departure. The definition formulated will depend on the emphasis placed on various aspects of this concept. Social, historical, religious, political, economic, philosophical, and judicial factors must be considered when defining ownership.[268]

Ownership has been defined in the case of *Gien v Gien*.[269] It has been defined as the most complete real right that a person can have regarding a thing. A person with ownership rights over immovable property can do whatever he/she pleases. With this insight, ownership has been believed to be an absolute and individualistic right. What is implied by the right being absolute is that it is an unrestricted right in principle. Ownership, being the right of one's own thing, is mostly differentiated from the other rights by the principle of absoluteness, as it is the most complete right. Limited real rights like pledges, leases, mortgages, and servitudes flow from ownership as the mother right. The concept of ownership means that a person who has ownership over a thing has direct control over that thing, which can be enforceable against the whole world.[270]

Ownership does not only embrace the power of use and enjoyment of fruits. It also embraces the power to dispose of, possess, and reclaim a thing that has been withheld wrongfully and resist an unlawful invasion of a thing.[271] As a real right, ownership can be acquired by way of transfer from one person to another. In the case of land, such

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266 Silberberg & Schoeman 1983:39.
267 Oliver *et al*. 1992:28.
268 Oliver *et al*. 1992:30.
269 *Gien v Gien* 1979 (2) SA 1113 (T).
270 Badenhorst et al. 2006:92.
271 Van der Merwe & De Waal 1993:98.

right can be registered in the Deeds Office.[272] Since ownership was formulated long ago, it was called *dominium* in Roman Law. This meant it was the strongest real right a person could have over an object or a *res*. *Res* was widely defined, and it included movable, immovable, corporeal, and incorporeal property. There are remedies such as *rei vindicatio* that protect ownership. *Rei vindicatio* is used by owners to regain control over their properties.[273]

A person who owns the land has the strongest right over it, which gives him a nearly undisputable right that stops other people from interfering with it. Ownership, as stated above, is an absolute right. Its absoluteness does not mean that it is free from restrictions. The maxim plena in re potestas explains the Roman concept of ownership. This means that individuals with ownership over a thing can exercise it however they please, as long as it is not over the limits of the law.[274] Can this right be registered? This will be answered in the topic below.

4.3.1.1 The system of registration of title deeds

Since the Cape's early days, land ownership was transferred by public registration rather than private conveyancing. Although the system was initially underdeveloped, real rights were registered in the same form.[275] Like with other forms of property, the main factor of registration is intention. Ownership cannot be passed by a mere title deed without intention.[276] At the outset, the secretary of a political council or a staff member used to draw grants and have them signed by the commander and countersigned by the secretary.[277] The grant would be handed to the new owner after the company's seal had been placed on it and only after it had been copied into a book. In the event of successive transfers and mortgaging of that land, the person transferring or mortgaging appeared before the secretary and two political council delegates and signed the concerned deed in their presence. The secretary would then countersign the deed and record it in case of grants. The office of the Registrar of Deeds was then established in 1828. The Registrar took over the duties of the

[272] Van Wyk 2012:67.
[273] Mabasa & Mabasa 2021:63.
[274] Mabasa & Mabasa 2021:64.
[275] Carey Miller & Pope 2010:45.
[276] Carey Miller & Pope 2010:47.
[277] Silberberg & Schoeman 1983:88.

commissioner and the secretary in the attestation of deeds of transfer and mortgage bonds. A conveyancer authorised by a power of attorney to act on behalf of an owner is responsible for executing deeds of transfer and mortgage bonds in the presence of a registrar, which the registrar will attest.[278]

As provided in section 102 of the *Deeds Registries Act*,[279] Only conveyancers practising within the province where the deeds registry is located may prepare mortgage bonds, deeds of transfer, certificates of title, etc. When deeds are lodged for registration only, the registrar will distribute the registration through both execution and attestation. Registration will occur after the registrar has signed the registry endorsement of the deed.[280] There has been a question of whether the South African land registration system must be categorised as a system of registration of deeds or as a system of registration of title. Silberberg answered this question by first explaining the two concepts. Registration of deeds signifies a system that records deeds at their face value. For example, it can be done without paper examination and without being linked to any proper cadastral system, but only conversing priority on registered deeds over unregistered deed deeds.[281]

A register of titles is an authoritative record of the rights that define the units of land that exist at any time. Its features include simplicity, cheapness, security, suitability to circumstance, simplicity, completeness of records, expedition, and accuracy. This is more advanced in practice. Most of the features that a system of title registration has may, in some circumstances, also characterise the registration of deeds. This raises another question of trying to determine the factor which will give the difference between the two and help us classify a system in a borderline case. The effect of the registration would seem to be decisive in the case of the difference between positive and negative systems. If the registration acts as a warranty of title in the person registered as a holder, it will be regarded as a registration of title. If it doesn't, it will be regarded as a registration of deeds.[282]

It is essential to remember that the registration of deeds and registration of titles are not to be believed to be two distinct and separate systems. A system of title registration

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278 Silberberg & Schoeman 1983:89.
279 *Deeds Registries Act*.
280 Silberberg & Schoeman 1983:90.
281 Silberberg & Schoeman 1983:108.
282 Silberberg & Schoeman 1983:108.

must not be seen as superior to the system of registration of deeds. The system of land registration cannot, in South Africa, be classified as a system of title registration.[283] Registering real rights in the Deeds Office protects people who own things in the registered names. It provides convincing proof of a person's real right over a thing. Not all rights can be registered. Only real rights such as ownership, mortgages, usufruct, or servitudes can be registered.[284]

According to section 63(1) of the *Deeds Registries Act*, rights in immovable properties are divided into ownership, limited real rights, and other forms of land tenure that cannot be registered in the deeds registry. Ownership is an individualised right that is enforced strictly and is protected by court actions. They can only be transferred by registration in the Deeds registry. Other forms of land tenure are weak rights, which are permit-based entitlements to use or occupy land that cannot be registered. This can be because the land is not surveyed or because it is impossible to individualise land-use rights in communal property.[285]

Two recent developments in the registration system show the acceptance of an attitude that is more flexible towards registering communal and fragmented use rights. Firstly, there is a different procedure to that of surveyed and individualised land followed in the case of sectional titles. A sectional title unit will be registered in a sectional title register of a specific scheme held at a Deeds registry and not in the conventional land register. The difference is that the management structure of the sectional title scheme also forms part of the register. Secondly, a fully computerised land registration system (e-DRS) has been being examined by the Chief Registrar of Deeds since 1998. It has been predicted that the development will allow conveyancers linked to the central registration computer system to make a paperless lodging and electronic verification of information. This development will allow different land tenure systems to be incorporated into different registers but in the same registration system.[286]

283 Silberberg & Schoeman 1983:109.
284 Mabasa & Mabasa: 2021:66.
285 Pienaar 2013:20.
286 Pienaar 2013:21.

4.3.2 Permission to occupy

Permission to Occupy (PTO) is a personal right that permits a user to have rights over a rural piece of land that is not surveyed to use or occupy. Because of its nature, these rights cannot be registered in the Deeds Registry but can be registered in other state departments.[287] Pre-colonial systems were modified by government proclamations and control over many years and were still far from being standard.[288] This was the case before and after the apartheid era. During this period, the system of Permission to occupy was slowly introduced to most areas with customary tenure. It commonly covered both arable and residential sites when the former were available.[289] In African holdings in the former homelands, PTOs became the most common form of government regulation in the twentieth century. They were used as a way of government regulation and control in the customary land tenure. The system was gradually developed by the state in different parts of South Africa, starting in the Cape. Officials and headmen were responsible for the distribution and allocations of existing and new sites.[290]

The idea was to make people aware of the registers and issue certificates to genuine men who were landholders and married. Hut taxes were supposed to be paid by people who had such allocations. There was then an initial uneven implementation of the PTO system. Under the *Native Trust and Land Act* of 1936, the PTO system was effectively extended on land and purchased subject to the restoration under Proclamation 116 of 1949. Although pacing was done to the land allocated under the PTO system to measure them roughly, the lands were never surveyed.[291] Written certificates were allocated with the occupier's names from the magistrate's office.[292] It was only residential plots that PTOs were being issued for when land started becoming scarce in many reserved areas. The PTOs issued had conditions attached to them, allowing the state to take away the rights of people who would fail to pay taxes, absent people, and convicted criminals.[293]

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287 LexisDigest, "Permission to occupy", https://www.ghostdigest.com (accessed on 12 April 2023).
288 Beinart & Delius 2021:87.
289 Beinart & Delius 2021:88.
290 Beinart *et al*. 2017:19.
291 Beinart *et al*. 2017:19.
292 Beinart & Delius 2021:88.
293 Beinart *et al*. 2017:20.

The state made sure that PTOs could not offer landholder and occupants ownership. Chiefs and local headmen were sometimes ordered to reallocate land. Homeland governments adopted this system in the 1950s, and some gave themselves more legal powers over the land. Certificated land rights were issued to many families, which showed their customary entitlements. The families were entitled to a residential plot with a space for livestock kraal, a garden, access to communal grazing, and a field. The land was then regarded as customary land, and the PTOs were used to secure it. Since people had no ownership rights over the land, they could not sell nor buy such land. Communities acting with local political authorities, such as chiefs and headmen, could allocate new plots to people and have them confirmed by the state.[294]

A dedicated member informed a relevant official of that community.[295] The allocation would then be entered in the land register by the official. The head of the family would receive the PTOs. If a man was granted the PTO and later died, the PTO would continue with the widow in the name of the deceased man only if the woman were the head wife of the man.[296] Although it issued many PTOs, the PTO system was never complete. In some areas, magistrates and local Native Commissioner's offices kept copies of the PTOs. No information on the specific locations and sizes was recorded and could be searched in the manner of the Deeds Registry because the land was not surveyed.[297] There were a lot of disorganised PTO records by the end of the Homeland era in the early 1990s.[298] This was because the system has largely broken down since 1994 without clarity on its legal status.[299]

PTOs were seen as an insufficient and unequal right to land during the transition to democracy. For this reason, they were no longer formally issued. In some areas, the local and provincial authorities continued to issue them in the allocation of land, although their legal status was uncertain. Currently, there are three types of modified customary and PTO land tenure: former homelands with no PTOs, areas with the old PTOs, and new areas with PTO allocations or without them.[300] The Presidential Advisory Panel on Land Reform and Agriculture estimated that 60 per cent of South

294 Beinart *et al*. 2017:20.
295 Pienaar & Du Plessis 2010:79.
296 Pienaar & Du Plessis 2010:80.
297 Beinart *et al*. 2017:20.
298 Beinart *et al*. 2017:22.
299 Beinart & Delius 2021:88.
300 Beinart *et al*. 2017:22.

Africans operate outside the formal property system. It also found that, to date, there has not been any sign of an intention to develop the property system and change the colonial foundations.[301]

Of all the available tenure rights, PTO is the least formal, least administrative, and most flexible and easy to understand. A sketch plan constructs a PTO, whereas the other tenure rights are built by a cadastral diagram, which must be approved according to a land Survey Legislation and Spatial Planning policy. A PTO right ceases to work when the holder dies. The beneficiaries of the deceased holder cannot inherit it. No financial institution can accept a PTO as a real security because it is a personal right. This means a holder cannot use it to take a mortgage or secure a debt.[302] Unlike ownership, PTOs have different rights in regard to registration. I will explain this in the topic below.

4.3.2.1 Registration of the right of permission to occupy

As mentioned in Chapter 2,[303] the right awarded to a landholder under PTO cannot be registered. This is why such rights are referred to as off-register rights.[304] Section 63(1) of the *Deeds Registries Act*[305] stipulates that personal rights may not be registered subject to the exceptions below. If a personal right has been registered by mistake, it will keep its character and can be cancelled if an interested party approaches the court.[306] The categories of personal rights that can be registered are:

a. Section 63(2) of Act 47 of 1937 provides that the prohibition in section 53(1) cannot be applied to the terms and conditions of leases, mortgage agreements, or other similar contracts. The personal rights part of the agreements will not become real rights upon registration.

b. Personal rights that have a connection to registrable real rights can be registered as well. This is evident in the case of *Ex Parte Geldenhuys,*[307] where the acquirer of a homestead was obligated to pay a sum of money to each of

301 Mabasa & Mabasa 2021:94.
302 LexisDigest, “Permission to occupy”, https://www.ghostdigest.com (accessed on 12 April 2023).
303 Chapter 2 under topic 2.2.2 which is about communal land tenure.
304 Pienaar & Du Plessis 2010:79.
305 *Deeds Registries Act*.
306 Van der Merwe & De Waal 1993:47.
307 *Ex Parte Gledenhuys* 1926 OPD 155.

the remaining children, which was deemed as registrable because it was connected intimately to the conditions of the will that were registrable.

c. The *iura in personam ad rem acquirendam* (personal rights in respect of registrable real rights) a registrable due to a remark made in the case of *Registrar of Deeds (Tvl) v The Ferreira Deep Ltd*[308] Such rights are personal until they are registered and converted to real rights.[309] This remark must have been made after looking at section 102 of the *Deeds Registries Act*, which states that a right becomes real upon registration. Registration of personal rights does not make the right real, but it only makes it public to have the world restrict the ownership of the land where the personal right has been registered.

d. *Onera realia* (real burdens) are personal rights that can be registered. De Villiers also mentioned in the case above that these rights can become real upon registration. These rights impose personal obligations on the landowner.[310]

Silberberg believes that personal rights are not supposed to be deemed to be known because they are registered, just like it cannot be ascribed to everyone about the existence of every registered real right. The legal consequences that must flow from any real right created by other methods should be the same as those that flow from registering a real right. It is, therefore, the creation of a real right and not registration *per se* which causes a right to obtain real effect, although registration is one of the requirements for the creation of a real right. Therefore, there is doubt on whether registering a personal right can have a real burden on the land.[311] The registration of a personal right has no consequence at all. The registration cannot turn the personal right into a real right and cannot constitute a real burden on the land. When there has been a registration of a personal right against the title deed of land, a subsequent transfer of the land to any other person by the pre-emptor, other than the pre-emptor himself, will be allowed by the registrar unless the pre-emptor has lodged a written consent. A third party will only know about the registered personal right after the acquired real right is registered. They will not be allowed to defeat the personal rights

308 *Registrar of Deeds (Tvl) v The Ferreira Deep Ltd* 1930 AD 169.
309 Van der Merwe & De Waal 1993:47.
310 Van der Merwe & De Waal 1993:48.
311 Silberberg & Schoeman 1983:57.

registered.[312] Failure to register the right is not the only differentiation that there is regarding ownership and PTO. There are other areas where differentiation is shown. I will mention and discuss them below.

4.4 MORE AREAS WHERE INEQUALITY IS EVIDENT

4.4.1 Security of tenure

Security of tenure is being able to defend one's ownership, use of land, occupation, and access to land legally and practically from interference by other people. One serious element of this concept is to be protected from unlawful or arbitrary evictions from one's home. There is a high risk of losing rights over land under an insecure tenure. People living in communal areas face many challenges because of the legal insecurity of their land tenure. In most areas, people who have been using and occupying land for a long period undisturbed suffer because they don't have a strong legal claim over the land. The vulnerability of the groups that were historically marginalised and dragged the impact of apartheid's racially discriminatory laws has been worsened by the insecurity of the land. It places these groups at a risk of dispossession and exploitation. Not having a secure tenure has also deepened the socio-economic disadvantages that people experience in communal areas.[313] Section 25(6) of the *Constitution*[314] provides for the security of tenure.[315]

The provision gives people whose tenure is insecure because of past racial discrimination laws a right to have a secure tenure or comparable redress under a provision of an Act of Parliament. This provision is supported by section 25(9), which requires that the government pass legislation that will effect the provision. The

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312 Silberberg & Schoeman 1983:58.

313 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):3.

314 *Constitution*.

315 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):4.

government is constitutionally obligated to protect and strengthen people's rights over land in communal areas. Although there have been laws enacted to improve the security of tenure of labour tenants and farm dwellers, there has not been legislation, other than the *IPILRA*, in place to promote and secure the land rights of people living in the former homelands.[316] People living in communal areas may be vulnerable to exploitation in the form of land grabs because of their lack of insecure tenure. Land grab refers to, for example, when governments, transitional and national companies, and land speculators acquire a large amount of land in rural areas. This could be in the way of long-term leases or sales.[317]

Land grabs are meant for areas that are not used, but they are sometimes used to acquire land used and occupied in rural or communal areas. The effect of land grabs on tenure security and the livelihood strategies of households that depend on the land in communal areas is overwhelming. There is a high risk for these people as their rights to use, occupy, and access land could be dispossessed. The inequality is worsened by the instability of people living in communal areas because of high levels of poverty and insecurity of tenure. The disadvantage of this insecure tenure is that it leaves people vulnerable and unable to resist and make choices freely about the acquisition of land by governments, companies, and land speculators.[318] The fall of land administration systems in former homelands has intensified tenure security in communal areas. The former homelands had a complicated land administration system, which the apartheid government created. The system was established on numerous laws and regulations. When this system collapsed, it greatly affected the

316 Clark & Luwaya, “Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa”, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):4.

317 Clark & Luwaya, “Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa”, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):4.

318 Clark & Luwaya, “Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa”, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):20.

accuracy and reliability of official land records and registers of land rights in communal areas. The most affected areas are the provincial departments that maintained the records and the traditional council offices.[319]

Most people living in these areas were left insecure as a result. Areas that were affected have left people using old PTOs that were issued during the apartheid era. This is the case in some places in the Eastern Cape. They use the old PTOs as proof of their land rights over the land they occupy. In addition, people who have received land since 1994 in terms of the communal tenure systems might not have them recorded for proof of their rights.[320] Many people may be better off in communal areas now, but most are still overwhelmed by the insecure tenure they live in, and some have already had their rights dispossessed. The government has adopted some legislative and policy innovations in the context of communal land and rural development, but these have failed to address the enduring tenure insecurity. The laws and policies governing communal land tenure cannot remedy the breakdown of land administration systems and the negative effect of land tenure's insecurity on livelihoods.[321]

4.4.2 Succession of the land

Customary law is unwritten, and it is passed from one generation to another, just like customs. It is orientated within a community, and it differs from territorial and tribal basis. It controls relations between an individual and another, not between the state and individuals. Customary law is concerned with mainly property, succession, and

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319 Clark & Luwaya, “Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa”, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):27.

320 Clark & Luwaya, “Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa”, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):7.

321 Clark & Luwaya, “Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa”, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):29.

family matters. This customary law can be applied where applicable as provided by the *Constitution*. Land does not form part of a deceased estate in customary law. According to customary law, the holder's right of the deceased to the land ceases to exist when he dies. In the real world, the deceased's descendants do not agree to vacate the land. They continue to occupy and use the land as the rights de facto are passed to the spouse and the children who are still alive. There is some flexibility in communal tenure systems. They are continually changing and adapting based on different circumstances. The practices of communal land tenure are like the concept of living customary law. Living customary tenure systems are a mixture of rules, laws, and practices.[322]

As the customary law of succession developed and is still developing, the proclamation of exclusive rights over land has become more common for people. When individuals transfer land between them, it would be custom not to have payment over such land. But currently, in practice, the land being transferred is compensated for. The nature of these transactions is often hidden intentionally. There are no difficulties created in the classifications of real rights and personal rights in legal systems that accept several real rights clauses. A person who wants to draft a will or enter a contract cannot be restricted or limited by a firm system of real rights. Therefore, a party to a contract or a testator is allowed, to a certain extent, to form new and strange rights concerning the property he owns.[323] In practice, this criterion has been developed in the registration of real rights concerning one's land. Only land rights could be registered and confirmed by the *Deeds Registries Act* from early on. The courts have developed two requirements to determine if a right is real and can be registered. The requirements are (a) the creator of the real right must have the intention of binding not only the person who owns the land now but also the successor, and (b) the right or condition in its nature must result in a subtraction from the dominium of the land it's registered on if registered.[324] The two requirements will be explained fully below.

322 Van der Merwe & De Waal 1993:40.
323 Van der Merwe & De Waal 1993:40.
324 Van der Merwe & De Waal 1993:41.

4.4.2.1 Intention to bind subsequent owners

The intention must not be to bind the landowner in his capacity but to bind him as a landowner. Suppose the intention is only to bind him in his capacity. In that case, the right will be deemed unregistrable, and it will not be accepted as real even if it amounts to the subtraction of the dominium of the land. The case of *Nel v Commissioner for Inland Revenue*[325] has illustrated this criterion in its decision. There were farms and urban plots donated and transferred by Nel to his son in 1947. The condition of the transfer was that, upon his death, the son had to register an usufruct by notarial deed in favour of his mother regarding the urban erf and make monthly payments of €20 to her. Upon death, the widow applied to have the condition made as a declaratory order to have the condition deductible from the estate duty in terms of the Administration of Estate Act. The usufruct was accepted but refused to be made in monthly payment. The court reasoned that the father did not intend to bind the land directly but intended to impose a personal obligation on the son to pay a monthly sum after he died.[326]

4.4.2.2 Subtraction from the dominium test

The courts apply this requirement to determine whether a condition or right is real and if it is registrable. This can also be referred to as a diminution of ownership, the property and the change on the land, or the burden on the land. This is based on the idea that a limited real right reduces the owner has power over his property since it may confer some power to the holder inherent in ownership or stop the owner from exercising his full ownership rights. These rights stop an owner from having full power to enjoy, use, and dispose of the land, which is real and registrable. This test was applied in the case of *Ex Parte Geldenhuys*, leading to a new category of real rights being recognised. In this case, five children have land bequeathed to them in co-ownership as a usufruct in favour of the spouse that survives. The land stated that it must be divided equally, with the oldest child having the majority share and distributing it amongst the children by drawing lots. The child who would be allocated the potion with the homestead would have to pay each of the children a sum of €200 within five years. The registrar refused to register such conditions. The surviving spouse

325 *Nel v Commissioner for Inland Revenue* 1960 (1) SA 227 (A).
326 Van der Merwe & De Waal 1993:41.

approached the court to have the conditions registered. The judge formulated the subtraction from the dominium test.[327]

He stated that the focus should be on the obligation created and not much on the right. If the obligation forms a burden on the land, then the right that corresponds is real and can be registered. If the obligation binds a person, the corresponding right is personal and cannot be registered. In this case, the co-ownership had a burden on the land, but the payment of €200 was found to be personal. This condition was, however, found to be registrable because it affected the testator's intention and was closely connected with the registrable condition.[328]

With the information above, one can say that people's rights in customary tenure are personal rights that cannot be passed to a descendant upon the holder's death. They differ from the rights awarded to people with ownership rights in that ownership rights can be transferred to the descendants of the right holder.

4.5 CONCLUSION

This chapter focused more on the difference between ownership and permission to occupy by looking into them directly and their different features. As provided above, ownership is all about the legal relationship with an intellectual nature, which is about the relationship between the owner of the thing and his relationship with other subjects concerning the thing. On the other hand, permission to occupy is an authorisation given to people so that they can occupy and use the communal land. They are allowed access to a part of the community and some grazing fields. Although there are different permissions to occupy being used, the old and the new ones, they are all being used to secure their rights. This brings me back to the differentiation that I have been arguing about. I still keep the same position that it is unfair that some people hold superior rights than others. They enjoy the benefits of the law in regard to land better than others.

These two concepts have different rights connected to them. A person who owns land has real rights, and a person with permission to occupy has personal rights, which

[327] Van der Merwe & De Waal 1993:42.
[328] Van der Merwe & De Waal 1993:43.

cease upon death. The disadvantage of communal land is that it is not surveyed, leaving it vulnerable to land grabs. This is mainly because the state is failing to pass legislation that will secure people's land rights in communal areas. This chapter proves the inequality between the two rights. People with ownership can stop people from interfering with their property. They have remedies like rei vindicatio, which can assist in claiming their property back, whereas people with permission to occupy do not have such. The former enjoy the right to transfer their property through succession, and the latter doesn’t. Since land occupied with a personal right is not secure, it cannot be used as security over anything or as property in a joint estate. Although there has not been legislation that helps in the rights awarded to PTOs, it doesn’t mean that the state did not try. Chapter five (5) will give more information about this as it addresses the 1991 white paper, the constitution's provisions about land, and the land reform processes.

CHAPTER 5: THE INFLUENCE OF THE WHITE PAPER, THE CONSTITUTION AND THE LAND REFORM PROCESS ON PTOS

5.1 INTRODUCTION

South Africa had issues with land, such as the unequal distribution of land, twisted land ownership, settlement patterns, land with insecure tenure, and the loss of land and rights in land.[329] The newly elected South African government made laws and implemented land reform programmes in 1994. The land reform programme consists of three dimensions: redistribution, which involves transferring commercial white-owned farms to black users; restitution, which involves resolving land claims for land lost during apartheid measures; and land tenure reform, which involves providing access to more secure land.[330]

Land reform was introduced in South Africa as a temporal process with two phases. The first phase, which was initiated in 1991 under the De Klerk government, was an exploratory reform programme grounded on the White Paper on Land Reform policy.[331] The complex land control system that prevailed in 1991 after abolishing the racial approach to land made it clear that the White Paper of 1991 was needed.[332] The presentation of the White Paper on Land Reform has two noticeable features. First, combative ideological positions about South Africa's social structure were considered facts. For example, many statements can be contested about free market protection of people's rights, private property, and traditional, ethnic, tribal, and natural communities. Second, coaching solutions related to land issues in terms of language development were included. This represents an attempt to cast land policy and legislation in a shape that is acceptable internationally.[333]

The constitutional length and the policy framework of 1991 differentiate the first and second phases of land reform mentioned above. The primary part of the second phase is found in the final *Constitution*. Two dimensions of land reform occur due to the

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329 Pienaar 2014:141.
330 Cliffe 2000:273.
331 White Paper on Land Reform Policy, 1991. Two White Papers on land reform policy have been published. One in 1991 and another in 1997. I am going to refer to both White Papers in this chapter. I will refer to the former as the White Paper of 1991, and the latter as the White Paper of 1997.
332 Pienaar 2014:141.
333 Marcus 1991:49.

promulgation of the interim and final *Constitutions*. Under section 28, a less reform-centred and less focused approach was embodied in the interim *Constitution*. At the same time, the final *Constitution* embodies a more expansive and reform-centred land reform approach. There are important implications in the final Constitution, under section 25 on the reform-centred approach for all role players.[334] With the phases above concerned, it is crucial to look into the property clause (section 28) of the interim constitution to determine whether it has not restricted land reform. When considering section 28, section 8(3)(b) and sections 121 to 123 of the interim *Constitution*, one can say that land reform has not been restricted. This will be discussed in detail below. However, this does not excuse that section 28 did not provide for an all-encompassing land reform programme. The final *Constitution* is more reform-oriented and comprehensive and prohibits obstruction of land reform or equitable access to natural resources.[335]

When apartheid ended, the Mandela Government launched an active programme of land reform, manifested in new legislation and its White Paper on South African Land Policy of 1997. The main objective has been to compensate for the gross imbalance in landholding. The reform programme has three parts: ways to redistribute land, actions to restore property taken through discriminatory laws, and a programme to restore how property is held.[336] The White Paper on South African Land Policy, 1997, provides that the government's land reform policy case is four-fold. (1) to compensate for the injustices done during apartheid; (2) to substitute national reconciliation and stability; (3) to reinforce and support economic growth; and (4) to better household welfare and reduce poverty. Issues identified by the White Paper need to be addressed if the land policy proposed is to be effective. One of the issues that were identified is environmental issues. The land reform programme is expected to expand sources of income for people, allow them to have more control over their lives and the environment they live in, and decrease poverty. It is also expected to decrease the risk of land deprivation.[337] I will discuss how the White Paper of 1991, the White Paper of

334 Pienaar 2014:167. This approach implicated role players including policymakers, the government, the legislatures, and the judiciary. See in this regard Pienaar 2014:168.
335 Pienaar 2014:173.
336 Cliffe 2000:274.
337 Makombe 2018:1403.

1997, the *Constitution* of 1996 and the Land tenure reform have affected or developed PTOs.

5.2 WHITE PAPER ON LAND REFORM POLICY, 1991

Before ushering in the new democratic political indulgence, the National Party anticipated the imminent political changes in South Africa and introduced the White Paper on Land Reform in 1991.[338] It focused primarily on agrarian reform and recollecting property ownership for people disadvantaged by previous discriminatory land policies. The White Paper was founded on the idea that land was a national asset that needed to be used and developed and that this could be achieved if everyone had access to it.[339] The National Party programme was limited and aimed to maintain the property ownership status quo.[340] President De Klerk wanted to demonstrate the hard work a team of well-informed officials put into creating the legislation and policy during the introduction of the White Paper. He said the hard work resulted from extensive consultation, negotiation, and deliberation.[341] The White Paper's objective was to ensure the maintenance of security and patterns of community order.[342]

When the White Paper was implemented, the government saw the land issue as a critical aspect of the reform agenda. It was then deemed necessary for change to be implemented. The White Paper was based on two principal objectives: (a) access to land was a fundamental human, and (b) the human right had to be fulfilled by free willingness and private ownership. The White Paper set out three principal policy objectives: (1) to expand access to land rights to cover the whole population; (2) to have the security and quality of title upgraded; and (3) to promote the use of land as a national asset. The White Paper identified two necessary policy positions while trying to secure the first objective: (1) all racially based restrictions of land had to be abolished, and (2) support had to be given to the extension of access to land rights to

338 The White Paper on Land Reform tries to give a way to reach justice on land problems in a way that suits both white and black people. The White Paper represents the results of intense labour in the upper and middle reaches of the state's framework and appears to have passed through the government's conflict. See in this regard Bekker 1991:43.
339 Pienaar 2014:155.
340 Weideman 2004:220.
341 Marcus 1991:49.
342 Ottaway 1996:134.

cover the whole population. An *Abolition of Racially Based Land Measures Bill* was then proposed.[343]

Three matters of policy priority were identified to secure the second objective: (1) land rights had to be upgraded, and registration systems had to be rationalised; (2) tribal tenure had to be accepted in a context where there is an option to convert to freehold: and (3) the integrity of title must be protected. The *Upgrading of Land Tenure Rights Bill* and the *Residential Environmental Bill* were then proposed. Four matters of policy position were identified to secure the third objective: (1) maintaining the capacity of commercial production for agricultural land and broadening the involvement through assistance; (2) promoting the development of rural areas, especially in areas that are not developed; (3) accelerating provision of land for future generations; and (4) conserving and preserving land for the future generations. The *Less Formal Township Establishment Bill* and a *Rural Development Bill* were proposed.[344]

The two objectives stated above did not have any roots in history. They proposed a considerable change and thorough movement away from the existing general land approach. The approach may be recognised to the fear that there may be a threat in a new political dispensation to the current white private ownership and free enterprise.[345] Some of the Bills that were brought by the White Paper of 1991 were upgraded into Acts. I will discuss the Acts below and how they have influenced PTOs.

5.2.1 The impact of the White Paper and the equivalent legislative measures

The White Paper proposed five Bills, which, together with the White Paper, were responsive, ascending from a long call to deal with the repeal of the *Land and Group Areas Acts*, the fights over land in urban and rural areas, and constitutional debates that the ANC launched.[346] The five proposed land reform Bills were the *Abolition of Racially Based Land Measures Bill*, the *Residential Environment Bill*, the *Upgrading of Land Tenure Rights Bill*, the *Rural Development Bill*, and the *Less Formal Township Establishment Bill*.[347] Only three out of the five proposed statutes became law. The

[343] Miller & Pope 2000:245; Pienaar 2014:154.
[344] Miller & Pope 2000:245.
[345] Pienaar 2014:155.
[346] Marcus 1991:49.
[347] Marcus 1991:50.

three are the *Upgrading of Land Tenure Rights Act* 112 of 1991, the *Abolition of Racially Based Land Measures Act* 108 of 1991, and the *Less Formal Township Establishment Act* 113 of 1991.[348] Upon enactment, *the Abolition of Racially Based Land Measures Act* of 1991 (as amended) repealed the 1913 and 1936 *Land Acts*, the *Asiatic Land Tenure Act* 28 of 1946, the *Group Areas Act* 36 of 1966, and the *Black Communities Development Act* 4 of 1984.[349]

The proclamation of the *Abolition of Racially Based Measures Act* of 1991 had all other discriminatory measures and offending Acts repealed. All the provisions that dealt with leasehold, ownership and the conversion of leasehold to ownership in the earlier, black-developed areas in white centres were reserved. These leaseholds were being changed by the *Upgrading Act* in urban areas that were granted under the *Black Communities Development Act* and the Conversion of Certain Rights into Leasehold Act. The *Upgrading of Land Tenure Rights Act* of 1991 provided for upgrading deeds of grant for units under leasehold into full ownership.[350] The *Upgrading Act* granted permission to occupy and quitrent into full ownership in non-urban areas and agricultural land in traditional areas. Unfortunately, this was delayed because the land was unsurveyed. This complicated the process and made it hard for the aims of the White Paper to be fulfilled.[351]

The White Paper and the Bills embody a minimum enhanced reform package[352] to eliminate legal structures that have become old or that delay present policy and structural socio-economic trends. The Bills were also meant to protect and establish white privilege and rights that were made through systematic discrimination. Unfortunately, they do not live up to the promise that land reform should be handled essentially and comprehensively. The White Paper has an outstanding feature regarding the attention paid to land tenure. This focus is on the absence of individual, private, freehold tenure.[353] The White Paper, in stating that all the land ownership

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348 Miller & Pope 2000:248.
349 Weideman 2004:221.
350 Pienaar 2014:158.
351 Pienaar 2014:159.
352 The 1991 White Paper provided for the redistribution, restitution and tenure reform. The White Paper and the Bills that accompanied it integrated various important shifts of principles for the National Party. The ANC and the National Party agreed that access to land must be open to everyone regardless of race, and that other forms of tenure apart from freehold can exist in a unified rural sector. Legislative reforms like the *Abolition of Racially Based Land Measures Bill* intended to deracialise land tenure. See in this regard De Klerk 1991:104,105.
353 Marcus 1991:50.

limitations based on race should be lifted, made it clear that there should not be any significant steps taken towards land redistribution. The market should instead take over.[354]

The White Paper denied the return of the land to the deprived people because such moves would impede national development to the detriment of all. It further suggested that land restoration should not be undertaken because it would spark conflicts, it would not be easy to implement due to contradictory and overlapping claims being lodged, and returning to the past would disrupt the country's current direction and pace of development.[355] It believed that reclaiming people's lost land due to past policies and other historical reasons would not be achievable.[356] Given the importance of redistribution and restitution in the new land law, it is worth quoting the Government's previous reasons for denying land restoration programmes.[357] The Government believed that a land restoration programme for communities and individuals who gave up their land forcefully due to previous policies or any other historical reason would not be possible. Aside from the huge potential of conflict essential in a restitution programme, contradictory and overlapping claims to land and other practical problems would make the application of restitution very difficult or impossible.[358]

The National Party was against any form of agricultural land redistribution when the need to assist black entrepreneurs who wanted to develop into small or medium farmers was recognised. The White Paper outlined a land redistribution policy which did not address the political issues of restitution and equity and the economic problems of the role of agriculture that may arise in times of an increase in population and economic stagnation. The Government had an approach that allowed several black people to acquire land from white farmers. The black people would, unfortunately, be restricted from buying the land due to a lack of capital and laws that made it challenging to have smaller holdings broken from more extensive holdings to create

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354 Ottaway 1996:134.
355 Miller & Pope 2000:246.
356 Ottaway 1996:134; Weideman 2004:221.
357 The Government is of the view that the land restoration programme made for people and communities whose rights were taken under duress due to previous racially discriminative practices or laws will not be possible. Apart from the bug potential of battle central to such a programme, land claims that are contradictory and overlap, as well as other problems, would make enforcing land restoration very hard or impossible. Because of this, the Government sees it best to promote peace and progress by accepting the land restoration programme and that the opportunities that the new policy gives be broken for a more equitable dispensation. See in this regard Miller & Pope 2000:46.
358 Miller & Pope 2000:305.

affordable units. This resulted in insufficient land being transferred from whites to blacks.[359]

According to the White Paper, the size of units to be owned by people must be determined according to their viability. This means there should be a sizeable minimum area per farm that would make the occupation of households to earn a living from agriculture possible.[360] The ANC criticised the White Paper. The ANC believed that the White Paper was trying to arrange land disposition under the cover of free-market proposals. The ANC opposed that the White Paper wanted to preserve a racist status quo that involved different standards of blacks and whites.[361] The White Paper and the Bills integrated a few critical principles shifts for the National Party. It now appears in principle that the National Party and the ANC have agreed that access to land should be open to everyone regardless of race and that other forms of tenure apart from freehold have a right to exist and develop in united rural areas. Principles have differences based on several primary issues, such as the need for restitution and redistribution of land and suitable compensation rates for past or present occupants or owners.[362]

To show cooperation concerning the position of the White Paper, the ANC in May 1991 accepted the government's decision to institute an advisory commission on land allocation. The National Land Committee[363] (NCL) pointed out that there were noteworthy differences between the philosophy of the White Paper and what would be put in place by the Bills mentioned above. The NCL called for the Government's proposed advisory commission on land allocations regarding the *Abolition of Racially Land Based Measures Bill* to include all members who were confident about the black communities and to eliminate the past or present state officials as the least trusted people.[364] The Acts did not have a great impact on the issuing of PTOs. This is

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359 Ottaway 1996:134.
360 De Klerk 1991:106.
361 Miller & Pope 2000:246.
362 De Klerk 1991:104.
363 The National Land Committee (NCL) is one of South Africa's important land non-governmental organisations and a strong supporter of the Landless People's Movement, pg.41. The NCL originated from a complicated situation. The motivation that led to the formation of the NCL was found in white liberal welfarist concerns which were directly connected to the Black Sash tradition of upgrading the suffering of black people without a clear emancipatory project. The NCL is important to the history of national liberation because it represents the democratic movement that focuses on land questions and organised resistance based on people's everyday struggles to stick to land by people who were oppressed during apartheid, pg.45. See in this regard Mngxitama 2006.
364 Miller & Pope 2000:248.

because they were not able to change the status of PTOs. The government tried another route of reforming land.

5.3 LAND REFORM IN SOUTH AFRICA

South Africa developed a multi-faceted land reform to rectify the historical imbalances caused by colonisation and apartheid. The programme addressed unequal land-holding patterns and secured, protected, and strengthened previously disadvantaged people's land rights.[365] Land reform is internationally seen as a process to redistribute property or rights in land to benefit people without land, the tenants, and the people who farm.[366] This means that land reform is fundamentally connected to agriculture and agricultural reform. Another aim of land reform is to increase people's ability to gain access to land and confer secure land rights.[367]

Pienaar has narrowed and proposed that land reform involve initiatives provided in the legislation, policy and other measures consisting of mechanisms and actions aimed at expanding access to land and improving tenure security to restore rights in land.[368] A broad interpretation of land reform may involve changing laws, customs, or regulations regarding land use and ownership or other land practices. Based on this definition, it can be argued that land reform has occurred endlessly. When land changed hands between people, land reform of some sort occurred.[369] Land reform is a way to address past racial inequalities and exclusions.[370] Land reform aims to correct some agrarian economic features that prevent it from making money. Many landholders were abstracted as inefficient economic producers and suitable targets for reform.[371] The Department of Land Affairs is responsible for restoring land rights to those who were unjustly deprived of them, redistributing land to those denied equitable access under

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365 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):4.
366 Lipton 2009:323.
367 Pienaar 2015:3.
368 Pienaar 2014:15.
369 McCusker 2016:3.
370 Hall & Williams 2003:1.
371 McCusker 2016:12.

apartheid and segregation, and securing the tenure rights of those excluded from acquiring title to it in the past.[372]

Land reform assessments have been shown in a technicist light, blaming policy or governmental shortcomings for their lack of success. This is, however, not sufficient for understanding fully the failures of land reform. Brent[373] is of the view that South Africa's land reform in the broader political economy has never been articulated or understood fully. He argues that the land reform program wanted to restore the peasantry. It then tried to create yeoman farmers[374] when it failed to restore the peasantry.[375] Land can be reformed through the land redistribution programme discussed below.

5.3.1 Land redistribution

This programme aimed to reallocate land to landless labour tenants, poor people, and farm workers and to develop farmers for residential and productive uses to enhance their quality of life.[376] This approach is about achieving land reform goals.[377] Without transferring land rights directly to beneficiaries.[378] Redistribution is more about facilitating access to land than the actual legal change.[379] Land redistribution was created to transfer land from white to black communities through a willing-buyer, willing-seller market-based approach. The difference between land redistribution and land restitution is that land redistribution addresses land imbalances instead of specific dispossession cases.[380] The Department of Land Affairs (DLA) created redistribution by relying on a communal property association (CPA). The *Communal Property*

372 Hall & Williams 2016:1.
373 McCusker 2016:11.
374 A yeoman is a person who owns and cultivates land. Yeoman farmers are known to be individual landowners, with single proprietor farming, and are whites. See in this regard Calo 2020:12.
375 McCusker 2016:11.
376 Cliffe 2000:274.
377 The land reform programme was aimed at redistributing at least 30% of the white-owned commercial agricultural land to black South Africans by 2014 and settling all redistribution claims by 2005:678. The redistribution was aimed at strengthening the property rights of communities who were already occupying land, and to give access to those without land due to previous disadvantages, pg. 690. Land reform was also aimed at contributing to economic development by giving beneficiaries opportunities to participate in productive land use and increasing employment opportunities: 694. Read in this regard Pienaar & Kloppers 2014.
378 Pienaar 2014:21.
379 Miller & Pope 2000:309.
380 McCusker 2016:94.

Association Act[381] gave a group of individuals a guarantee of certain rights created to buy land.[382]

Land redistribution aims to provide people experiencing poverty with land for productive and residential development purposes to improve their livelihoods. People who were sidelined, women in need, and projects that could be quickly and effectively implemented were identified as priorities. This programme would enable suitable people and groups to receive a Settlement/Land Acquisition Grant (SLAG) up to a maximum of R16,000 per household for acquiring land directly from willing sellers.[383] The basis for this approach was a state-supported financial package for every beneficiary. The government's effort to create an enabling environment for land reform beneficiaries involved two aspects: first, it had to help direct funds into a new market that seemed weak and in which the private sector would not risk its funds. Second, it had to help beneficiaries and entrepreneurs get on their feet through the conditions and training they received.[384] The *Development Facilitation Act* 67 of 1995 also plays a significant role in the redistribution process by introducing measures that can help speed up land development, including providing land services for low-income housing. This Act also introduced the notion of initial ownership.[385]

Land redistribution involves the state acquiring land to distribute to people who lack or have insufficient land. This is provided by section 25(5) of the 1996 *Constitution*.[386] This section requires the state to increase land accessibility. It establishes a socio-economic right for people needing land to influence the state to make land accessible, as confirmed in the case of the *Republic of South Africa v Grootboom and Others.*[387] The Constitutional Court held that the rights must be deemed in the context of a bundle of socio-economic rights provided in the *Constitution*. They give the right to access

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381 *Communal Property Association* Act 28/1996.

382 McCusker 2016:95.

383 The Government came up with an approach that included a single and flexible redistribution mechanism which can support a wide range of land reform beneficiaries including labour tenants, women, the poor, new entrance to agriculture, farm workers, and individuals. The mechanism can be used in many circumstances. It rests largely on voluntary transactions between willing-sellers and willing-buyers as against block settlements in selected areas. See in this regard Pienaar 2014:207.

384 Pienaar 2014:207.

385 Miller & Pope 2000:309.

386 "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

387 *Grootboom and Others v Government of the Republic of South Africa and Others* (CCT38/00) [2000] ZACC 14 (21 September 2000).

land, sufficient housing, food, healthcare, water and social security.[388] Section 25 of the final *Constitution* requires the state to establish conditions allowing citizens to gain equal access to land using available measures and responsible legislation. Several pieces of legislation intended to play an essential role in the redistribution process, including the *Communal Property Association Act* discussed in Chapter 3 above. This Act is relevant because many communities must jointly group resources to negotiate and hold a title deed.[389] The land was also put in the *Constitution* when it was enacted.

5.4 LAND REFORM ROOTED IN THE *CONSTITUTION*

Land reform was initiated in two different phases in South Africa: the exploratory programme before the new *Constitution* and an all-encompassing programme after 1994. While the constitutional dimension differentiated these two phases, the first phase was without a *Constitution* with a Bill of Rights. The second phase was categorised by having an interim *Constitution* for some time, followed by the final *Constitution* being used now. Section 25 of the *Constitution* provides for land reform, which investigates the meaning of having land reform rooted in the *Constitution*, specifically in the property clause. Due to the land reform being rooted in the *Constitution*, there is a need for a precise approach and interpretation of all land reform-based and land reform-related case law and statutory measures.[390] I will focus on the *Constitution* of 1996 because it directly relates to my study.

5.4.1 The Constitution of the Republic of South Africa, 1996

After various constitutional negotiations between political parties, South Africa enacted the final version of the *Constitution* in 1996. According to Section 2 of the *Constitution*, the *Constitution* is the country's highest law, and all inconsistent laws are declared

388 Rugege 2004:7.

389 The White Paper provided a broad policy environment which included land redistribution. The Communal Property Association Act created communal property (CPA) associations as explained in Chapter 3 above. The CPA was a model which accommodated land reform under the Department of Land Affairs. The government assisted in selling selected land transfers from willing sellers to be sold to black people whose land was previously dispossessed. See in this regard McCusker 2002:114.

390 Pienaar 2015:1.

invalid.[391] The 1996 *Constitution* was precise about the land reform programmes and balanced in addressing property law issues. Land rights were also included under the property clause in the Bill of Rights.[392] The property clause is one of the primary rights in the Bill of Rights. It is subject to general limitations provided in section 36, the possibility of affirmative action as a specific limitation provided by section 9(2), the application of the Bill of Rights provided for by section 8, administrative justice provided for by section 33, and the interpretation of the Bill of Rights provided for by section 39.[393]

The *Constitution* obligates the state to strengthen and protect people's tenure rights in communal areas. Section 7 mandates the state to protect, respect, fulfil, and promote the rights in the Bill of Rights, including the right to secure tenure for people with insecure tenure because of previous discriminatory conduct or laws. These duties place an obligation on the state. The responsibility to protect commands the state to take action to stop others from intervening with the right to secure tenure for people in communal areas. The obligation to respect mandates the state not to damage a right to secure tenure that already exists. The commitment to fulfil and promote commands the state to adopt the right legislative, budgetary, administrative, promotional, judicial, and other actions towards realising the tenure security right.[394] The allocation of powers and responsibilities to provincial and national governments has a fundamental impact on the implementation of land reform. This impact includes administering state land. The *Constitution* regards deed registration, land reform, and land survey as the responsibility of the national government. The three main factors of land reform,

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391 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):7.

392 Rugege 2004:3.

393 Miller & Pope 2000:290.

394 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):7.

namely restitution, redistribution, and tenure reform, are also the responsibility of the Government.[395]

Section 25 replaced section 28 of the Interim *Constitution*.[396] Rights in property are guaranteed under section 25 against deprivation.[397] Section 25 also provides that the state has the power to confiscate private property to use it for public purposes or in the interest of the public with a just and equitable compensation. According to section 25(3), the timing and amount paid for compensation must be just and equitable, showing an equitable balance between the interest of those affected and the interest of the public regarding all factors, including the use of property, the history behind the acquisition and use of the property, the property's market value, the extent of the state investment and subsidy in the purchase and beneficial capital developments of the property, and the intention of the expropriation.[398] The last part of section 25 is a bit different from section 28 of the Interim *Constitution*. Although both sections aim to protect existing property rights and restore past imbalances, section 25 has more details on reform orientation than section 28 of the Interim *Constitution*. When the *Constitution* began, an all-encompassing land reform programme was in the process of being opened, although several legislative measures related to land had already been declared before 1996.[399]

Sections 25(5) to (7) provide the constitutional basis for the three land reform programmes. Section 25(5) obligates the state to take responsible legislative and other steps to substitute conditions that promote equal access to land.[400] The provisions of sections 25(6) to (9) motivate the legal recognition of informal and customary land rights in communal areas. Section 25(6) provides a right for a secure tenure. In accordance with section 25(6), this right is offered to a person or community who has a legally insecure tenure because of past racially discriminatory laws. Such a person

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395 Miller & Pope 2000:303.
396 Pienaar 2014:169.
397 It was held in the case of *Agri South Africa v Minister for Minerals and Energy (CCT 51/12) [2013] ZACC 9* that while interpreting section 25 of the Constitution, the approach that should be used concerning expropriation is to consider the role that this section plays in facilitating the fulfilment of the country's reconciliation responsibilities, by recognising the need for economic opportunities. This section is the primary basis for the strain between the interests of the wealthy and the previously disadvantaged. Unfortunately, the strain may be on the country for years to come in trying to achieve the equal distribution of wealth and land for everyone.
398 Pienaar 2015:3.
399 Pienaar 2014:182.
400 Pienaar 2014:183.

or community deserve a more secure tenure as per an extent provided by an Act of Parliament.[401]

Section 25(7) gives a person or the community whose land rights were dispossessed after 19 June 1913 due to past discriminatory laws the right to claim restitution or equitable redress. This section was created to reformulate section 8(3)(b) of the Interim *Constitution*. The three programmes of land reform have been rooted constitutionally. Section 25(8) ensures that the provisions of section 25 do not obstruct the state from taking legislative and other measures to achieve land and related reform to restore the past discriminatory laws as long as the measures align with section 36 of the *Constitution*. Section 25 (9) further explains the land tenure reform programme, which provides that the parliament must enact legislation referred to in section 25(6).[402] The Government took a further step in 2017 and focused on land alone in the White Paper on South African Land policy discussed below.

5.5 WHITE PAPER ON SOUTH AFRICAN LAND POLICY, 1997

When apartheid ended in 1994, vital steps were taken to undo the irregular land distribution of the past and to quicken rural development.[403] The White Paper on South African Land Policy of 1997 was enacted to develop and distribute a separate paper addressing tenure matters, especially by the end of 1997.[404] The White Paper outlines the South African land reform programme. One of the essential elements of the land reform policy is tenure reform, which aims to protect, secure, and strengthen people's land rights, specifically where the land rights are weak because of past racially discriminatory practices and laws.[405] Although ownership and new forms of

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401 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):7.

402 Pienaar 2014:184.

403 McCusker 2016:93.

404 Pienaar 2014:212.

405 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023):4.

landholding were supposed to be developed, some measures were available temporarily to address urgent and pressing issues.[406]

The White Paper preserved land principles by identifying seven key areas in need of redress, including the unequal distribution of land ownership, the need for sustainable land use, the injustices of racially based dispossessions, the need for public land administration in an operative manner, tenure security, the need to have all property rights recorded and registered, and the need for fast land release for implementations.[407] The White Paper of 1997 states that the Bill of Rights assures existing property rights, but it also places the state under a constitutional obligation to take measures to allow citizens to have equal access to land, provide redress to people whose land was dispossessed after 19 June 1913, and promote a secure tenure. Reforms are fundamentally directed towards enabling the relocation of land rights without pursuing the revision of substantive property law principles.[408]

The White Paper entails that the three sub-programmes of land reform will be executed through an ongoing legislative programme and legal mechanisms already in place. The legislations are the *Upgrading of Land Tenure Rights Act* 112 of 1993, the *Provision of Certain Land for Settlement Act* 126 of 1913, the *Restitution of Land Rights Act* 22 of 1994, the *Land Administration Act* 2 of 1995, the *Development Facilitation Act* 67 of 1995, the *Land Reform (Land Tenants) Act* 3 of 1996, the *Communal Property Association Act* 28 of 1996, and the Interim *Protection of Informal Land Rights Act* 31 of 1996.[409] Since the White Paper was published, more legislation has been enacted, including the *Extension of Security of Tenure Act* 62 of 1997 and the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998.[410]

5.6 LAND TENURE REFORM

Land reform facilitated the transformation of the Bantustans, a significant part of South Africa's history. Communal land, a cornerstone of explicit ethnic and racial divisions,

406 Pienaar 2014:212.
407 McCusker 2016:93.
408 Miller & Pope 2000:285.
409 Miller & Pope 2000:304.
410 Miller & Pope 2000:305.

restored tribal and ethnic identities.[411] It is a missed opportunity that communal land tenure did not receive the attention it deserved in the land reform program in South Africa. There was a significant expectation that the new government would prioritise communal land tenure, but unfortunately, this was not the case.[412] Consequently, land reform has been criticised for failing to improve the livelihoods of beneficiaries significantly.[413]

This programme targets people like former farm workers, farm workers, labour tenants, and sharecroppers.[414] Land tenure reform wants to authenticate forms of tenure, including tenure in communal areas.[415] Land tenure reform aims to secure or upgrade insecure land rights. This programme is based on the following objectives: (a) rights should be entrusted to land rights holders, not institutions. This means that beneficiaries must be allowed to choose the form of tenure they prefer; (b) in circumstances where there are group rights, basic human rights of all beneficiaries must be protected; and (c) popular and functional land administration systems must continue. Tenure reform had two challenges: (a) an instant challenge to protect current land rights and (b) an enduring challenge to rearrange land tenure to meet constitutional imperatives.[416] This approach does not take away much land from people but impacts reform by implementing numerous forms of tenure.[417]

Legislation was enacted to meet the immediate challenge of protecting current land rights during the tenure reform period. Enacting legislative measures started a full-scale reform programme. Protecting the existing tenure was essential to start and finish an overall tenure reform programme. Two relevant legislative measures were the *Upgrading of the Land Tenure Rights Act* and the *Protection of Informal Land Rights Act.* The form of tenure was upgraded automatically or after following a prescribed procedure, depending on the nature of the right.[418] The Interim *Protection of Informal Land Rights Act* 31 of 1996 was enacted to protect people who did not have secure tenure from losing their rights and interests in land. The *Communal*

411 McCusker 2016:97.
412 McCusker 2016:101.
413 Rusenga 2022:125.
414 Rugege 2004:13.
415 McCusker 2016:94.
416 Pienaar & Du Plessis 2010:82.
417 Pienaar 2014:20.
418 Pienaar & Du Plessis 2010:82.

Property Associations Act 28 of 1996 was passed to allow groups of people to obtain, manage, and hold property under a written constitution. The *Land Reform (Labour Tenants) Act* 3 of 1996 was enacted to provide for the acquisition of land by labour tenants and the provision of funding.[419]

5.7 CONCLUSION

Land has always been and continues to be an essential topic for most African people and for the economies and politics of many African countries. People have been focused on land for years, trying to fight for the security and reform of land. Segregation and apartheid policies drove many people to the cities to look for employment in commercial farms. They never got ownership or other secure rights; instead, they acquired a PTO. The PTOs they held could be withdrawn anytime, and the occupier was left as a squatter. The new democratic dispensation must recover land security for the vulnerable people. In this setting, the constitutional provision was made, demanding the state enact an Act of Parliament providing for the security of tenure for people with insecure tenure. The exposition above illustrates how the White Paper of 1991 brought about land reform, which was later incorporated into the 1996 *Constitution*.

Land reform is an interim process designed and developed in two phases, which may take many years to complete. The land reform was brought about in two phases: the exploratory and constitutional phases. The status of land in South Africa required an all-encompassing redress model. The scope and impact of the exploratory land reform measures were limited. The first phase was extended in the second phase when the new dispensation started in 1994. The land reform programme had three sub-programmes: land restitution, redistribution, and tenure. The Interim *Constitution* had a property clause that lacked a reform-centred approach, but the final *Constitution* provided for it. The Interim *Constitution* of 1993 was enacted with section 28, which is still relevant today for its contribution to providing a theoretical framework and structure that supported dispensation, which started on 27 April 1994. Sections 121-123 of the interim *Constitution* also laid the foundation for the restitution programme employed in the *Restitution of Land Rights Act* 22 of 1994. The final *Constitution* replaced the

[419] Cliffe 2000:275.

Interim *Constitution* in February 1997. Section 25 of the final *Constitution* replaced section 28 of the Interim *Constitution*.

Both section 28 and section 25 need the courts to protect interests in private property and further the aims of the land reform programme. Section 25(6) provides that an individual or community with insecure tenure due to past racially discriminative practices or laws has the right to the extent an Act of Parliament provides to secure tenure or comparable redress legally. The land reform programme did not successfully restructure agrarian relations for the landless poor. It was predicted that market-based land reform would enable a speedy transfer of land from white landholders to black-sidelined citizens. However, this has not happened in practice. Not a lot of land has been redistributed, and a dualistic agrarian structure that succeeded apartheid stayed unchanged. This has contributed to the high rate of poverty. There is a need to rethink land reform programmes by considering more redistributive processes that would bring effectiveness and equality when making land policies in the future.

The White Paper of 1991 and its accompanying Bills, of which three were made legislation, the Interim *Constitution* of 1993, the final *Constitution* of 1996, and the White Paper of 1997, have contributed to land reform and PTOs. In my view, if the provisions of the Constitution are adhered to, it might become easy for the status of PTOs to be changed. There can be another White Paper passed to deal with the provisions of land with more focus on the positive development of PTOs. The focus must be on how the status may be upgraded until it is like that of ownership. Chapter 6 will discuss how the courts, in applying some of the legislation discussed above, contributed and continue to contribute to land reform and PTOs.

CHAPTER 6: THE CURRENT LEGAL POSITION OF PTO RIGHTSHOLDERS AS DECIDED IN CASE LAW

6.1 INTRODUCTION

The chapters above discussed a few statutes that influence PTOs and rights holders. Some of the statutes discussed above are applied in case laws used to determine the current positions of PTOs. Some statutes were born of the White Paper addressed in chapter 5 above. White minorities were privileged to own land in South Africa because of a long history of racial dominance, colonisation, and land dispossession. Black people tried to fight for their land but failed.[420] To correct these racially discriminatory laws, the South African post-government started a programme of land reform discussed in chapter 5 above. The programme has three subprogrammes aimed at creating a more secure tenure.[421]

With the programme's slow results, many people still hold land under PTOs. The land administration in some areas is chaotic, resulting in many people living on land for many generations but without the right to the land they occupy. This is because some people have PTOs, and some don't.[422] The United Nations Centre for Human Settlements estimates that 20 to 80 per cent of urban growth is informal. Therefore, the formal land delivery system might take time or never be able to catch up with the formal housing demand. The informal settlement might continue to provide shelter for poor people. This proves there's a massive need for the government to devise ways to manage existing and future informal settlements.[423] This chapter explores and analyses a few cases that have contributed to and continue to contribute to the current provisions of the PTO.

[420] Rugege 2004:283.
[421] Cousins 1998:136.
[422] Cousins 1998:635.
[423] Davies & Fourie 2002:218.

6.2 *COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION AND OTHERS V INGONYAMA TRUST AND OTHERS* 2021 (8) BCLR 866 (KZP)

The applicants based their application on the actions of the Trust and the Board, who have been undermining the tenure security of the occupiers and residents of the people living on the land held under the ingonyama (Trust-held land) in KwaZulu-Natal and unlawfully extracting money from them by forcing and inducing them to conclude lease agreements and pay rental. They stated that the Board and the Trust violated the customary law and statutory PTO rights of the occupiers, and the residents of the Trust-held land protected by the Constitution and the Acts of Parliament.[424] They stated that section 2(5) of the Trust Act gives them statutory power to conclude lease agreements, subject to getting prior written consent from the community or traditional authority concerned.

All homelands were abolished when South Africa attained democracy. The homelands and self-governed territories were unified into South Africa and vested in the national government. The KwaZulu Natal land did not fall under this arrangement because an agreement was struck by the Government of KwaZulu Natal and the Government of South Africa before the interim *Constitution* came into place for the National Party to develop a Trust and transfer all the land under the KwaZulu Natal Government to it. PTOs were still used as a residential form of tenure in the land transferred to the Trust. A PTO was a statutory recognised form of tenure on unsurveyed land under the Black Areas Land Regulations (Proclamation 188 of 1969). The PTO was recorded in an allotment registered and afforded to the holders with perpetual and exclusive occupancy and use rights. The *Land Affairs Act* repealed the Proclamation 188 of 1969 and retained the PTOs institution. The *Land Affairs Act* governs the PTOs over the land held in Trust.

Section 25 of the *Land Affairs Act* provides that after consultation with the tribal authority, the Minister can grant and record PTOs in a prescribed manner. Section 25(2)(a) – (c) provides that a right is conferred to the right holder to use and improve the allotment for the purpose stated by the Minister; a PTO is used for the duration of the life of the holder and the right may be conferred on his widow after his death. Only

[424] The *IPILRA* and *Ingonyama Trust Act*.

the Minister can withdraw a PTO after consulting the authority concerned. According to section 26, PTO right holders can strengthen their rights over land by formalising them by getting their land surveyed and acquiring deeds of grants and a certificate of registered title provided in section 43(1) of the *Deeds Registries Act* of 1937. Proclamation R63 of 1998 assigned KwaZulu-Natal with the *Administration of the Land Affairs Act*, with sections 24 to 26 excluded. The Minister was still responsible for implementing provisions that govern PTOs.

In April 2007, the board decided to stop issuing PTOs, and the existing PTO rights should be converted into lease agreements for residential and business purposes. Occupants should pay a rental to keep their entitlement to live on the land. In November 2007, the board told the Portfolio Committee on Agriculture and Land Affairs (the Portfolio Committee) about its decision to issue lease agreements and cut the issuing of PTOs. In the 2011/2012 Annual Report, the Board stated that they are abolishing the issuing of PTOs because PTOs are a legally weak and racially based form of land tenure. Notices were published in November 2017, persuading PTO holders to convert their rights to lease agreements. There was a little mix-up with the Department of Rural Development and Land Reform (DRDLR), which resulted in them instructing the Trust and Board to stop issuing leases until the legality of the process was cleared up. The Board did not obey the instructions.

The main issue to be decided was whether the Trust and the Board's conduct regarding PTOs and their conversions to lease agreements was lawful and constitutional. The court agreed with Professor Nhlapo’s view that paying regular rent to traditional authorities for land is a new phenomenon in Zulu customary law. The actions of the Trust and the Board have contravened sections 2(2) and 2(4) of the *Trust Act*, which mandates how they are supposed to administer the Trust for the benefit, social well-being, and material welfare of the beneficiaries that resides in the Trust-held land and requires the Ingonyama to handle the land on terms of the Zulu customary law or any other applicable law. The Trust and Board decided to convert PTOs into lease agreements, claiming that it would improve the security of tenure for residents.

However, this has deprived the beneficiaries and residents of their informal or customary ownership rights in Trust-held land. The Trust becomes the lessor, and the residents become tenants without rights other than permissive occupation and use.

The leases obtained cannot be perpetually inherited and transferable. The leases continue occupation only if rent has been paid. Failure to pay rent can result in the holder being removed from the Trust-held land in terms of their lease agreements. Reg 11(2) of the PTO Regulations provides that a PTO for residential purposes is not subject to rental. The Trust is creating a long-term residential lease that expires after 40 years. An application for another lease must be made after the expiration. The traditional council must approve the lease. There is a contradiction: a PTO can only be cancelled by the Minister or his delegate, whereas the Trust can cancel a lease agreement.

The lease agreements overlook the co-existing customary rights that every family member has. They also deny families and communities their customary law privilege to participate in decision-making regarding matters related to the occupation and use of tribal land. The Trust and the Board must have provided the steps people must take to implement the PTO Conversion Project and the proper process. This would help explain their vision better, whether the project was adequately and appropriately explained to the residents and beneficiaries, and the effects it would have on the existing customary law rights. The Trust and the Board failed to tender evidence of the effect of their PTO Conversion Project. They also failed to evaluate whether the project would harm the existing customary law rights to the land.

The court was satisfied that the conclusion of lease agreements has adversely and severely affected PTO rights and customary land rights. The idea of removing residents who do not pay rentals violates their land rights. The actions of the Trust and the Board to convert PTO rights to lease agreements have prejudiced the third to ninth applicants in terms of their existing customary law rights. All the residential lease agreements concluded were declared unlawful and invalid.

The judgment, in this case, saved the people in Kwa-Zulu Natal from giving up their PTOs and getting lease agreements. At the same time, it did not provide a solution to the problem that was raised by the Trust board. The board stated that the reason why it wants to change PTOs into leases is because PTOs are a legally weak and racially

based form of land tenure. PTOs are still the same even today. Not developed, and not providing a secure tenure to people.

6.3 TACHMO CC V MPHUTI N AND ANOTHER (A39/2020) [2022] ZAFSHC 146 (31 MAY 2022)

This case is about an appeal made in terms of Rule 51 of the Magistrate Court Rules and directed to the dismissal of an application for the eviction of the first respondent, Ms N Mphuthi (from now on referred to as the respondent), made in terms of section 4 of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (the *PIE Act*). The appellant is a close corporation with Mr TW Mokoena as a sole member. The Dihlabeng Local Municipality (the Municipality) is a respondent in this matter. The appellant declared in his founding affidavit that he was the lawful owner of the property in question. He stated that he bought the property from the Motloungs, who were, at the time, the owners of the property as stated in the official allocation of residential sites issued by the municipality on the 19th of November 2008.

The appellant was informed in 2013 that a shack was erected on the property, but the residents couldn't be located. He was told in February 2014 that the property had been developed and that the respondent was told that her permit was invalid. He then started an eviction process against the respondent in 2015. The respondent denied the appellant's declaration that he was a lawful owner of the property and claimed that she was the lawful owner. In support of her response to the founding affidavit, she attached a PTO issued on 26 September 2008. She had paid R8 000.00 to Mr Mandla Khambule at the municipality and was given a PTO, which vested all rights to the property. The court had to determine whether the person whom the eviction order was made against was an unlawful occupier or not.

Although this was a motion proceeding, it was important for the municipality responsible for the housing and related matters, Mr Ndwandwe, to testify as a neutral witness. He explained the process that is followed to obtain a PTO. What was important to note was the document is supposed to have three signatures, one from the Head of Department with an official stamp and be accompanied by a proof of payment for the property. These requirements were not present on the Motloung's documents in the municipality records. It was found that Mr Mandla Kambule was busy

with fraudulent activities of selling sites to people from 2013 to 2015. He used to backdate permits to 2006/2007/2008 in all the sites sold. Mr Ndwandwe testified that most of the permits issued by Mr Mandla did not comply with the requirements of a valid permit.

The court asked Mr Ndwandwe if the ownership of the property is recorded in the municipality records, and he answered by testifying that the office file confirms that the property belongs to Tachmo CC. This validated the statement that the appellant gave that he is the lawful owner of the property. From Mr Ndwandwe's testimony, the Motloungs had legally obtained the site as shown on the site permit and the proof of payment. The documentation that the respondent had to prove the PTO had not complied with the requirements for a valid transaction as it did not have the required signatures and a stamp. The court granted an order in favour of the appellant.

This judgment did not develop PTO rules, but it just made clear a few requirements that are needed when a person completes a PTO registration. It still seems as if PTOs have a lot of complications and fraud connected to it. Nothing about the issuing or the rules around PTOs was made better or changed by this judgment.

6.4 *OOSTENWALD AND ANOTHER V RETIGNLED AND OTHERS* (LCC 13R/2021) [2022] ZALCC 10 (4 APRIL 2022)

This is an automatic review that originates from the Magistrate Court in terms of section 19(3) of the *Extension of Security of Tenure Act* 62 of 1997 (*ESTA*). An eviction order was granted by the Magistrate against the first respondent, Remaining Extent of Portion 2 of the Farm Wegelegen 400, Registration Division JT in Mpumalanga (the property). The first applicant is Oostwald van Niekerk residing in the property. MR Oostwald's wife, Mrs Cornella Magrieta van Niekerk is the second applicant also residing in the property. The applicants have been registered as owners of the property since 2008. The first respondent who also resides in the property, is Mr Tshepo Radebe, the grandson of the late Tawamari Scotch Tshabangu and Ntombi Maria Mnguni (the Tshabangus). The second respondent is Chief Albert Luthuli Municipality, and the third respondent is the Department of Rural Development and Land Reform. Mr Tawamari was born on the property, worked for the owners of the property until he

could not anymore, and lived there. The property was allocated to the Tshabangus for residential and grazing purposes.

They lived on the property until they passed away. They were buried on the property alongside all 13 other members of the Tshabangu family. The applicants stated that they were not told about the presence of the Tshabangus in the property when they purchased it in 2008. They had a PTO, which allowed them to occupy the property until they died. The applicants stated that their right of occupation came with the right to keep the ten head of cattle, 20 sheep and two horses that the first respondent's grandfather left upon death. They were also given a right to cultivate about 1.5 hectares of land. The occupation agreement recorded all these conditions, which were attached to the application. They stated that the grandfather had no dependents staying on the farm by the time they obtained ownership of the farm. They further stated that the Tshabangus would keep asking for permission for their grandchildren to stay on the farm, and permission was granted.

In 2017, the first respondent was granted permission to stay on the farm with his grandfather until their death, as he would be taking care of his grandparents. When the first respondent's grandfather died in November 2018, the first respondent's permission to occupy was automatically terminated. The first respondent was told through a notice to vacate the property within 72 hours in February 2019. After the respondent had failed to vacate, an application for eviction in terms of *ESTA* was filed. When the applicants issued an eviction application, they stated that the respondent was occupying the property illegally since his right of occupation was cancelled. The applicant stated that the first respondent only stayed on the farm for 18 months from 2017.

The first respondent disputed this and stated that he was born and raised on the farm by his grandparents until he left and stayed with his mom at the age of 8 for study purposes. He regarded the farm as his ancestral home because he and his grandfather were born and raised there. He stated that he was a labour tenant. The court had to determine whether the first respondent was occupying the farm openly and continuously before or after the 4th of February 1997; which section of the *ESTA* was supposed to be relied on between section 8 and section 11; whether there is an alternative accommodation; and whether it is just and equitable to evict the first

respondent. The Magistrate stated in his conclusion that the first respondent was a caregiver of his grandparents and not an occupier and applied the provisions of section 1 of *ESTA*.

Mr Gerhardus Lengton acquired the property in 1999 and found the first respondent's grandparents on the property. He stated in his supporting affidavit that he used to go to the property for weekend getaways. He further stated that he was approached by the first respondent's grandparents, requesting permission to occupy the property because they were too old to relocate. He gave them the right to occupy agreement, which came into effect in 2001. The right to occupy which they were given is not neutral. It restricts the rights of the Tshabangus. The Tshabangus were inferior, old and vulnerable. Their right to a secure tenure is found in the *Constitution* not from a PTO from the owner of the property. Section 25(6) of the *Constitution* was the basis for the enactment of the *Land Reform (Labour Tenants)* Act 3 of 1996 and the *Extension of Security Act*. These two Acts were passed to provide secure tenure for all labour tenants and those using and occupying the land because of their associations with labour tenants, to provide for the acquisition of land and rights in land for labour tenants.

If the Tshabangus had applied to become labour tenants, they would have enjoyed better security and protection of tenure. The judge in this court stated that he doubted if the Magistrate had considered the agreement at all to make a value judgment as to its fairness. The first respondent made a vital point about African culture when he stated that as his grandparents gave birth to his mom, he has only one home, which is his grandfather's home. The first respondent might be referring to an instance when the child is born out of wedlock. The court, in this matter, was unable to confirm the order made by the Magistrate. The court then ordered that Magistrate Carolina's order be set aside and replaced with the order that "the application is dismissed".

I have provided this case to show how complicated PTOs can be. Different people consider themselves to be legally right to stay in the property mentioned above for different reasons. It is not easy to determine who is right and who is wrong because of the rules around PTO rights. Unfortunately, the judge did not give any information as to how to resolve this issue in the future.

6.6 *NORMAN NDONGENI V THEMBISA NDONGENI AND 3 OTHERS* (CA28/23) [2024] ZAECMHC 8 (30 JANUARY 2024)

The appellant is Mr Norman Ndongeni, residing with his sister, the first respondent, Thembisa Ndongeni, at Ndongeni Residential Allotment No. 1[…]A, Lubhacweni Location, Mount Frere (the property). The second respondent was occupying the property unlawfully. The third respondent is the Department of Rural Development and Agrarian Reform. The fourth respondent is Umzimvubu Local Municipality located in the same area as the property. The property was under the name of the appellant and the first respondent's father, who is now deceased. On the 5th of August 2021, the appellant was appointed as an Executor of the Estate of their mother, who died later after their father. At the time of the mother's death, the property had already been registered in the name of the appellant because it was never registered in the name of the mother.

The applicant initiated an eviction application against the first respondent in terms of s 4(2) of the *Prevention of Illegal Evictions and the Unlawful Occupation of Land Act* (*PIE Act*), relying on the right to occupy the property and stated that the first and second respondents were occupying the property unlawfully. The applicant also stated that he is a holder of a PTO that was issued to him on the 05th of August 2009, and he has the right to evict the first and second respondents. The first respondent resisted and sought a declarator that the PTO was unlawful and must be set aside by the court. The first respondent based her counterapplication on the fact that the appellant had no right to evict her from their family home and that the PTO was obtained without her knowledge and consent, which makes it invalid.

The appellant argued that the court a quo should have validated the PTO because the property was not returned to commonage after the father passed on, and it was never registered in the name of the mother. They further stated that the appellant is the lawful holder of the allotment of the property if the National Commissioner has not cancelled it. The appellant further argued that the PTO gave him an undisputable right to evict any unlawful occupier from the property. The court had to decide whether the court a quo erred in finding that the registration of the PTO into the name of the appellant was not relevant to the relief sought by the first respondent in her counter application. The court also had to decide whether the court a quo was right in stating that the counter

application didn't need to be served upon the third respondent. Lastly, whether the counter application should have been granted and the main application dismissed.

The court stated that the third respondent seemed to have a legal interest in the relief sought by the first respondent about the declaration of the PTO as unlawful. What mattered was not that the basis of the challenge was that the property was a common home but that the third respondent's administration decision was sought to be questioned. Because of this, the first respondent had to serve the counterclaim upon the third respondent. The court further stated that the first respondent failed to involve the *Promotion of Administrative Justice Act* (*PAJA*)[425] review to challenge the administrative decision to issue a PTO by the third respondent in favour of the appellant. This made it terminal to the counter application. The counter application brought by the first respondent was defective, procedurally and in substance. The court a quo should have dismissed the counter application with costs. Because there is no evidence that the property was allotted to the mother at any stage, the main application should not have been dismissed. When the PTO was issued to the appellant, it had no occupational rights extended to the siblings.

The claim made by the first respondent that the property is a common home and the appellant obtained an invalid PTO without her consent does not trump the rights that the appellant has to occupy the property exclusively from her. Therefore, the court a quo erred in ruling that the appellant had no right to evict the first respondent. The judge, in this case, read the dissenting judgment captured by Tilana-Mabece AJ. The judge noted that the main issue is that the majority judgement did not consider the fact that the PTO channels and old legislation[426] and the operation are inconsistent with the *Constitution*. However, the constitutional issue did not arise in this matter and the court a quo. The main issue is compliance with section 6 of *PAJA*, which the first respondent failed to adhere to. The minority judgment acknowledged that a PTO is a perpetual right to occupy that gets terminated when the holder dies, having the land reverted to the tribal authority for a new PTO to be issued to another applicant. With this definition, it made no sense to the judge why the appellant was said to lack *locus standi* to exercise his right to evict the first respondent from the property.

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425 Promotion of Administrative Justice Act 3/2000.
426 *Black Administration Act* and the regulations made thereunder.

The appeal was upheld with the order of the high court set aside and replaced by the order that granted the main application dismissed the counter application and finally evicted the first and second respondents from the property. The first and second respondents were given 90 days to vacate the property. An interdict was issued against the first and second respondents, stopping them from entering the property after they had vacated.

The judge has used section 6 of *PAJA* to upgrade the position of the PTO. Although this has changed PTOs a bit in that now they can be interpreted fairly through the *PAJA* and the *Constitution*, my problem remains. The PTO, which is being upgraded to meet up with the provisions of *PAJA* does not provide a secure tenure. It is still a legally weak form of tenure.

6.6 CONCLUSION

As discussed by Beinart and Delius in their article (2021:94), a PTO is still a valid right. This right is protected by the *Constitution* and the *IPILRA* No.31 of 1996, even though it has not been formally renewed. A judge held this in the case of *Nandipha NO v Irfani*.[427] Although *IPILRA* protects people's rights, it also has a potential weakness. The weakness is that it allows people with PTOs to lose their land rights and have big companies win the land over if the community accepts it. This happened in the cases of *Machoga v Potgietersrus Platinum*[428] and *Global Environmental Trust and Others v Tendele Coal Mining*,[429] where the judges ruled in favour of the traditional communities led by chiefs who supported mines and allowed landowners to lose their rights in land.

A PTO was defined in *Norman Ndongeni v Thembisa Ndongeni and 3 Others* as a perpetual right to occupy that gets terminated when the holder dies, having the land reverted to the tribal authority for a new PTO to be issued to another applicant. The requirements of obtaining a legal PTO listed in *TACHMO CC v Mphuti N and Another* are important to note so that people do not repeat the same mistake of getting a voidable PTO agreement. As it is, the issue of land tenure and PTO right-holding confuses so many people. This is evident from the case of Oostenwald, where it was

[427] *Nandipha NO v Irfani Traders CC* (2018) 4654/2017.
[428] *Machoga v Potgietersrus Platinum* (2006) 1(3498/06).
[429] *Global Environmental Trust and Others v Tendele Coal Mining* [2019] 1 All SA 176 (KZP).

held that if the Tshabangus had applied to become labour tenants, they would have enjoyed better security and protection of tenure. This case showed how confused the Tshabangus were about the rights they had over the property they occupied.

The court held in the case of *Hlongwane v Moshoaliba* that ownership of immovable property could be passed through delivery through registration with a real agreement at the Deeds Office. This made Mr Dennis legally competent to sell the property to Ms Moshaoliba. However, if the appellants had done as advised and registered the home as a family house, their rights could have been recognised as the *Deeds Registry Act* 47 of 1937 makes provision for a family house. This is why I believe that the issuing of PTOs has brought so much confusion to the community. Hence, I believe that the development of the PTO would be a great solution, just like how the *Amendment Act* in the *Graham Robert* case proposed it. Although the *Amendment Act* in the *Graham Robert* case had intentions of developing the land tenure system, it was found to have effects of destroying the world. There are still so many people who are occupying land under a PTO. This is inconsistent with the *Constitution*, which provides that the State must protect, respect, fulfil, and promote the rights in the Bill of Rights. This was part of the reasons why the Amendment Act wanted to develop the land tenure system.

A part of me understands and agrees with the view of the Trust and the Board in the case of *Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others*.[430] However, I can't entirely agree with how they wanted to change PTOs into lease agreements without honouring the customary practices of community members in KwaZulu-Natal. I shall share my view further in chapter 7 below. What to note for now is that I only agree with the idea that PTOs must come to an end. It was fair for the judge to keep the best interest of the community at heart while he granted his order. The judgments in this case will help me share my view about PTO holdings in my concluding chapter below.

[430] *Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others* 2021 (8) BCLR 866 (KZP)

CHAPTER 7: CONCLUSION AND RECOMMENDATIONS

7.1 INTRODUCTION

The previous chapters have shown the rights that people have in respect to land. They have also demonstrated how some of the rights have come about. PTO was also explained in detail as the right that the research focuses on. Legislations were examined, and case laws were discussed to give a clear view of the PTO right and how it is currently held. Important concepts like land tenure were discussed in the discussion of the PTO rights. Chapter 2 identified the rights that govern PTOs in communal land. Chapter 3 discussed a few legislations that brought about the rights in land. Chapter 4 discussed the difference between ownership rights and PTO rights. The White Paper of 1991 and the White Paper of 1997 were discussed in Chapter 5. Chapter 6 discussed case laws that have given the current stance of PTOs. This chapter seeks to summarise the most important concepts that this research touched on, and more additions will be made to clarify everything. A recommendation on how to solve the problem that gave rise to this research will be made. In a 1994-2017 commissioned report of a high-level panel, it was stated that the consequences of tenure security of people living in communal areas, which was brought by apartheid and colonialism, can be solved only if a new system is constructed on top of the repeal of apartheid laws.[431]

7.2 PERMISSION TO OCCUPY AS A STATUTORY RIGHT

As provided in Chapter 2 above, the notion of ownership[432] was restricted in the pre-colonial era in South Africa. Customary law in property was not concerned with the people's rights in property but with the obligations that people had towards each other regarding property. It was more important to have a good relationship with people than

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[431] Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023).

[432] Before the notion of ownership was introduced, everything was held in common and everyone had equal rights to the same thing, or the things were said to belong to nobody. It was only rights to use that were protected. See in this regard Du Plessis 2011:50.

a person's ability to uphold an interest in property against the world. People were entitled to property in the form of obligations that resulted from family relationships rather than a means to keep people from using certain property. It can then be said property was embedded in social relationships rather than giving people a title or individual claim over property.[433]

The scope for developing the principles and pace of customary law was limited. Regarding property, common law replaced customary law when the colonial conquest introduced the market economy. Common law then made it hard to interpret customary law and tenure.[434] Colonists thought that the concept of ownership applied to civilised societies everywhere and that every land deserved an owner even if the rights were not defined. It was easy for the government to appropriate unowned land because the notion of ownership was new to people under customary law. Whenever there was a dispute about land between African people, common law was used to resolve the dispute instead of customary law.[435]

Communal tenure practices that emphasised the exclusive use by individuals or families were not only ignored by the colonial state but by the apartheid state as well. Individuals and families hold rights and interests that are more individualised than how people think. People have strong rights of use, access, and occupation, except for excluding others. This differs from communal rights because families and individuals must use communal resources.[436] Because of this, people obtained permission to occupy land. These PTOs can be obtained lawfully through an application. A formal and legal PTO must contain three signatures, one of which is from the Head of the Department, as well as an official stamp. Proof of payment must accompany the document.[437] Unfortunately, ownership and PTOs do not share the same rights, as explained in Chapter 4 above.

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433 Du Plessis 2011:49.
434 Du Plessis 2011:50.
435 Du Plessis 2011:51.
436 Clark & Luwaya, "Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa", https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023).
437 *TACHMO CC v Mphuti N and Another* (A39/2020) [2022] ZAFSHC 146 (31 May 2022).

7.3 THE DEVELOPMENT OF THE LAW IN COMMUNAL AREAS

South Africa takes pride in the post-1994 *Constitution* enacted with the Bill of Rights, protecting everyone in the country and recognising Indigenous South Africans.[438] The interim *Constitution* recognised customary law. It safeguarded a prominent place in the final *Constitution* by stating that the courts must recognise and apply customary law like common law. This provision meant that customary law and common law were now to be treated alike. When the final *Constitution* was passed, it did not talk about customary law and common law in the same breath as was provided by the interim *Constitution*. The final *Constitution* compels the courts to apply customary law subject to the *Constitution* and other legislations. It recognised customary law and traditional authorities.[439] The final *Constitution* upgraded customary law to the same level as common law but was not always treated the same.[440] The courts have been using customary law as instructed by the *Constitution*. For example, in the case of *Bhe and Others v Khayelitsha Magistrate,*[441] The court specified in the ruling that customary law is subject to and protected by the *Constitution* in its own right.

Customary law has been defined to mean the customs and usages observed traditionally among the indigenous African people of South Africa and form part of the people's culture.[442] In the *Bhe* case, it was stated that customary law has had its sources in people's customs, traditions and practices. It is flexible and changes over time depending on the customs that people are practising among different people. This now falls under the concepts of written and customary law. According to Woodman, the customary law practised by people results from the customary law that was observed before the colonial era but has developed and is up to date with the current circumstances. It can, therefore, be said that the lives and customs are constantly changing by the rules and practices of people. When a society changes, the rules and practices also change along with them.[443]

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438 Maimela & Morudu 2021:54.
439 *Constitution*:sec. 211.
440 Rautenbach 2019:2.
441 *Bhe and Other v Khhayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC.
442 *Recognition of Customary Marriages Act* 120/1998.
443 Ozoemena 2014:148.

The concept of customary law marked a standard shift in acknowledging the need to differentiate between versions of customary law that existed in South Africa.[444] Customary law has many uncodified rules that illustrate tradition but are constantly evolving and influenced by appropriate pressures. Such changing laws that people keep adapting to are what make up living customary law. It is unlike written customary law, which is codified and restrictive. It follows the processes of making formal law.[445] Written customary law[446] is found in court precedents, legislation, and texts. It portrays a past slanted by authoritarian values. Living customary law is known as the law that best describes people's day-to-day lives. The flexible nature of customary law is primarily found in the interactions between people's aspects. In the case of *Pilane and Another v Pilane and Others,*[447] the court held that the customary law's true nature is as a living body of law, dynamic and active, with an essential capacity to develop and keep up with the changing lives of the people subject to it. This means that customary law is law in its own right. The rules and practices of customary law are not standard but reflect the changing needs of society. This statement by the court signified the importance of living customary law as it represents the reaffirmation of the developing requirements of societies.[448]

Another case law that emphasises the importance of customary law as a living system that is not bound by written customary law or historical precedent is *Shilubana and Others v Nwamitwa*.[449] In this case, Ms Shilubana was appointed as the new chief of her people, which was against the past practices that only allowed the eldest son of the previous chief to be a new chief. The provisions of gender equality provided for by the *Constitution* were used to resolve this case. The Constitutional Court adapted to the changes in society and applied customary living law, which has been updated since this case. The court put aside some of the tests used to determine such matters. It stated that customary law is supposed to reflect the modern practices of a society, which is why customary law is always developed with constantly evolving practices. The court updated the training to allow women to become chiefs just as men did.

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444 Ozoemena 2014:151.
445 Hull *et al*. 2019:2.
446 Sometimes referred to as official customary law. In this research, it will be referred to as written customary law.
447 *Pilane and Another v Pilane and Others* 2013 (4) BCLR 431 (CC).
448 Ozoemena 2014:151.
449 *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9.

Considering the above, the government must enact legislation and intentionally and meaningfully interact with the realities of how the customary tenure system works in practice and resist the force of following the written law without amendment. Millions of South Africans interact with land based on customary law models, which are not protected and regulated by the *Deeds Registries Act*. For the property clause provided in the *Constitution* to obey the spirit, purport and object of the Bill of Rights, a substitute solution must be made for legislation that conforms to the provisions of the *Constitution*.[450] Land tenure must be reformed to recognise how land rights are currently held locally. This means that the development of the law must change. This can be done by developing written customary law and replacing it with living customary law. In doing so, what is already in existence will be designed to meet the current needs of the people.[451] If land reform had been developed to enable customary interests to be registered, there wouldn't have been any insecurity in tenure and the problems that come with it since everyone would have had an equal right to property.[452]

7.4 LEGISLATIONS ENACTED FOR CHANGE

Legislation is a way used to develop land rights. For this reason, a few legislations were enacted with the belief that they would be able to change the way rights in land are held in rural areas. The *ULTRA* allowed some surveyed sites in the former homelands to be converted to privately held titles. It was also applied in grant deeds issued in a few townships, such as PTOs issued by the Bophuthatswana government. In theory, *ULTRA* applies to PTOs in communal areas and traditional councils seeking collective titled ownership in customary land.[453] The government tried to develop the *Land Rights Bill*, which intended to give customary rights statutory recognition and upgrade them without changing their basic customary character. The Bill proposed that protected land rights be awarded to beneficiaries, with the Minister of Land Affairs

450 Mabasa & Mabasa 2021:75.
451 Hull *et al*. 2019:5.
452 Mabasa & Mabasa 2021:77.
453 Mabasa & Mabasa 2021:100.

remaining as the minor owner of the land. Individuals or groups of people would hold the right. The right holders would manage and control their rights.[454]

Millions of South Africans occupy land and hold uncertain land rights in customary tenure in the former homelands on transferred land and informal settlements. The *Constitution*, in sections 25(6) and (9), promised enhanced and upgraded tenure to the people living in the former homelands. Unfortunately, this has not been done yet.[455] The *Constitution* provides in section 26 that a person's insecure tenure due to past racially discriminatory laws or practices has the right to the extent provided by an Act of Parliament to receive a secure tenure or any possible redress.[456] Unfortunately, the government has not passed an Act that practices this clause. There should be a system of tenure that allows every South African to hold secure ownership.[457] A few years after the finalisation of the 1996 *Constitution*, the ANC government passed three Acts through the Department of Land Affairs to protect the land rights of people with no formal titles. The *IPILRA*, as discussed in Chapter 3, tried to give the provision of section 25 of the *Constitution* legislative force. This Act was especially aimed at the former homelands, where PTOs' customary rights were uncertain.[458]

The way the Act is written is moderately generous to some types of landholdings who may be vulnerable. Applicants are supposed only to show their beneficial occupation as if they have owned the land for five years. This has been applied to people who have held their land under PTOs or customary tenure or through other informal allocations since 1994. However, *IPILRA* does not include people who occupy land as workers or tenants. Farmworkers and people who lease residential land or plots, including those who got their leases from the Ingonyama Trust in KwaZulu-Natal since 2007, are not covered by *IPILRA*. The Act protects people from the removal of rights. The *IPILRA* has a few weaknesses in that it does not provide for the rights in land that people who hold land under PTOs have. Another weakness is that there is no

454 Pienaar & Du Plessis 2010:84.
455 Beinart *et al*. 2017:1.
456 Beinart & Delius 2021:84.
457 Beinart & Delius 2021:85.
458 Beinart *et al*. 2017:26.

administrative support backing up *IPILRA*.[459] It is also unlikely to be given the strength to manage as a land rights protector for low-income families effectively.[460]

Another legislation that came into effect after the provisions of the Constitution[461] was the White Paper of 1997.[462] The White Paper of 1997 highlighted some values regarding the security of tenure and referred to tenure in the former homeland, which was held in trust by the government and issued PTOs to black people. The idea was to move from PTOs that were being issued and reform tenure.[463] This upgrade of customary tenure into individual ownership was intended to ensure that people could access the capital value of their land and to promote investment.[464] It also aimed at changing the discriminatory laws made during the apartheid era so that they would conform to the Constitution's basic human rights and equality.[465]

The *CLRA* was enacted to provide for people who hold land rights in rural areas.[466] *CLRA* was enacted with, among other things, the intention of providing for the need to secure insecure and informal rights, connecting secure rights with better administrative and governance systems and addressing gender equality in the context of communal tenure. Because of the listed intentions, a more modern system was foreseen to inspire economic investment and endorse development in some poor areas in the country.[467] The *ULTRA*, discussed above, was never extended to cover non-surveyed customary land because alternative legislation like the *CLRA* was supposed to provide for them.[468] Unfortunately, the Constitutional Court found the *CLRA* to be invalid.[469] Ever since the *CLRA* was declared invalid, the ANC government has not yet enacted an Act that will replace it in a way that suits the court's ruling. Due to this, millions of South Africans hold insecure tenure. Most African landholders are found in the poorest

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459 The stronger legislation that we need must be backed up for it to work effectively. See in this regard Beinart *et al*. 2017:28.
460 Beinart *et al*. 2017:31.
461 Section 25(6) of the *Constitution* entitles individuals or communities whose land tenure is legally insecure due to past racially discriminatory laws or practices to tenure which is legally secure. Section 25(9) commands parliament to enact legislation to provide for such tenure security.
462 The White Paper on South African Land Policy, 1997.
463 Du Plessis 2011:45.
464 Hull *et al*. 2019:18.
465 Du Plessis 2011:46.
466 Mabasa & Mabasa 2021:100.
467 Pienaar & Du Plessis 2010:83.
468 Mabasa & Mabasa 2021: 00.
469 *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10.

parts of South Africa, where land is an important asset for them. This is another reason why their rights must be made secure.[470]

7.5 RECOMMENDATIONS

Before a recommendation is made, it is important to consider what the people in South Africa need and what would benefit them. Then, a recommendation that would be in their best interest can be made. The Appeal Court in Botswana, in the case of *Kweneng Land Board v Matlho & Mthlabane,*[471] stated that customary law had evolved to the extent that land interests should be equal to common law ownership. The possibility of having a tenure system that can cover the needs of all people in both rural and urban areas must be considered. The current deeds registration system provides two forms of registration: individual rights in surveyed land and fragmented urban property holdings for time-sharing and sectional titles.[472] A third form of communal land rights can be developed to equalise land rights to those of ownership regarding communal rights over communal areas like grazing sites.[473]

According to my understanding of the law around PTOs, people get PTOs from the chiefs who have been appointed as trustees of the State to appoint the land. Since a PTO is a personal right, the right dies with the holder. This means that the property will now have to be taken back to the State through the chiefs since no one can succeed it. With the evolving law, it has become customary that when the holder of the right dies (a man in most cases), the property remains with the wife or the child in the family. Sometimes, it is taken by the whole family and treated as a family house even when not registered. This proves that the law has evolved to fit what people in the societies want it to be. Therefore, since this has become customary to people, the government must consider putting it into legislation. It is obvious from what is being practised that people are now treating the land in communal areas as if they own it. This is because they practise such rights, although they aren't recognised.

Just because rights are not recognised does not mean they aren't there. Something should be done about these existing but not recognised rights. At an International

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470 Beinart & Delius 2021:94.
471 *Kweneng Land Board v Matlho & Mthlabane* (1993) 37 JAL 193.
472 Pienaar 2013:25.
473 Pienaar 2013:26.

Interdisciplinary Security of Tenure Conference held at the University of the Free State from the 6th to the 8th of May, Professor Daniel Brand stated that “the puzzle of tenure is not so much about rights and giving rights to people, it is much more about the reality of rights and interests and how people live together”. He further stated that “the basic shift required is to think differently about a system of law. It is no longer a system of rights that allows us to exclude others from property, but it should be seen as a system of regulation concerning land relationships”. The lack of knowledge about certain property rights and the current practices around the land will make people fight once they learn that they have fewer rights to land than they thought. For example, people currently exercise rights as if they own their property, whereas they only have a PTO. When people act in a certain way, the government and lawmakers must also react in a way that suits the people's actions. In this case, people are evolving laws to allow them to hold ownership rights and do away with PTOs. This means that the government must react in a way that allows people to do away with PTOs and grant them ownership rights.

There must be an enactment of legislation which will comply with the provisions of sections 25(6) and (9) of the *Constitution*. The legislation must recognise individuals, families and groups' rights over the land they occupy and use. The rights to be recognised must be protected to such an extent that there would not be an infringement against them, and the security of tenure will be strengthened. The protection of these rights may be based on, and not limited to, the basic protections provided in *IPILRA*. The legislation must provide for the registration of such rights.[474] As Bennert suggested, there should at least be an amendment of the *IPILRA* or a new legislation passed and made permanent. The Act must have specific provisions about every individual's rights, either individual or communal. People with rights in land under PTO must be allowed to have their rights converted into ownership.[475] There should be an administrative system that will regulate all valid land claims. The rights must not be inferior but equal to title deeds.[476] A few legislations and case laws have proved

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474 Clark & Luwaya, “Communal Land Tenure 1994-2017: Commissioned Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa”, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commisioned_Report_on_Tenure_Reform_LARC.pdf (Accessed on 27 July 2023)

475 Beinart *et al*. 2017:32.

476 Beinart *et al*. 2017:54.

that some land rights, such as PTO rights, are inferior to individualised ownership rights because they cannot be registered. The inclusion of informal land rights in the protection of land rights that ownership and limited real rights have can be a solution to the land tenure problems that South Africa has.[477]

A new form of tenure that would meet the needs of people and the demands of the new and transformative paradigm must be developed, as it is one of the main objectives of the current constitutional era. This can be done by changing and amending approaches to ownership and property concepts.[478] An approach that can be implemented is moving from a communalist and traditionalist policy and focusing on all South Africans holding land rights in systems that are equal to and secure as ownership.[479] There should be a complete and operative land administration system[480] for land tenure rights developed to avoid a disorganised approach to land administration and sustainable development. It is essential to apply and develop sound governance principles for land administration.[481]

After careful and thorough consideration, I am recommending a single national land tenure system that will allow for the registration of all rights held to property. People living in communal areas will have their informal rights converted to ownership. This will not kill the essential part of customary rights in that it will still respect the communal rights that community members have. The legislation to be enacted must correct the weaknesses of *IPILRA*. The law must align with the current practices that have become customary to people. A title deed will be issued to people for the portion of land they own, but outside their boundaries, will be a site owned communally by all members—for example, arable sites, grazing land, and access to the mountains and rivers. An individual's registration of rights will also indicate that the person has communal rights in all communal sites. This registration system will secure the land for fair registration of rights and respect customary law. This will also boost the livelihoods of people in rural areas as they can invest in their properties and have them held as security as they better their livelihoods. They can get a lot of economic benefits

477 Pienaar 2013:25.
478 Pienaar 2014:382.
479 Beinart *et al*. 2017:1.
480 When comprehending the land administration system of land tenure internationally, aspects like land policy principles, equal protection, spatial data and technical principles, and land tenure policies are recognised as requirements. See in this regard Pienaar 2013:25.
481 Pienaar 2013:20.

by investing in their properties. This will keep the country's economic development high and boost its economy. It will also give the people in rural areas a sense of belonging. Most importantly, the Constitution's spirit, purpose and objects will be adhered to. South Africa belongs to everyone who lives in it, so everyone deserves to be treated the same way.

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