

## DEFINING THE PROPERTY RIGHTS OF OTHERS:

### POLITICAL POWER, INDIGENOUS TENURE AND THE CONSTRUCTION OF CUSTOMARY LAND LAW<sup>1</sup>

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Constitutional recognition of indigenous law and the role of traditional authorities at last dignifies African legal culture in South Africa with the official equality it has so long been denied. But this new status will stimulate the debate over the content and construction of judicially-recognized customary law and its relationship to the new bill of rights (Bennett 1994a; Bennett and Roos 1992).

One of the first questions to be confronted is how land tenure is linked to the administrative powers of traditional authorities. Within weeks of President Nelson Mandela's inauguration, this issue had already threatened the stability of the new government of national unity; former State President de Klerk's last-minute assent to the KwaZulu Ingonyama Trust Act meant that approximately three million hectares were to be administered by Zulu King Goodwill Zwelithini as the sole trustee, with administrative expenses to be borne by the new KwaZulu/Natal provincial government (Randall and Chothia 1994). Although a Cabinet committee managed to resolve the initial crisis, the King's powers over the allocation of resources were left to be settled by future legislation. (See Bennett 1994b; Ngubane 1994 for different accounts of the relationship between traditional authority and land tenure.)

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1 I am indebted to many people who suggested possible sources of information and commented on earlier drafts, in particular Rick Abel, Phil Bonner, Neil Parsons, Gay Seidman, and participants in the May 1995 Symposium on Law, Colonialism and Property in Africa at Stanford University, California, and in a Seminar at the Land Tenure Center, University of Wisconsin.

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As the Ingonyama Trust debate shows, constitutional recognition of indigenous law will require the new government to disentangle indigenous land rights from a colonial legacy of indirect rule, under which political sovereignty and land ownership were intertwined. Moreover, the property rights of individuals, family groups and communities under indigenous land tenure systems were entrapped in an administrative model of customary law (Chanock 1991a: 76). Indirect rule cast the allocation of plots of land within a community as an "official administrative act" of the traditional leadership (Bennett 1995: 133). This imposed a system of patronage and political dependency, simultaneously undermining community governance and reshaping the role of traditional authorities in the political process. Finally, a revitalization of indigenous land law will require the new state to ensure that those communities and individuals who wish to continue to hold land within the framework of an indigenous land ethic are able to determine the contours of this form of tenure without administrative interference based on colonially constructed notions of the content of indigenous tenure. This would require that communities are able to reinfuse indigenous tenure with community norms and practices, rather than remaining dependant on administrative fiat.

This process may also serve to free "customary" legal concepts and rules from their colonial moorings and to bring formal legal notions of indigenous tenure into line with more recent understandings in the social sciences. Of particular importance is recent work in history and legal anthropology emphasizing the extent to which the legal framing of "customary tenure" is shaped by its construction in a context dominated by particular, culturally-specific, legal notions of property and ownership and the way colonial imperatives shaped the particular content given to customary tenure. (See generally Berry 1993; Mann and Roberts 1992. See Maddock n.d. for an example of how these developments have impacted upon legal movement towards the recognition of Aboriginal land rights in Australia.)

Through a close examination of *Hermansberg Mission Society v Commissioner of Native Affairs and Darius Mogale* (the HMS case) I hope to contribute to this growing body of literature and to demonstrate how a particular, possibly erroneous, construction of indigenous law became geographically extended and imposed as legal authority for a universalized notion of "customary tenure."

In conclusion I will argue that recognizing the constructed nature of existing legal notions of customary tenure allows us to reopen the question of land held under communal tenure and may facilitate a greater recognition of the land rights of individuals and families under indigenous law. Discrediting the basis of current legal notions of customary tenure provides an incentive for future legislative and judicial explication of the constitutional recognition of indigenous law and traditional authorities to liberate indigenous tenure from the domination of

administrative processes. This could be accomplished by a 'reinvigorating process' through which communities committed to the recognition and practice of an indigenous land ethic are able to directly contribute their shared understandings and accepted intra-community practices as sources for the construction of a legitimate system of indigenous tenure.

### The Hermansberg Mission Society Case and the Creation of Legal Authority

The reimposition of colonial administration and indirect rule over African communities in the Transvaal at the end of the second Anglo-Boer War was accompanied by the registration of African lands in the name of the Commissioner of Native Affairs, to be held in trust for the communities. The HMS case arose when the mission society challenged the transfer of a portion of the farm Boschfontein, in the Rustenburg district, to the Commissioner in trust for Chief Darius Mogale and his tribe. The HMS claimed that a particular portion of the farm could not be transferred as it had been sold to the HMS by the Chief's father. Darius Mogale responded by denying the alleged sale of the land.

Representing a pivotal moment in the construction and recognition of property rights in "colonial" society, the HMS case hinges on an African chief's refusal to recognize an alleged land-sale contract concluded between his father and the plaintiff missionary society. The chief argued that he could not alienate tribal land without the explicit consent of the community. Rejecting his argument, the court held that an African chief, as trustee of the community's land, might alienate land with the consent of the chief's council and without the direct participation of the community. Although apparently a subtle distinction, the shifting of chiefly accountability for the control and distribution of community resources from the *pitso* - a body made up of all married males, the recognized political participants in the community - to the chief's council - a body made up of male elders representing different sections of the community (Myburgh 1985: 57) - had profound consequences for the future conception of community, and ultimately for individual property rights in African polities. This shift of power away from the *pitso* was part of the colonial transformation of social and property relations in African communities, reflecting the colonists' image of a backward society, or, in effect, the 'feudalization' of African society.

This story of colonial interaction spans a period during which an African community was transformed from an autonomous political entity into a subject group. Its territory was incorporated into the colonial state while its land rights were formally transferred to the colonial administration. The community's relationship with the HMS followed a similar trajectory. Initially the mission was

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invited to join and serve the community and settled on land granted by the Chief. Thirty years later, however, the mission asserted an exclusive right to the land to resist the parcel's inclusion in the "native reserve" being created for the community. Based on a financial transaction, which may have been a sale, mortgage, or secured or unsecured loan, the mission's claim and the consequences for the community reveal the ambiguities of meaning and changing circumstances typical of these colonial interactions.

The choice of a case must be guided not only by concern for its particular facts but also by its impact on legal precedent. Both the context within which the HMS litigation arose and its legal significance make it pivotal. For it involved the question of alienability, which Martin Chanock identifies as one of the two elements determining the construction of customary tenure (Chanock 1991a).

The opinion of Innes CJ is the source for subsequent legal arguments about the relationship between political authority and land rights, which anchor the line of cases culminating in the declaration of the Privy Council that

the true character of the native title to land throughout the empire, including South and West Africa . . . is a uniform one . . . [which] takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is sovereign. (*Sobhuza II v Miller and Others*: 525)

This feudal notion of individual or even community rightlessness with respect to political authority is thus extended, as the colonial or official understanding of indigenous tenure throughout the empire, with profound consequences (Chanock 1991a: 64-66).

Colonial authorities had postulated the limited tenure rights of indigenous landholders from the time when consideration was first given to the recognition of indigenous law (Rayner 1898, quoted in *Amodu Tijani v Secretary, Southern Nigeria*: 404). But the "legalization" of this viewpoint finds its inception in the HMS case. From mere dicta in the opinion of Innes CJ, the proposition that "ownership in land... was foreign to their ideas" is transformed into a powerful legal precedent through its citation by the Privy Council in *In re Southern Rhodesia* and then in *Sobhuza II v Miller and Others*.

Denying the land rights of Lobengula's Ndebele people, Lord Sumner, stating the advice of the Privy Council in *In re Southern Rhodesia*, cited as sole authority the statement that, when the African peoples of South Africa

were governed by their own customs and laws the notion of separate ownership in land or of the alienation of land by a chief or any one else was foreign to their ideas. (*In re Southern Rhodesia*: 215)

Revealing their evolutionary assumptions the Privy Council contrasted this "original" situation with that of the

Basutos . . . who had made considerable progress both in the idea of transferable property in tribal land and in usages for ensuring the assent of the tribe to alienation of it.<sup>2</sup>

Although willing to countenance evolutionary development, especially as a result of "contact with white men and . . . residence under their rule",<sup>3</sup> the Privy Council maintained that most aboriginal peoples had no comparable notion of ownership over land. Thus it could argue that, although the Queen was pleased to recognize the sovereignty of an indigenous monarch, it would be fanciful to try to span the great gulf between European juridical conceptions and all the various conceptions of their respective subjects.<sup>4</sup>

This distinction between sovereignty and the juridical conceptions of the subjects of the colonial power or colonized societies allowed the colonial courts to "legalize" the process of colonization within the context of established colonial law while simultaneously denying any preexisting rights to land among the indigenous population by reconstructing indigenous property relations so as to exclude the possibility of their recognition under the common law. Given the consequences of this distinction for the land rights of indigenous people, individually and collectively, its source and status as legal authority is pivotal to future interpretations of "customary law."

### Constructing the Property Rights of Others

Authoritative texts on customary law continue to argue that indigenous law "cannot be adapted to ownership in immovable property for there is no such customary law", while simultaneously conceding that indigenous law "knew ownership and possession of movables, and occupation and use, but not ownership, of land" (Becker 1989: 50). This distinction seems to be more a

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2 [1919] AC 211 at 215.

3 [1919] AC 211 at 215.

4 [1919] AC 211 at 216.

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product of nineteenth-century European notions of ownership and colonial ordering than a genuine reflection of land rights in indigenous law.

While modern notions of land tenure portray property as a bundle of rights, which may differ from one jurisdiction to another and even over time (Lewis 1985), official customary law continues to be dominated by the assumption that "true" ownership is in all circumstances equivalent to freehold title. This assumption denies the existence of land ownership in indigenous law on the ground that, where a property holder does not have the right freely to alienate, he does not have an ownership right. This notion of ownership, however, is based on a combination of two nineteenth-century jurisprudential traditions. The first is the absolutist concept of ownership, advocated by pandectist philosophers, but challenged as ahistorical when applied to Roman-Dutch law (Visser 1985). The second consists of the feudal notions of property relations which underpin English land law. Despite this pedigree, and the formal recognition of the concept of ownership, its exact content remains contested in both the European civil law and Anglo-American common law traditions and is subject to continuing debate in South African law. Freed of the assumption of a single definition of ownership, we can examine how the process of colonial ordering and the "legalization" of indigenous law reconstructed the "legal" relationship between indigenous communities and their land.

### *Colonization and the construction of customary tenure*

A review of the fate of indigenous land rights at the hands of colonial regimes reveals outcomes which differ according to the relative strengths of the colonized and colonizing groups. Three general patterns may be discerned, ranging from the complete denial of land rights to the recognition of "customary tenure."

The first pattern is typified by situations in which the colonizers simply negated indigenous land rights, asserting that the land in issue was *terra nullius*.<sup>5</sup> This denial continues today for less powerful or more marginalized communities, like the San in Botswana (Wilmsen 1989a: 1), or has only recently been overcome, as for Aboriginal communities in Australia (Maddock n.d.). Even when the property rights of these communities have been recognized in the form of a common law

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5 But cf. *The Western Sahara Opinion: Concerning Certain Questions Relating to Western Sahara (Rio de Ore and Sakiet El Hamra)*, 1975 ICJ 12 (Advisory Opinion of October 16, 1975). This was the first major legal refutation of the notion that unsettled lands were *terra nullius* before the arrival of European colonizers.

aboriginal title, however, they are subject not only to the state's normal powers of expropriation but also to any "use for administrative purposes the use of which is inconsistent with the continued enjoyment of the rights and privileges of [the] people under native title" (Brennan J., Mabo case: 76).

The second pattern occurred in situations where the colonizers initially recognized the territorial rights of the indigenous sovereign but subsequently - often as a consequence of the military defeat of the colonized - denied the existence of cognizable property relations among the defeated people. Thus in *In re Southern Rhodesia*<sup>6</sup> the Privy Council denied the property rights of Lobengula's people following his defeat and the extension of British sovereignty over Southern Rhodesia. Although that case originated in a conflict between the British South Africa Company and the Crown over rights to unallocated lands, the Aborigines Protection Society intervened on behalf of the Africans of Southern Rhodesia, "claiming that Africans had rights which had not been ceded" (Chanock 1991a: 65). The argument was based on contemporary international law, which held that, if the property rights of colonized or defeated communities were similar to those recognized in English law, they would not be affected by a change in sovereignty (McNeil 1989). In order to overcome this well-established precedent the court "approached the question in terms of social evolution" (Chanock 1991a: 65) arguing that

[s]ome tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society.<sup>7</sup>

Significantly, this denial of individual land rights among Africans was further justified on the basis of colonial imperatives. Rejecting the position of the Aboriginal Society, the court stated that according to their argument

the natives before 1893 were owners of the whole of these vast regions in such a sense, that without their permission or that of their King and trustee, no traveller, still less a settler, could so much as enter without committing a trespass. If so, the maintenance of their rights was fatally inconsistent with white settlement of the country, and yet white settlement was the object of the Company and controlled by the Crown, and that object was successfully accomplished, with the result that the

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6 [1919] AC 215.

7 [1919] AC 215 at 233.

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aboriginal system gave place to another prescribed by the Order in Council.<sup>8</sup>

This statement of the reality of de facto colonial power was said to make "further inquiry into the nature of the native rights unnecessary."<sup>9</sup>

The third response was to acknowledge the existence of certain "lesser" indigenous property rights. Where the colonial power was able to assert sovereign authority but lacked the power to dominate colonized society completely the recognition of "property rights" involved the "creation" of customary law in a process of "dialogue between the colonial state and its African subjects" (Chanock 1991a: 62). However, the courts did not recognize these rights as equal to ownership, which could withstand a change of sovereignty in the form of colonization. The courts rather defined them as lesser rights, to occupation and use, confirming their vulnerability to simple extinction by any act of the new sovereign inconsistent with their continued existence.<sup>10</sup>

This response contained two elements. First, it defined the rights of the colonized as limited to occupation and use, which characterized feudal land law in England. Land rights in this feudal model were seen as deriving from "political authority, rather than residing in the peasantry" (Chanock 1991a: 64). This construction of African land rights had the virtue of according with prevailing colonial notions of state and society and enabled colonial authorities to make a connection between British and African land law. Second, in accordance with this characterization, rights to land were seen as inextricably bound up with issues of sovereignty and governance. This allowed the Crown to assert a control over colonized lands, which it had long been required to relinquish under English law, while simultaneously rearticulating the role of African chieftainships in accordance with the policy of "indirect rule," which mediated between African resistance and a limited colonial state.

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8 [1919] AC 215 at 234.

9 [1919] AC 215 at 234.

10 Significantly, as Martin Chanock has noted,

... [the] early colonial discussions over African rights to property, particularly land, were over the extent to which property was communal, and the extent to which individuals had use rights... The expropriation of communal lands was far more easily politically and legally accomplished and justified than the expropriation of individual rights. (Chanock 1991b: 70)



*Customary tenure as a product of universal history*

The intellectual framework upon which this edifice was built reflects the universalizing narratives of social evolution which dominated the nineteenth century. They were summed up with respect to land tenure by Lord Lugard, the architect of the policy of indirect rule:

In the earliest stage the land and its produce is shared by the community as a whole; later the produce is the property of the family or individuals by whose toil it is won, and the control of the land is vested in the head of the family. When the tribal stage is reached, the control passes to the chief, who allots unoccupied lands at will, but is not justified in dispossessing any family or person who is using the land. Later still, especially when the pressure of population has given to the land an exchange value, the conception of proprietary rights in it emerges, and sale, mortgage and lease of the land, apart from its user, is recognized... These processes of natural evolution, leading up to individual ownership, may, I believe, be traced to every civilization known to history. (Lugard 1922: 280-81, quoted in Chanock 1991b: 69)

This colonial construction of customary land tenure, however, must be understood not as merely thrust upon unresponsive African societies but rather as the outcome of an interaction in which the colonized constantly sought to shape the process so as either to protect what remained of their lands or to further the interests of particular sections of African society. Colonial administrators sought "information on traditional social structures and identities in order to know how to apply customary rules in governing colonial peoples," while "African colonial subjects renegotiated rules and social identities in order to cope with or take advantage of colonial rule and commercialization" (Berry 1993: 34). Africans, thus, have actively participated in the development of customary law (Chanock 1991b) and the construction and perpetuation of particular notions of communal tenure (Chanock 1991a: 66; see generally Cheater 1987).

### Contextualizing the Hermansberg Mission Society Case

Although the importance of context in the creation of customary law and the role of colonized participants is now widely accepted, it remains essential to investigate how this framed the emergence of specific legal authority. As Martin Chanock argues:

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[w]hile "law in action" derives its meaning from local situations and conflicts, we must not lose sight of the general overarching legal framework as a major ingredient of each situation. (Chanock 1991a: 66).

Context is relevant in the HMS case at two points in time, first when the transaction in issue took place, and then 30 years later during the litigation. The transaction occurred in 1876, a period in which the necessity of clarifying property relations had come to the attention of the mission societies. On the one hand, missions in the Cape had been made aware of their tenuous property relations in 1854, when Sir George Cathcart announced the establishment of trust tenure on mission stations. He argued that this was necessary because it was not clear "whether these mission lands were the property of the missionary or of the mission community congregated within it."<sup>11</sup> On the other, the denial of sovereignty and continued colonial expansion brought into question the long-term stability of the chiefly land grants upon which the mission stations were initially founded. For example, the denial of Tlhaping sovereignty over lands in what became the British Crown Colony of Griqualand West by the Keate Award in 1871 threw into question chiefly land grants and left the mission stations in that area subject to the vagaries of colonial administrative policy (Shillington 1985: 35-89). Aggravating these uncertainties was the general shortage of land for rural settlement, for both black and white, from the 1870s onwards (Davenport 1977: 118).

The litigation arose in a context shaped by the consequences of these earlier processes. They required the Mission Society to distinguish its holdings from those of the tribe, whose land was in the process of being placed in trust as part of the colonial creation of African reserves. Significantly for the missionaries' understanding of their property rights, the process of placing land in trust was initiated after the first British annexation of the Transvaal by Sir Theophilus Shepstone in 1877. The very transaction in issue was carried out by Chief Frederick Mogale so that he could obtain £60 from the HMS missionary J.P. Jordt. He needed this sum to obtain a transfer of the farm Kafferskraal No 597 from one Orsmond. The transfer when completed was then registered in the name of Shepstone's son H. C. Shepstone, "in his capacity as Secretary for Native Affairs and in trust for Chief Magalie and his people."<sup>12</sup> Despite this forewarning,

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11 Further Papers Relative to the State of the Kafir Tribes, July 1855, No. 12. Sir George Cathcart to the Duke of Newcastle, 14 Mar. 1854, in Davenport and Hunt 1974: 35.

12 Registrar of Deeds, Particulars of the three farms Boschfontein No. 381, Kafferskraal No. 597 and Kareepoort No. 623, district Rustenburg (21st March

however, it seems that the HMS saw no reason to assert rights in land inconsistent with those granted by the community until faced with the threat of direct state intervention.

Another important factor defining the context within which the litigation took place was the aftermath of the Anglo-Boer War. During this the Rustenburg district among others had witnessed a tenant revolt, in which African communities took over Boer farms and asserted rights to the land (Warwick 1983: 51). Resistance to the return of Boer landlords (Warwick 1983: 165-6), the new British administration's reconstruction policies, which reasserted landlord/tenant relationships and disarmed African communities (Krikler 1993), and the "great fear" of a general uprising which swept the Northern Transvaal in 1904,<sup>13</sup> all set the stage upon which the litigation unfolded.

While Innes CJ, the author of the decision in the HMS case and later Chief Justice of the Union of South Africa, 1914-27, is recognized as having been one of South Africa's few great liberal judges, a contextualized analysis of his decision will reveal that it may have been precisely his nineteenth-century liberal notions of social evolution that explain his understanding of the case. A close examination of the evidence and legal argument furthermore demonstrates that these notions of social evolution and the resulting distinction between ownership and rightlessness - which denies the existence of individual or even family-based customary law rights vis-a-vis the sovereign, is as suspect as earlier constructions of indigenous peoples' property rights.

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1906), *Illiquid Cases* 99/06 at 502 [ztpd 5/615] (State Archives, Pretoria). H.C. Shepstone was the son of Sir Theophilus Shepstone and the brother of the T. Shepstone, commonly known as Offie, who gave expert evidence at trial in this case (Beinart 1980). He was Secretary for Native Affairs in the first British administration of the Transvaal (Delius 1983: 222).

13 This interestingly is blamed in part on the

agitation of the irresponsible Offie Shepstone, a landowner angling for a post in the Department of Native Affairs, whose extravagant ideas concerning peasant revolt were to be brought to the attention of the authorities again a few years later. (Krikler 1993: 230).

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### *A contested transaction*

Giving evidence before Innes CJ in the Transvaal Supreme Court, Jordt testified that Chief Frederick Mogale "couldn't understand why I wanted to buy because the erf had already been given to me."<sup>14</sup> Although made 30 years after the event, this statement raises issues of sovereignty and property, church and sovereign, advisor and intermediary, all of which bedevilled relationships between chiefs and missionaries.

The evidence in the case showed that the relationship between Jordt, Chief Frederick Mogale and the BaPo community was initiated by the Chief's request that the HMS appoint a missionary to the community. The choice of this particular mission society was based not on religious preference but rather on the fact that in response to a request in 1853 by the neighbouring Kwena Chief Setshele to President Pretorius the Boer "government had invited the Hermansburg Lutheran Mission to establish itself in the area" (Simpson 1986: 87). The arrival of Jordt in 1874, therefore, was part of a wider development, which saw the establishment of twelve "fully-fledged Hermansburg Lutheran Mission stations in the [Rustenburg] district" by 1885 (Simpson 1986: 87).

Explaining the establishment of Christian missions by "chiefly invitation" as a "creative response to the undermining effects of colonisation on both the ideological and material basis of chiefly authority," Simpson contextualises chief-community-missionary relationships in the district in terms of the twin processes of colonization and African resistance or response (Simpson 1986:370). The role of missionaries in mediating this confrontation was, on one hand, welcomed by African communities - whose "chiefs wanted evangelists because they had seen how 'Mateebe's missionaries' were 'a shield to his back,'" (Comaroff and Comaroff 1991: 256) - and, on the other, it restructured the lifeworld of African communities in ways that could have been comprehended by neither chiefs nor missionaries, who came "from a world that had conjured up a hard-edged distinction between politics and religion, secular power and sacred authority" and who "failed to see that sovereignty in Tswana communities simply could not be apportioned in such terms" (Comaroff and Comaroff 1991: 256-257).

Intertwined in the complexities of this relationship is the fact that during the nineteenth century the "most significant aspect of the co-operative relationship between the chiefs and the Lutheran mission [in the Rustenburg district] . . . was the extent to which this facilitated the purchase of land on behalf of the various

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14 J.P. Jordt, evidence given on the 21st March 1906, *Hermansberg Mission Society v Commissioner for Native Affairs and Darius Mogale*, 99/06, 1906 Illiquid Cases from 84-99, ztpd 5/615, State Archives, Pretoria at 512-3 (hereafter *Evidence*).

tribes" (Simpson 1986: 364). Many African communities had been displaced, and land purchase was an important part of reconstituting the community. Even the chief of the BaPo community, "who had fought alongside the boers against the Ndebele," came into conflict with the Boers when the community resisted claims on their land and labour (Simpson 1986: 85) and was forced to flee south to Basutoland in about 1847 (Breutz 1989: 413). Chief Mogale Mogale (Frederick's father) only returned to the district in 1862 after purchasing the farm Boschfontein, "because the kraals of his ancestors were situated there" (Breutz 1989: 414). Furthermore,

[the] purchase of land on behalf of these chiefdoms contributed greatly to the maintenance of chiefly authority by maintaining the material basis of the chief's ability to distribute land amongst members of the chiefdoms. (Simpson 1986: 365<sup>15</sup>)

The interdependence of chiefs and missionaries was not untroubled. Although the missionaries felt that "great things could be achieved" as long as the "chief remained under the influence of the missionary," the "Lutheran missionaries complained that the second generation of chiefs after the establishment of the missions... wanted to be 'masters of the church'" (Simpson 1986: 368). The determination of the missionaries to maintain the autonomy of the church in the face of chiefly presumptions to control the jurisdiction of the missions led to open conflict between the missionaries and chiefs and consequent tension between members of the missionaries' congregation and non-converts (Simpson 1986: 369). The "necessity to register all African owned land in the name of the Commissioner of Native Affairs" in the years following the end of the Boer War "revealed that much of the land ostensibly bought by missionaries was in fact owned by Africans" (Simpson 1986: 93) It is in this context that we must place the initial transaction between Chief Frederick Mogale and Jordt, as well as the subsequent conflict and court case between the chief's heir, Darius Mogale, and the missionary.

The relevant transaction took place on April 18, 1876, two years after Jordt had arrived and established himself as missionary to the community. Jordt asserted ownership rights on behalf of HMS only in 1905, however, when the farm Boschfontein was about to pass to the Commissioner of Native Affairs in trust for the tribe and when Chief Darius Mogale, attempted to sell mineral rights to the land on behalf of the tribe.

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15 Land grants by the sovereign have historically been a source of political authority and cannot be read as explaining the subsequent tenure relations between sovereign and grantee, or subject.

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In reconstructing the contested transaction there are a number of points of agreement among the different witnesses. First, Chief Frederick Mogale was seeking to obtain the £60 to complete payment for the land transferred from Orsmond. Second, Chief Frederick Mogale received £60 from Mr. Jordt after signing a document drawn up and witnessed by a neighboring Boer farmer and his brother-in-law. Third, the land at issue had previously been granted to Jordt by Chief Mogale and was worth more than £60 at the time of the transaction. Fourth, in 1898 Chief Darius Mogale refused to erect beacons indicating the boundaries of the contested land after Jordt had informed him that the mission society had purchased the land from his father.

Factual disagreement focused both on the nature of the transaction - whether a sale or loan agreement - and on whether a sale could have been validly executed by the chief. This second aspect is a mixed question of law and fact, involving the issues of what consent the chief must obtain and of whether it was obtained in this case. Witnesses for the defendant, Chief Darius Mogale, acknowledged that there had been a transaction between Chief Frederick Mogale and Jordt involving £60,<sup>16</sup> but stated that the sum was a loan to pay the costs of a case against Orsmond, from whom Chief Frederick had purchased land.<sup>17</sup> Chief Darius Mogale and all the witnesses called on his behalf either stated that they had heard about the alleged sale only after Darius became chief or conceded that Chief Frederick Mogale had discussed the problem of the debt with Ziervogel (the lawyer) and the fact that he was going to obtain the money from the missionary, but claimed that he could not have sold the land as this was neither discussed nor agreed upon by the council.

Although Jordt acknowledged that the community had needed the money to resolve a land transaction and that the chief had asked his advice, he told the court that he offered to pay the £60 if the chief "would and could lawfully sell the erf."<sup>18</sup> The chief, Jordt said, agreed to "speak with his people" and later came to the missionary's house, with a group of his councillors and people, who witnessed the contract of sale being signed and the £60 handed over. This version was repeated by Michiel Dorfling, who was the brother-in-law of the drafter of the deed of sale and also witnessed the written contract. Witnesses for the plaintiff included three members of the community who were present at the time of the transaction and stated that they had attended the community gathering or *pitso* where the "Chief asked us if we could release him from debt to Jacob Ziervogel

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16 *Evidence*, Jonathan Moqoa, August Moerane, Bethuel Masilo, Maria Mohale.

17 *Evidence*, Bethuel Masilo, Maria Mohale.

18 *Evidence*, Jordt.

[and] we voted that if he saw a chance he was to release us."<sup>19</sup> While Lukas Bil(w)ani told the court that the Chief had gone to "Jordt to advance the money," he repeated Jordt's version of events and said the "Chief told us Jordt would give the money if he could retain the ground... we voted agreeing."<sup>20</sup>

*The court's decision*

Faced with this contradictory evidence, Innes CJ relied on the written contract, upon which Chief Frederick Mogale had made a cross in the presence of two neighboring white farmers, and on the integrity and reputation of the missionary.

Turning to the central issue of the case Innes CJ stated unequivocally that he was "satisfied that the deed of 1876 was actually entered into" (HMS Case: 140) and the purchase price paid. Rejecting the defendant's evidence that the transaction was a loan agreement the Chief Justice said:

I do not for one moment accept the story that the money was a loan by Jordt to the chief Frederik. If that were so, Mr. Jordt cannot have forgotten it, and he must have been fabricating the story which he told the court. On this part of the case I unhesitatingly accept the evidence of Mr. Jordt, not only from the respect which one has for the office which he holds, and for the work which he has done and is doing in this country, but from his demeanor in the witness-box, and the straightforward way in which he gave his evidence, which convinced me that he was speaking the truth. (HMS Case: 141)

Having established to his satisfaction that the contract was in fact entered into, the Chief Justice then turned to consider its validity. Since "the chiefs are not acting for themselves... [but as] trustees for their people," any contract would remain "valid and binding upon the present chief Darius and his tribe." At issue, then, was "under what circumstances a native chief, who is a trustee for his people, can validly sell tribal land." The Chief Justice acknowledges "that the consent of the people must in some way or another be given." (HMS Case: 141-143)

This leaves two questions: "how the consent of the people should be signified" and "whether such consent was duly given in this particular instance." In answering the first the Chief Justice identifies two theories: that the "chief may sell land

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19 *Evidence*, Makaliana.

20 *Evidence*, Lukas Bil(w)ani.

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freely if he obtains the consent of his councillors" and that the "acquiescence of the council in itself is not sufficient."

[In addition to the] 'unanimous consent of the council... the transaction sanctioned by the council, and approved by the chief, should be submitted - in the case at any rate of people of Basuto origin - to a *pitso* duly convened, and that it should be approved by the *pitso*.' (HMS Case: 143)

The Chief Justice was "inclined to accept the former" view, advanced by witnesses who "could have no interest at all in the case, and who stated merely the result of their long experience". These were Mr H.M. Taberer, the Assistant Secretary for Native Affairs, and Mr Theophilus Shepstone.<sup>21</sup> Justice Innes thus concluded that "the unanimous consent of the councillors or indunas is sufficient to justify the chief in disposing of or alienating the land of the tribe." (HMS Cases: 143)

Giving judgment for the plaintiff the Chief Justice concluded by finding not only that "the council had given its consent to the contract between the chief Frederik and Mr. Jordt" but also that there was "evidence to show that a *pitso* had been convened and had also sanctioned the agreement". Finally the judgment of the court held that "defendant Darius Mogalie be, and is hereby condemned in the costs of suit." (HMS Case: 143<sup>22</sup>)

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21 Better known as Offie Shepstone (Potholm 1972: 11), the son of Sir Theophilus Shepstone and corrupt agent for the Swazi King Mbandzeni's concessions (Parsons 1982: 174; Thompson and Wilson 1971: 277).

22 See also: Judgment, 1906 Illiquid Cases, No. 99/06 at 537 of archive. Interestingly this condemnation to pay costs had unforeseen consequences. The debt incurred in this and a subsequent case, *Mogale v Engelbrecht and Others*, led to "Darius Mogale being deposed as chief by the Governor-General acting in his capacity as Paramount Chief under law number 4 of 1885 and was replaced by his cousin Filius Mogale" (Simpson 1986: 159). After being deposed in 1908 Darius Mogale was banished from the district and only allowed to return after a long struggle in 1939 at the age of 75 (Simpson 1986: 160-162). In 1921 after the community had once again voted to have Edward Mogale, the son of Darius, replace Filius Mogale as Chief, the Sub-Native Commissioner forwarded a letter to the secretary of Native Affairs from several white farmers in the district who requested that Filius be kept on as chief. Significantly, one of the signatories to the letter was one H.J.C. Jordt.



*Creating a customary rule*

Given the charged atmosphere of contending claims and struggles over land in the aftermath of the Anglo-Boer war, and the insistence by the British administration and courts that private property rights be upheld and land be freely transferable regardless of race (Krikler 1993: 42-3; *Tsewu v Registrar of Deeds*, affirmed by Innes CJ in the HMS Case: 141-2), it is no surprise that the court found in favor of the plaintiff missionary. To do so, however, the court had to find that the agreement between Chief Frederik Mogale and the missionary was a contract to sell land the chief had previously granted under indigenous tenure to the HMS and that this contract was valid and binding on Chief Darius Mogale and the community. In order to reach the second conclusion the court had to determine the conditions under which a chief could sell tribal land and whether they were met. By implication, then, the court had to define the tenure relations between sovereign and community in African society.

The court's first enquiry concerned facts and perceptions. The Chief Justice was able to dispatch this issue by relying on the written contract produced by the missionary, discounting all contrary testimony by relying implicitly upon the parol evidence rule, which forbids the introduction of extrinsic evidence tending to contradict or vary the terms of a written contract (Hosten et al. 1983: 399). The court refers to the fact that the deed "bears the mark of the chief Frederik" but then asserts that "on this part of the case I unhesitatingly accept the evidence of Mr Jordt." This seems to imply that the Chief Justice recognizes that neither party to the contract - one Setswana-speaking, the other German - could have understood the Dutch contract, and that the distinction between a deed of sale and a mortgage may not have been apparent to the chief.

The defendant acknowledged that there had been a transaction but claimed it was a loan. The missionary conceded that the chief initially sought a loan and could not understand why Jordt wished to purchase land already granted to him. And a witness to the transaction told the court that the "ground was at that time worth more than £60."<sup>23</sup> Given that the tribe was actively buying land during this period it seems unlikely that they would have agreed to sell this parcel for less than its market value. A witness for the plaintiff said that the missionary was willing to "give money if he could retain the ground"<sup>24</sup>; and the defendant's witnesses, including councillors to the deceased Chief Frederik Mogale, denied they would

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23 *Evidence*, Dorfling.

24 *Evidence*: Lukas Bil(w)ani for plaintiff.

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have "consented to the alienation of this land."<sup>25</sup> Mortgage transactions also were known to the parties.<sup>26</sup>

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25 *Evidence*, August Moerane.

26 In 1908 the chiefdom was £2,000 in debt on farms mortgaged to the HMS (Simpson 1986: 159), although this debt may have been imposed as security for the costs awarded the Mission Society as a result of this case. However, mortgage agreements between African communities and colonial entities were common in the nineteenth century. Three examples will serve to illustrate this usage.

The first concerns the aftermath of the annexation by the Boers in 1884 of Barolong lands in the Thaba'Nchu area of the Orange Free State. After taking the bulk of the territory for themselves, they "recognized two tiny African locations and 95 farms belonging to individual Barolong landowners" (Platzky and Walker 1985: 74). By 1900 only 54 of the original 95 farms remained intact, the other Barolong landowners having "lost their land to the whites by taking out mortgages which they could not pay back" (Platzky and Walker 1985: 74).

Second, after East Griqualand was annexed in 1874, whites were recognized as owning 63 of approximately 505 farms granted by the Griqua polity. Five years after restrictions on the sale of Griqua titles were lifted, however, approximately half of the Griqua titles had changed hands. "The titles passed very largely into the hands of local merchants and speculators to whom many Griqua, in trying to establish themselves on the land, had become indebted. Some Griqua landowners undervalued their only substantial asset and used it directly to pay debts. But the white traders also enforced payment in land rather than offering long term mortgages" (Beinart 1986: 264-265). In a short time the Griqua, a "landed community, allied to the colony, became . . . a collection of landless people with a deep-seated sense of grievance" (Beinart 1986: 260).

The final example involves the use by the lawyer and later parliamentarian V.G. Fenner-Solomon of "legal" sleight of hand to hasten the dispossession of the Kat River people. Following the passage in 1905 of the Boedel Erven Act, which defined who had legal right to land among the Kat River people, "Solomon extended credit to them on a lavish scale.... Or so he claimed". He did not ask for receipts and he kept no records. When transfer deeds arrived from Cape Town, Fenner-Solomon informed his clients that they owed him amounts, including government charges, legal fees and personal loans, many times what they were expecting. Although he "offered them time to pay, he demanded that they immediately sign power of attorney for him to pass bonds payable to himself...

Thus, although the missionary may have intended to secure the land as private property, Chief Frederik Mogale, his councillors and the community may have understood the transaction as a mortgage. It is not outlandish to imagine such a confusion occurring at a time when missionaries and communities recognized contending sovereignties<sup>27</sup>, especially when the principal actors may only have been able to communicate through translators.<sup>28</sup> Moreover, it is now acknowledged that social relations, including legal relationships, were subject to continued renegotiation, particularly in colonial interactions.<sup>29</sup>

Whether the community was attempting to renegotiate a deal made in a time of need, or whether the missionary was attempting to ensure the security of the Mission Society's property in a time of dual sovereignty and growing political instability,<sup>30</sup> must remain an open question. However, these subtleties were not visible to the court as it sought to reshape Transvaal property law by declaring private property rights and the right of Africans to participate in the land market - a position that would be reversed seven years later by the 1913 Land Act.<sup>31</sup>

The second part of the court's enquiry sought to determine whether the contract of sale was valid and binding on Chief Darius Mogale. In pleadings he argued that

even if Frederik did enter into a deed of sale purporting to sell to the plaintiffs the portion of the farm Boschfontein... he did so on his own responsibility and without reference to or consent from his tribe. (HMS case: 136)

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Co-heirs were made jointly indebted and severally liable for the payment of the bond, so that the whole property could be expropriated for the default of a single heir" (Peires 1987: 73-74).

27 "Now the natives had two Lords... [and] the chiefs were glad when a missionary settled down with the tribe. This was of great significance for them as regards the government and the white population and they would listen to the missionaries' advice and words" (Hermanburger Missionblatt, July 1910, at 195, quoted Simpson 1986: 365).

28 Interestingly Jordt's evidence before the court in 1906 was given through the government interpreter (*Evidence*: 512).

29 Berry 1993; Roberts 1991.

30 Jordt employed a surveyor to survey the ground only in 1897 (*Evidence*: 513), many years after the death of Chief Frederik around 1880 (Breutz 1989: 414).

31 See, for example, Innes CJ's masterful application of technical legal arguments to deny the legality of government practice in the recently defeated South African Republic in *Tsewu v Registrar of Deeds* (1905) T.S. 130.

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Although the Chief Justice again rejected the Chief's objection, this time by asserting that the "council had given its consent to the contract" and "there was evidence to show that a *pitso* had been convened and had also sanctioned the agreement"(HMS Case: 143), the record contains interesting unresolved contradictions.

Firstly, the evidence of community agreement comes from three witnesses for the plaintiff, of whom at least two were part of the "Diederich faction," which had left the community eight years before in a conflict with Darius Mogale.<sup>32</sup> Secondly, the defendant's witnesses, including Chief Frederik Mogale's wife and four surviving councillors,<sup>33</sup> all denied knowledge of the sale, and by implication, that the community consented. Significantly, denial by four of Chief Frederik's councillors also implies that the Chief could not have had the unanimous consent of his council, which the court found necessary for the Chief to alienate the land.<sup>34</sup> Finally, the failure of the Chief's councillors to sign the contract of sale, even as witnesses, raises doubts in a context where both "expert witnesses" suggested to the court that contracts involving the transfer of land between colonists and African communities were usually executed by chiefs and their councillors to indicate that consent had been obtained. Henry M. Taberer, Assistant Secretary for Native Affairs, told the court that "contracts which are filed in my office are usually executed by the Chief and his council."<sup>35</sup>

The court had to determine the consent required to validate a Chief's alienation of tribal lands. Two distinct theories emerged, one from two ex-Native Commissioners, an Assistant Secretary for Native Affairs and Theophilus Shepstone, and the other from two of Chief Frederik Mogale's councillors and Chief Darius Mogale.

The colonial administrators and experts focused on the relationship between the chief and his council, suggesting either that the *pitso* (characterized as a particularly "Basuto" institution) merely confirmed prior decisions or was only called upon to decide matters of grave concern. The African witnesses, by contrast, argued that the consent of the *pitso* was essential. Although both Taberer and Shepstone asserted that the chief's position "with regard to land is that of

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32 *Evidence*: Lukas Bil(w)ani and Koos Makaliana.

33 Jonathan Moqoa, August Moerane, Bethuel Masilo and Ephrain Mohale.

34 The court seems to have relied on the assertion by Offie Shepstone that he had "[n]ever known a chief attempt to alienate unless he had consent of his council. The chances in favor of his having the consent in a case like the present are overwhelming." (*Evidence*, Shepstone)

35 *Evidence* at 529.

trustee for his people,"<sup>36</sup> they conceded that the chief could not act without the unanimous consent of his councillors, whom they characterized as representatives of the tribe. The denial of the political power of the *pitso* - consisting of all married men, through whom land is held by families - has the effect of denying the existence of property rights in land in African societies. Recognition of the essential role of the *pitso* would have made it harder to confirm transfers of African land in the colonial period but also would have acknowledged that under indigenous law African people had rights distinct from those of their political authorities (Ngubane 1994).

Innes CJ advanced as pure dictum the proposition:

[W]hen the natives first settled in this country, in Natal, and in other parts of South Africa, when they were governed entirely by their own customs and laws, the notions of separate ownership in land, or of alienation of land, by a chief or anyone else, was [sic] foreign to their ideas. (HMS case: 142)

He argues, however, that this case demonstrates that the situation has changed, and now "natives do endeavor to obtain rights over land by contracts which the law does not prohibit" (HMS case: 142). Given the entry of African communities into the market, land must be alienable by chiefs under certain circumstances. Thus, while simultaneously denying the existence of "notions of separate ownership" in African society and confirming the alienability of African lands, the court confines the question of property rights in African societies to questions of political "consent" or, more specifically, to an issue of sovereignty.

Despite all the conflicting evidence introduced by African participants Innes CJ then asserts that the weight of expert evidence favors the theory advanced by the colonial administrators. He emphasizes that he was "impressed by the evidence of Mr. Shepstone and Mr. Taberer... both of whom could have no interest at all in the case, and who stated merely the result of their long experience" (HMS Case: 143). While neither was involved in the case, Mr. Taberer was deeply implicated as Assistant of Native Affairs in the shaping and implementation of post-war "native" policy, and the evidence of Offie Shepstone was highly questionable given his previous corrupt involvement in acquiring African lands and his anti-African activities during this period.<sup>37</sup>

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36 *Evidence*, Taberer.

37 This raises the question of the role of informants, experts, "native assessors," individual researchers and anthropologists in the construction of "customary tenure". Advocating particular versions of custom, these participants

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The court's assertion of a rule that, among

... all the Bantu peoples, including the basutoes, the unanimous consent of the councillors or indunas is sufficient to justify the chief in disposing of or alienating the land of the tribe...

may have been consistent with the Chief Justice's notions of evolutionary development. However, it was his framing of the question that had the greatest resonance in colonial jurisprudence. The general issue is not that colonial governments either misinterpreted or perverted established indigenous rules but that colonial intervention and the responses it provoked "legalized" indigenous practice. This transformation of the property rights of indigenous communities into legal form had profound consequences for the disposition of indigenous land rights. This "feudal" construction of the relationship of indigenous rulers to the

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are often unconsciously formulating their observations in order to promote or influence particular interests or government policies. Whether as colonial administrators, judicial officers, or sympathetic anthropologists, those engaged in documenting and elucidating "customary law" consciously and unconsciously created and recreated norms, rights and obligations that, at best, reflected their own culturally bound notions or, at worst, revealed a blatant eurocentric if not racist prejudice towards these "other" colonized communities. Recent scholarship on the history of law in Africa (Mann and Roberts 1991) has thoroughly demonstrated the relationship between the emergence of particular notions of customary law and the economic, social and political context of colonialism and the African response to colonial rule (e.g. Chanock 1991b: 70-71). However, the specific roles and motivations of participants in the construction of customary law have not received as much attention from lawyers as from anthropologists. The complexities of these relationships were revealed, for example, in the debate over the construction of land rights in the Algonquian Hunting Territories, in which the "social praxis and political advocacy" of the main protagonists had a profound impact on their construction of ethnographies and their understanding of whether private property existed in Native American hunting societies before contact with Europeans (Feit 1991). While going unchallenged in law, the question of the construction of ethnography, upon which western understandings of customary tenure and customary law in general have historically relied, continues to arouse great controversy in anthropology and other social sciences. See, for example, the furore after Edwin Wilmsen challenged the accepted anthropological notions of the San people of Botswana as examples of isolated pre-historic hunter-gatherers, arguing that they had a complex and long history of interaction with other inhabitants of Southern Africa (Wilmsen 1989b, and the debate this provoked in the journal *Current Anthropology*).

property rights of their subjects then was "legally" generalized "throughout the empire."<sup>38</sup>

*Customary tenure and the political consequences of rightlessness*

The consequence was the collapse of property rights into issues of sovereignty and political authority. According to Martin Chanock, two features dominated the context in which customary tenure evolved. First, indigenous tenure was scrutinized to determine the validity of colonial claims to land grants and concessions made by African chiefs. But, secondly, the "creation of a segregated system of land holding" in which African rights were confined to "areas designated for African occupation" could be justified only if the indigenous system differed from the British, so that the reserves were, "in terms of property law, to be reserves of the rightless, legally dependent on chiefs and communalism" (Chanock 1991a: 75), despite documented patterns of individual use (Gluckman 1945: 8, 10-11, quoted Chanock 1991a: 75). Any recognition that these observed patterns of individual use inside reserves were akin to ownership - even if individuals could not alienate - would have created "the possibility of conceiving of such rights having existed outside" the reserves or even have suggested that such rights might be established in areas designated for European colonial settlement (Chanock 1991a: 75). Thus, for example, the brief recognition by the colonial courts in *Tsewu v Registrar of Deeds*<sup>39</sup> of the right of African communities to enter the market and purchase land contributed to the passage of the 1913 Land Act in South Africa, prohibiting Africans from obtaining "recognized ownership" through the acquisition of common law rights to land (Davenport and Hunt 1974: paras. 65-68, pp. 40-43).

Having constructed a vision of African land tenure under "customary law" in which the most important rights - allocation, alienation, and reversion - were vested exclusively in the political authority embodied by the chief, it was a short step to the assertion that the loss of sovereign powers to the colonial authority made African land rights subject to administrative authority. This collapse of property rights into the realm of chiefly authority had equally debilitating consequences for the political rights of Africans. Founded in the practices of "indirect rule," first advocated by Theophilus Shepstone and modified by Lord Lugard, the "preservation" of "native lands and traditional authorities" became the justification for the exclusion of Africans from broader political participation (Ashforth 1990: 35-37). While political rights were extended in the Cape and

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38 *Sobhuza II v Miller and Others* [1926] AC 518 at 525.

39 1905 T.S. 130.

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Natal to those few Africans who had obtained sufficient common law property rights during the colonial period, it was through an attack on these rights that the process of disenfranchisement began. (See *R. v Ndobe*.)

The denial of African property rights is thus implicated in the demise of the Cape franchise and the construction of a segregated polity in which the white minority was to enjoy democratic participation while the black majority would continue to live under colonial and later neo-colonial domination in the "independent" bantustans (Klug n.d.). It is these political consequences that leads Martin Chanock to conclude that we need to think about rights in land "as central to the nature of the modern African polity," and the role of, and rule of, law in African states. For these important economic, and ultimately political, rights remain subordinate to an administrative regime that offers landholders no rights against the state (Chanock 1991a: 82).

### Conclusion: The Imperative of Questioning Legal Precedent

Either indigenous land rights have been completely denied by formal legal systems or their content has been mystified by a process of colonial construction. The High Court of Australia found it necessary in the *Mabo* case to challenge

... the validity of fundamental propositions which have been endorsed by long-established authority and which have been accepted as a basis of the real property law of the country for more than one hundred and fifty years. (*Mabo* case: 109)

Justifying his stance, Brennan J. argued that

to maintain the authority of those cases would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land. (*Mabo* case: 58)

Arguing in a similar vein, Deane and Gaudron JJ. noted that:

... the two propositions in question provided the legal basis for the dispossession of the Aboriginal peoples of most of their traditional lands. The acts and events by which that



dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices. (Mabo case: 109)

Despite this recognition of common law aboriginal title and the role this doctrine has played in the recognition of indigenous rights to occupation and use of land in Canada and the United States, and perhaps will play in South Africa in the future (Bennett 1993), it must be asked whether the refusal to recognize a right of indigenous ownership is not merely an extension of the original refusal to recognize any rights at all. The equation of indigenous land rights to the common law rights of occupation and use is perhaps really a product of the colonial imperative. Resistance as well was a reflection of the efforts of contending advocates embedded in nineteenth century conceptions of property and social-evolutionary conceptions of historical development. In that case it is necessary to reconsider the distinction between common law ownership and indigenous land rights of occupation and use.

While the concept of ownership in common law, whether Anglo-American or Roman-Dutch, has been considered flexible enough to incorporate a wide range of specific tenure arrangements such as joint ownership, sectional-title and other innovative forms of ownership, the land rights of indigenous peoples have continued to be seen as less than ownership. Thus, even as we recognize that the right to alienate freely is only one incident of the bundle of rights comprising an individual's or group's ownership of an object (and one peculiar to freehold title), the law still refuses to acknowledge that indigenous property regimes in which individuals may have all the incidents of ownership or co-ownership but not the right to alienate freely outside the community constitute a form of ownership. This leads to the absurd formalism reflected in the argument that, "while matters of ownership, mortgage, servitude, sale or lease of immovable property must normally be dealt with under the law of the land [common law], rights of possession, occupation or use of land are often intended by their grantor or possessor to be governed by customary law, and may be dealt with under that system" (Bekker 1989: 50). Significantly, this characterization of customary law as not knowing ownership has even been challenged within the South African debate on customary rights in residential and arable land (Kerr 1990: 61-65).

The law cannot continue to deny the property rights of "others" in circumstances where the social sciences recognize even common property regimes as containing forms of ownership (Bromley 1989: 872). Continuing to deny African land holders the same protection of their property as those members of society who were able to purchase freehold title would pose a serious threat to the legitimacy

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of the property clause in the 1993 Constitution. It is in this context that the statutory form of tenure most common under apartheid - permission to occupy - must be recognized as a gross violation of the inherent ownership rights of those who have continued to hold their lands according to the norms of African communities. (See also Cross 1992.)

### Cases Cited

*Amodu Tijani v Secretary, Southern Nigeria*

[1921] AC 399.

HMS Case (*Hermansberg Mission Society v Commissioner of Native Affairs and Darius Mogale*)

1906 T.S. 135.

Mabo Case (*Mabo and others v The State of Queensland [No. 2]*)

(1992) *Commonwealth Law Reports* 175: 1.

*Mogale v Engelbrecht and Others*

1907 T.S. 836.

*R. v Ndobe*

1930 A.D. 484.

*Sobuza II v Miller and Others*

[1926] AC 518.

*Southern Rhodesia, In re*

[1919] AC 211.

*Tsewu v Registrar of Deeds*

1905 T.S. 130.

### References

ASHFORTH, Adam

1990 *The Politics of Official Discourse in Twentieth-Century South Africa*. Oxford: Clarendon Press.

BEINART, William

1980 "Production and the material basis of chieftainship: Pondoland c. 1830-80." Pp. 120-147 in Shula Marks and Anthony Atmore (eds.), *Economy and Society in Pre-Industrial South Africa*. London: Longman.

1986 "Settler accumulation in East Griqualand from the demise of the Griqua to the Natives Land Act." In William Beinart, Peter Delius and Stanley Trapido (eds.), *Putting a Plough to the Ground: Accumulation*

- and Dispossession in Rural South Africa 1850-1930*. Johannesburg: Ravan Press.
- BEKKER, J.C.  
1989 *Seymour's Customary Law in Southern Africa* (5th ed.). Cape Town: Juta.
- BENNETT, Tom W.  
1993 "Redistribution of land and the doctrine of aboriginal title in South Africa." *South African Journal of Human Rights* 9: 443-476.  
1994a "The equality clause and customary law." *South African Journal of Human Rights* 10: 112.  
1994b "Trusteeship and Land Tenure." Unpublished draft.  
1995 *Human Rights and African Customary Law*. Cape Town: Juta.
- BENNETT, Tom W. and Johan W. ROOS  
1992 "The 1991 Land Reform Acts and the future of African customary law." *South African Law Journal* 109: 447-471.
- BERRY, Sara  
1993 *No Condition is Permanent: The social dynamics of agrarian change in sub-Saharan Africa*. Madison, Wisconsin and London: University of Wisconsin Press.
- BREUTZ, P.-L.  
1989 *History of the Batswana*. Ramsgate, South Africa: Breutz.
- BROMLEY, Daniel W.  
1989 "Property relations and economic development: the other land reform." *World Development* 17: 867-877.
- CHANOCK, Martin  
1991a "Paradigms, policies and property: a review of the customary law of land tenure." Pp. 61-84 in Mann and Roberts.  
1991b "A peculiar sharpness: an essay on property in the history of customary law in colonial Africa." *Journal of African History* 32: 65-88.
- CHEATER, Angela P.  
1987 "Fighting over property: the articulation of dominant and subordinate legal systems governing the inheritance of immovable property among blacks in Zimbabwe." *Africa* 57: 173-195.
- COMAROFF, Jean and John COMAROFF  
1991 *Of Revelation and Revolution: Christianity, Colonialism, and Consciousness in South Africa*, Vol. 1. Chicago and London: University of Chicago Press.
- CROSS, Catherine  
1992 "An alternate legality: the property rights question in relation to South African land reform." *South African Journal of Human Rights* 8: 305-343.

## DEFINING THE PROPERTY RIGHTS OF OTHERS

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---

- DAVENPORT, Thomas R.H.  
1977 *South Africa: A Modern History*. London: Macmillan.
- DAVENPORT, Thomas R.H. and K.S. HUNT (eds.)  
1974 *The Right to the Land*.
- DELIUS, Peter  
1983 *The Land Belongs To Us*. Johannesburg: Ravan Press.
- FEIT, Harvey. A.  
1991 "The construction of Algonquia hunting territories: private property as moral lesson, policy advocacy, and ethnographic error." P. 129 in George W. Stocking, Jr. (ed.), *Colonial Situations: Essays in the Contextualization of Ethnographic Knowledge*; *History of Anthropology* 7:109-134. Madison: University of Wisconsin Press.
- GLUCKMAN, Max  
1945 "African land tenure." *Human Problems in British Central Africa* 3: 1.
- HOSTEN, W.J., A.B. EDWARDS, Carmen NATHAN, and Francis BOSMAN  
1983 *Introduction to South African Law and Legal Theory*. Durban: Butterworths.
- KERR, Alastair J.  
1990 *The Customary Law of Immovable Property and of Succession* (3rd ed.). Grahamstown: Rhodes University.
- KLUG, Heinz  
n.d. "Carter Lecture." University of Florida, forthcoming.
- KRIKLER, Jeremy  
1993 *Revolution from Above, Rebellion from Below: The Agrarian Transvaal at the Turn of the Century*. Oxford: Clarendon Press.
- LEWIS, Carole  
1985 "The modern concept of ownership of land." *Acta Juridica*: 241-266.
- LUGARD, Frederick J.D.  
1922 *The Dual Mandate in British Tropical Africa*. London.
- MADDOCK, Kenneth  
n.d. "From Terra Nullius to Mabo." In volume in honor of Professor P.K. Bhowmick, Dept. of Anthropology, University of Calcutta (forthcoming).
- MANN, Kristin and Richard ROBERTS (eds.)  
1991 *Law in Colonial Africa*. London: James Currey.
- McNEIL, Kent  
1989 *Common Law Aboriginal Title*. Oxford: Clarendon Press.
- MYBURGH, A.C.  
1985 *Papers on Indigenous Law in Southern Africa*. Pretoria: J. L. van Schaik.

- NGUBANE, Harriet  
1994 "The role of monarchy and of traditional authorities generally in indigenous land tenure in South Africa." Unpublished submission to the Cabinet Committee formed to investigate the Ingonyama Trust Act, May 31.
- PARSONS, Neil  
1982 *A New History of Southern Africa*. London: Macmillan.
- PEIRES, Jeff  
1987 "The legend of Fenner-Solomon." In Belinda Bozzoli (ed.), *Class, Community and Conflict: South African Perspectives*. Johannesburg: Ravan Press.
- PLATZKY, Laurine and Cherryl WALKER  
1985 *The Surplus People: Forced Removals in South Africa*. Johannesburg: Ravan Press.
- POTHOLM, Christian P.  
1972 *Swaziland: The Dynamics of Political Modernization*. Berkeley and London: University of California Press.
- RANDALL, E. and F. CHOTHIA  
1994 "Land deal: The king's ransom." *Weekly Mail & Guardian* 10 (20), May 20-26, p. 2, col. 2.
- RAYNER, Chief Justice  
1898 "Report on Land Tenure in West Africa."
- ROBERTS, Simon  
1991 "Tswana Government and Law in the Time of Seepapitso, 1910-1916." Pp. 167-184 in Mann and Roberts.
- SHILLINGTON, Kevin  
1985 *The Colonisation of the Southern Tswana 1870-1900*.
- SIMPSON, Graeme N.  
1986 *Peasants and Politics in the Western Transvaal, 1920-1940*. University of the Witwatersrand, History Department: unpublished M.A. Thesis.
- THOMPSON, Leonard and Monica WILSON (eds.)  
1971 *The Oxford History of South Africa, Vol.II. South Africa 1870-1966*. London: Oxford University Press.
- VISSER, D.P.  
1985 "The 'Absoluteness' of ownership: the South African common law in perspective." *Acta Juridica*: 39-52.
- WARWICK, Peter  
1983 *Black People and the South African War 1899-1902*. Cambridge: Cambridge University Press.
- WILMSEN, Edwin N.  
1989a "Introduction." Pp. 1-14 in Edwin N. Wilmsen (ed.), *We Are Here: Politics of Aboriginal Land Tenure*. Berkeley and Los Angeles: University of California Press.

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- 1989b     *Land Filled with Flies: a political economy of the Kalahari*. Chicago and London: University of Chicago Press.