Land tenure reform in South Africa:

Traditional leadership, CLaRA, and 'living' customary law

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Abstract

The strengthening of rights to land by former homeland residents has been one of the important policy challenges in a democratic South Africa. The White Paper on Land Policy (1997) proposed tenure reform and the *Communal Land Rights Act* (CLaRA) was enacted for this purpose but was never implemented. It remains to be seen when the recently published new bill (July 2017) will become law. This paper explores contentions surrounding land tenure reform in South Africa by examining the legal challenge posed to the CLaRA. While the court declared the CLaRA unconstitutional due to procedural reasons, it avoided any judgement on the constitutionality of its clauses. This paper argues that the matter of defining the boundaries of communities which would become the legal owners of land is fundamentally important in reforming the customary land tenure system. The author also raises questions about whether it is wise or practical to match these boundaries of collective community ownership with those of traditional authorities, as envisaged by the CLaRA and by the new bill, by referring to a case study of 'living' law of customary land allocation and administration in a former KwaZulu homeland.

Keywords: tenure reform, South Africa, The Communal Land Rights Act (CLaRA), KwaZulu

1. Introduction

The strengthening of rights to land by former homeland residents has been an important policy challenge in a democratic South Africa. Roughly 30% of the population still reside in former homelands (bantustans), consisting of approximately 13% of the area of the country. The land in the former homelands legally belongs to the state except for former KwaZulu[1], but residents have a series of long-established customary rights to land through the membership of a particular group/community, usually centred on chieftaincy. These rights include a right to a household plot to build dwellings, cultivate fields and graze livestock in common. Their rights to land are different from those of legal rights holders. For example, it is usually impossible for them to receive loans from financial institutions using land as collateral. However, once residential land and fields are allocated to certain individuals/households, these lands are considered to belong to these individuals/households, as long as they are being used. Land can also be inherited among family members (Bennett 2004). Such a customary land tenure system is different from the freehold system applied to 87% of the area of the country, outside former homelands.

Since the 1990s, the strengthening land rights of rural residents under the customary land tenure system became an important policy issue in many African countries (Bruce and Knox 2009: 1365-1366). In South Africa, the 1996 Constitution identified this necessity, and the White Paper on Land Policy (1997) proposed tenure reform as one of the three pillars of its land reform policy (DLA 1997: 9). To implement such a reform, the *Communal Land Rights Act* (2004, hereinafter CLaRA) was legislated. However, the CLaRA faced a legal challenge, and was never implemented after being declared unconstitutional due to procedural reasons. While the new *Communal Land Tenure Bill* was recently published (July 2017), it remains to be seen when and how this new bill will become law.

This paper explores contentions surrounding land tenure reform in South Africa by examining the legal challenge posed to the CLaRA by those who saw it as strengthening the power of traditional authorities rather than strengthening people's rights to land. The first section discusses the restoration of traditional leaders as a background to explain why legislation like the CLaRA, that intended to strengthen the land allocation power of traditional leaders, was legislated in a democratic South Africa. I will then explore contentions surrounding the tenure reform of former homelands by discussing legal challenges against the CLaRA. While the court refrained from making judgments on the CLaRA's provisions, this paper argues that the question of defining the boundaries of communities which would become the legal owners of land is fundamentally important in reforming the customary land tenure system where membership of a particular community has been the basis for access to land. In the final section, I will discuss whether it is wise and practical to match these boundaries of collective community ownership with those of traditional authorities, as envisaged by the CLaRA and by the new bill, by referring to a case study of 'living' law of customary land allocation and administration in a

[1] The former KwaZulu is administered by the KwaZulu Natal *Ingonyama* Land Trust where the Zulu king serves as trustee.

former KwaZulu homeland.

2. Restoration of traditional leaders in a democratic South Africa

The 1996 Constitution recognises the status and role of traditional leaders, consisting of kings, chiefs, and headmen/women. As of early 2016, there are 13 kings and paramount chiefs, 829 chiefs, and 7,399 headmen/women in South Africa (FFC 2016). Even though they draw their legitimacy from the traditions and customs of local African societies, South African traditional leaders, like those of other African countries, have also changed their roles since colonisation. Of particular importance was the system of indirect rule introduced originally in the British Natal colony in the mid-nineteenth century and then applied nationally by the *Native Administration Act* (1927) after the Union of South Africa was formed. *The Act* recognised the status of traditional leaders but turned them into local administrative officers of the government. It also gave the Minister of Native Affairs the authority to create a new 'tribe' or divide the existing 'tribe', and to appoint and dismiss chiefs and headmen (Peires 2014: 15-16). After the National Party came to power in 1948, and through the *Bantu Authorities Act* (1951), traditional leaders became the local government and politicians in homelands under the name of 'tribal authority' (Sato 2000).

Due to the 'despotic' roles they played in the apartheid regime, several scholars argued that traditional leaders lost popular support (Mamdani 1996) and they would have no place in a democratic South Africa. Ntsebeza (2005) argued that traditional authority is incompatible with the democratic system as it relies on the hereditary system for choosing leaders. Another criticism came from women's organisations which indicated that women's rights are not recognised sufficiently under customary law (Amtaika 1996). Despite these criticisms, the 1996 Constitution recognised traditional leaders and subsequently the *Traditional Leadership and Governance Framework Act* (2003, hereafter TLGFA) gave them a wide range of roles, not limited to those in a cultural sphere, including in respect of land administration, agriculture, health, the administration of justice, safety and security, environment, tourism and so forth (Section 20-1).

To understand the remarkable restoration of traditional leaders after democratisation, one needs to recognise at least four factors that complemented each other. The first was the international political climate of the 1990s when both democratisation of South Africa and the restoration of traditional leaders occurred. During this time, the importance of preserving and restoring cultural rights was emphasised through the rise of indigenous rights movements. Traditional leaders were seen as the embodiments of traditional culture, customs and languages that were rapidly disappearing due to the wave of modernisation (Oomen 2005: 3-13).

The second factor was the domestic politics before and after democratisation, especially the competition between the Inkatha Freedom Party (IFP) and the African National Congress (ANC). In the early 1990s, IFP was not only popular in its original base of the KwaZulu homeland but also had many supporters in black urban townships in Gauteng Province where many Zulu people lived. Even after the release of Nelson Mandela, when the ANC began to gain overwhelming support inside the country, the IFP's popularity was

not shaken in rural KwaZulu. Because it was considered that the IFP maintained popular support through its close relationship with the Zulu king and chiefs, the ANC hesitated to undermine traditional leaders when it came to power in 1994 (Amtaika 1996, Sato 2000).

Third, traditional leaders have actively engaged in politics by organising themselves and becoming politicians (Oomen 2005: 95-98, Holomisa 2009; 2011). The most famous and influential association is known as the Congress of Traditional Leaders of South Africa (CONTRALESA). The CONTRALESA was formed in 1986 by traditional leaders who opposed the 'independence' plan of the KwaNdebele homeland. During the political transition period, it argued that the authority of traditional leaders under customary law should be recognised even after the transition to democracy. After democratisation, several chiefs, including Phathekile Holomisa, who used to be the chairperson of the CONTRALESA and Mandla Mandela, a grandchild of Nelson Mandela, continued to influence the policy formation process as members of parliament belonging to the ruling ANC.

Last, the inefficiency of local governments that cannot fulfil their expected roles in the provision of public services should be exposed. The problems of corrupt local councillors are also frequently reported in the media (Ainslie and Kepe 2016). Before democratisation, traditional leaders played the role of local governments in homelands. While it was possible that they governed people in a 'despotic' way (Mamdani 1996), other research argues that chiefs had to rely on support from residents to function as local governments in a situation where they did not have sufficient administrative or financial support from the homeland government. McIntosh (1992) argues that chiefs acquired a certain degree of legitimacy through this process. After 1994, democratic local governments were established[2], but it also became clear that a democratic way of electing leaders does not automatically lead to accountability of the leaders to the residents.

The TLGFA listed a wide range of roles to be played by traditional leaders in a democratic South Africa. Additionally, two pieces of legislation are particularly important as they will redefine the authority and roles of traditional leaders. They are the CLaRA (2004) and the *Traditional Court Bill* (2008). However, the CLaRA was declared unconstitutional in 2010 and was never implemented. The *Traditional Court Bill* was withdrawn in 2012 after many opposing opinions were expressed at the public hearings of parliament[3] (Mnisi-Weeks 2011). What specific problems exist in strengthening the land allocation power of traditional leaders? In the following two sections, I will discuss this question through examination of land tenure policy and legal challenges to the CLaRA.

[2] The establishment of democratic local governments means that traditional leaders lost local administrative power. However, the TLGFA lists a wide range of roles for traditional leaders at the local level. If traditional leaders were to play these roles, it would be possible to say that they are effectively the fourth tier of the government.

[3] Upon the publication of a new bill at the end of January 2017, the policy debate on the judicial power of traditional leaders resumed.

3. Land tenure reform policy and the CLaRA

3.1. White Paper on Land Policy (1997)

The White Paper on Land Policy (hereinafter the White Paper), published in 1997, proposed three programmes for South Africa's land reform policy. The first is a land redistribution programme aiming to distribute white-owned farmland to black people to rectify the inequality of land ownership among different population groups (races). The second is a land restitution programme aiming to restore land to people who were dispossessed of land by racially discriminatory laws and practices after the *Natives Land Act* (1913) was enacted. The third is a land tenure reform programme that aims to strengthen the land rights of residents in former homelands and tenants and dwellers on white-owned farms.

The White Paper identified two problems concerning the land tenure system of former homelands. One is that residents' rights to the land are not officially recognised, and therefore they are in a vulnerable state. The other is that the communal land administration system in former homelands is in a state of disarray and its tendency to discriminate against women is not compatible with democratic principles (DLA 1997: 30-34). To deal with these problems, the White Paper first proposed that the rights of people who have occupied land for a long time in former homelands should be recognised and treated as ownership (DLA 1997: 66). For this purpose, the *Interim Protection of Informal Land Rights Act* (1996) was enacted, aiming to protect vested interests (land rights) of people who do not have explicit legal rights to the land they occupy, such as former homeland residents. The *Act* also stipulated that these people with informal rights to the land must be treated as stakeholders when such land is subject to development projects and business transactions (DLA 1997: 62). This *Act* was enacted as an interim measure with an expiration date, but because new law has not come into force, it is being updated every year in the national parliament.

The second measure proposed by the White Paper was the democratisation of the administration of land rights. It stated that the ownership of land lies with the members of a community, not with the chief, tribal authority, or trustees (DLA 1997: 66). The collective landholding system must observe the basic human rights prescribed by the Constitution. The members of the group—including women—have the right to participate in the decision-making process regarding land administration and access to land. The White Paper clearly stated the idea of land rights based on fundamental human rights. It also indicated a lack of trust in traditional leaders, by stating that, while people support some chiefs, other chiefs are abusing their powers.

Following the White Paper, the *Land Rights Bill* was discussed within the Department of Land Affairs (hereinafter the DLA)[4], but it was never introduced to parliament. After the change of the Minister of Land Affairs, the discussion of a new bill began and the CLaRA was finally enacted in 2004. Nevertheless, the CLaRA was fundamentally different from the *Land Rights Bill*, and the two guiding principles of the White Paper (Cousins 2008: 13).

[4] In 2009, the name of the department was changed to the Department of Rural Development and Land Reform.

3.2. CLaRA

The CLaRA defines 'communal land' covered by it as land that is occupied or used, or that is going to be occupied or used, by members of a particular community, based on the rules and practices of that community. Included in this definition are (a) former homelands which are legally (nominally) owned by the state, (b) land acquired by black people collectively before the early twentieth century when land ownership by black people was restricted[5], and (c) land transferred to the group by land reform programmes after democratisation (Section 2). The *Act* also covers former KwaZulu territory (currently KwaZulu-Natal *Ingonyama* Trust Land) whose ownership was transferred to the Zulu King from the state through the political deal made just before the 1994 elections to secure the participation of the IFP in the elections[6].

The CLaRA aims to convert the various forms of land rights, formal or informal, registered or unregistered, of people and groups on these communal lands ('the old order rights'), to new land rights ('the new order rights'). Thus it seems that the CLaRA is loyal to the guiding principle of the White Paper that proposed the recognition of the existing rights to land as the starting point of tenure reform. It also stipulates that an investigation into the existing land rights has to be conducted before the old order rights are converted to the new order rights. The purpose of this investigation is to discover the competing or conflicting rights and interests to the land and to consider remedies if all competing interests cannot be satisfied (Sections 14 to 17).

The new order rights defined by the CLaRA are divided in two. One is the right as the owner of the whole communal land, which is given to the community that occupies the land. The communal land will be registered under the name of the community. To do this, the community has to first establish community rules, obtain a corporate status and establish a land administration committee. The primary authority and duty of the land administration committee include recording land allocations and transactions within the community, promoting the resolution of conflicts over the land and communication and coordination with relevant municipalities for development of the relevant communal land (Sections 3, 19, 21 to 24). The second new order right is the right to a piece of land within the communal land, which is given to the members of the community and registered under the name of the individual residents (Section 18-3b). The 'Deed of Communal Land Right' is issued to both the community that owns the communal land and the individuals who own a piece of land within the communal land (Section 6), and the registered right can also be converted into freehold ownership (Section 9).

The CLaRA calls for establishing two organisations for land administration. The first is the land administration committee mentioned above, and the second is the Land Rights Board which is the government agency overseeing the land administration. Of these two, the composition and authority of the land

[5] Land purchased by black people before the *Natives Land Act* (1913) was enacted. It was referred to as 'black spots' during the apartheid era.

[6] The *Act* was amended in 1997, by which the ownership of the land of the former KwaZulu was transferred from the Zulu king to a public institution called the KwaZulu Natal *Ingonyama* Trust Board where several people including the Zulu king sat as trustees.

administration committee are more important for considering the democratisation of the land administration system. The White Paper emphasised the necessities to abolish discrimination against women and to ensure the participation of women in the decision-making structure. There are repeated references to women's rights in the CLaRA. For example, it stipulates that at least one-third of the members of the land administration committee have to be women (Section 22-3), that women have the same land right as men (Section 4-3) and that a widow or a single woman also has land rights of her own (Section 18-4b).

However, the CLaRA also stipulated that if there is a traditional council within the community, such a council may exercise the authority and obligations of the land administration committee (Section 21-2). The traditional council is a council established in local municipalities by the TLGFA. Its predecessor was the tribal authority established by the *Bantu Authorities Act* (1951) of the apartheid era (Cousins 2008: 13). The TLGFA aimed to reform the administration system of traditional leaders, by introducing the principles of gender equality and democracy. It stipulated that one-third of councillors should be female and that 40% of councillors should be democratically elected members of a 'traditional community'[7]. However, not everyone agreed that the traditional council should become the land administration committee. This was far from the guiding principle of the White Paper that advocated to separate land administration from traditional leaders. Therefore, people who objected to the traditional council's taking over the responsibility of land administration committee decided to submit a legal challenge to the CLaRA.

3.3. Legal challenge to the CLaRA

In 2006, four rural communities[8], supported by white liberal activists, submitted their arguments to the Gauteng North High Court that several provisions of the CLaRA and the TLGFA are unconstitutional. The applicants claimed that the CLaRA is unconstitutional for two reasons.

First, the applicants claimed that the CLaRA undermines the security of land tenure that people already have. They made two arguments to support this claim. Contrary to the DLA's interpretation of the CLaRA that the traditional council could fulfil the role of the land administration committee, they argued that, wherever traditional councils existed, such councils would become the land administration committees and this would be problematic (Cousins 2008: 13). Their second argument addressed the boundaries of the 'communities'. All four communities asserted the relative autonomy of people living in the smaller areas within the jurisdiction of traditional councils and rejected the idea that the boundary of traditional council/tribal authority, i.e. 'tribe', would become a principal unit of land administration.

Second, the applicants claimed that there was an error in the legislative procedure of the CLaRA. In South Africa, each bill is classified as either a Section 75 bill or Section 76 bill of the Constitution by the

[7] The remaining 60% consists of 'members of the traditional community' chosen by traditional leaders.

[8] They were Kalkfontein in the Mpumalanga Province, Makuleke and Dixie in the Limpopo Province, and Makgobistad in the North West Province. See Claassens and Gilfillan (2008), Claassens and Hathorn (2008), and North Gauteng High Court (2009) for background information of these four communities.

government's legal advisor, and they have different deliberation processes. If a bill concerns matters on which the central government has the exclusive authority to make a policy, it shall be tagged as a Section 75 bill. If a bill concerns matters on which both the central and provincial governments have the authority to make a policy, it shall be tagged as a Section 76 bill. The CLaRA was classified and discussed as a Section 75 bill in parliament, but the applicants argued that it should have been considered as a Section 76 bill. They argued that this was because the provisions of the CLaRA concern customary law and traditional leaders and these are the matters on which both the central and provincial governments have authority to make policy (Murray and Stacey 2008). The government's legal advisor tagged the CLaRA as a Section 75 bill because the CLaRA concerned land and only the central government has the authority to make land policy.

In October 2009, the Gauteng North High Court ruled that several provisions of the CLaRA are invalid and the CLaRA should have been deliberated as a Section 76 bill. However, the judge also said that the parliament did not make this mistake deliberately and it had no intention of suppressing the opinions of the provinces. Therefore the judge rejected the communities' argument that the CLaRA as a whole was unconstitutional due to an error in the legislative procedure (North Gauteng High Court 2009). The High Court's judgement over the invalidity of several provisions of the CLaRA was subject to ratification by the Constitutional Court. The communities also appealed the High Court's judgement. In May 2010 the Constitutional Court supported the view of the High Court that the CLaRA should have been tagged as a Section 76 bill but ruled that it was incorrect that the High Court did not rule that the CLaRA as a whole was unconstitutional due to this reason. Conversely, the Constitutional Court did not make any judgement on whether the individual provisions of the CLaRA was unconstitutional (Constitutional Court of South Africa 2010). As a result of this judgment, the CLaRA was never implemented.

3.4. The issues raised in the legal challenge to the CLaRA

While the CLaRA was found to be unconstitutional due to procedural reasons, the question of how to define the boundaries of the collective/communal land ownership, raised by this legal case, is fundamentally important in reforming the customary land tenure system where the right to land has been given based on one's membership in the community. If the traditional council were to become the land administration committee, the owner of the communal land was going to be synonymous with 'tribe'. There are no population statistics of each tribe in South Africa, but Claassens (2008: 265) estimates that the population size of each tribe/community will be 10,000 to 20,000 persons. My rough estimate gives the figure of 18,000 persons per chief[9], which is almost the same as Claassens's figure. The size of the population differs for each tribe, but it should be questioned whether it is realistic and practical to establish a committee representing more than 10,000 people that would administer land owned collectively.

[9] The author divided the population of the former homelands (about 15 million) by the number of chiefs (830). Since there are 7,400 headmen nationwide, the population per headman is over 2,000.

Four rural communities that challenged the CLaRA claimed relative autonomy of smaller communities over the 'tribe' within the jurisdiction of the traditional council. For instance, the Kalkfontein community consists of a group of descendants of people who originally bought two farms from white people in the 1920s. Since black people were not allowed to own land at that time, the farms were registered as trust land with the Minister of Native Affairs as a trustee. Later, the farms were incorporated into the KwaNdebele homeland by the apartheid government. The inhabitants of the farms were placed under the jurisdiction of the Ndzunzda tribal authority. However, they refused to accept land administration by tribal authority and fought against its legitimacy in the court. Ultimately in 2008, the ownership of the farms was transferred to a community trust set up through the land restitution programme, but the chief refused to accept the existence of an independent community within his jurisdictional area (Claassens and Gilfillan 2008: 310). Likewise, the Makuleke community was forcibly moved to the Mhinga tribal authority area by the apartheid government, which later became part of Gazankhulu homeland. The Makuleke insisted on an independent identity from Mhinga tribe, but the Mhinga chief opposed such arguments by the Makuleke (North Gauteng High Court 2009).

Both Kalkfontein and Makuleke are communities that were incorporated into 'tribes' against their wills by the apartheid policy. In addition to four communities that challenged the CLaRA, there are many more people and communities, especially in the mining areas of the North West Province, that ultimately lived in the area which fell under the jurisdiction of ethnically-different traditional leaders as a result of forced or voluntary migration (Comaroff and Comaroff 2009, Manson 2013: 415). These areas fall under the jurisdiction of traditional councils consisting of Tswana traditional leaders, but many Xhosa mine workers came to work from the Eastern Cape Province and settled there. If a law like the CLaRA were to be implemented in such places, Xhosa people might be excluded from the land allocation process.

Moreover, the fact that the CLaRA was not only to be applied to former homelands but also to other lands owned by black people collectively raises further questions. In the so-called 'black spots' where black people purchased land before the *Natives Land Act* (1913), many residents had already lived outside the influence of traditional leaders since the beginning of the twentieth century, including those who converted to Christianity (Sato 2010). Hence the CLaRA will result in expanding the powers of traditional leaders over the land where they previously did not have the authority to allocate land. Moreover, in post-apartheid land redistribution and land restitution programmes, the beneficiaries of the programmes usually form trusts or Communal Property Associations (CPAs) as the legal owner of the land. The CLaRA was silent about the relationship between these trusts/CPAs and land administration committees. If traditional council replaces the existing trust, will the trust lose the authority and right to administer land? (Fay 2009: 1430-1431). Even if the same word 'community' is used, its meanings are different between land restitution policy and tenure reform policy. This has already created conflicts and confusion among people as well as government officials about the boundaries of 'community' (Turner 2013).

The legal challenge to the CLaRA also raised the question of whether traditional leaders should have the

authority to administer land in the first place. Unlike other African countries, South Africa's former homelands are not the main targets of agricultural foreign direct investment by foreign companies. Therefore, the so-called 'land grab' has not been a big problem. However, especially in areas where mining development is occurring in the North West Province, it is reported that traditional leaders allow mining companies to exploit mineral resources without consulting people and they monopolise the royalties obtained from the companies (Mnwana 2014). The Bafokeng people in the North West Province is known as the wealthiest tribe in South Africa due to the income from mines. However, the benefits accrued from mines are not widely circulated among local people. There is also a conflict among residents over the question of who should benefit from mines—should it be only Bafokeng or should non-Mfokeng who live on the Bafokeng land be included? (Comaroff and Comaroff 2009)

4. 'Living' customary law of land allocation and administration: A case study of former KwaZulu

4.1. 'Official' versus 'living' customary law

In the previous section, I examined the problem of regarding a 'tribe' as a unit of communal land ownership and of giving traditional leaders the authority to administer such land. The legitimacy of this boundary was particularly prone to be questioned in areas that have internal ethnic diversity due to migration. Does this problem also apply to rural areas of relatively higher internal homogeneity? In this section, I will discuss the current practices of the customary land tenure system, drawing on a case study of a former KwaZulu rural area that has relatively strong continuity from being a precolonial chiefdom and has a higher degree of internal homogeneity.

The discussion here is concerned with current debates that try to distinguish between 'official' and 'living' customary laws. Since the Natal colonial government codified the Zulu customary law at the end of the nineteenth century, many laws concerning customs and traditions of African societies such as marriage and the chieftaincy system were legislated by the South African and homeland governments. Apart from the statutory laws, there are also several books written by anthropologists which discuss customary laws systematically. However, these codified customary laws, even if faithful to the customs and norms of society at the time when they were recorded, will eventually become outdated along with changes in the circumstances surrounding the relevant societies. Moreover, sufficient attention was not paid to the differences within a language/ethnic group. In this context, several researchers began to argue about the necessity of understanding practices and norms practised in people's daily lives, i.e., 'living' customary law, which is different from what has been conventionally regarded as the 'official' customary law such as codified statutory laws and/or anthropologist's writings (Bennett 2004; 2008; 2009, Oomen 2005, Cousins *et al*. 2011).

The current practices of the customary land tenure system in the former KwaZulu rural area discussed in this section are examples of 'living' customary law. The 'living' customary law is characterised by its flexibility and occurrences of constant minor changes (Oomen 2005: 78). Therefore there is always a risk of

encountering outdated information after it has been recorded. Nevertheless, Cousins *et al*. (2011) demonstrated that policymakers are hardly aware of the existence of 'living' customary law and, consequently, they tend to rely on the customary laws of olden times, which in turn causes significant problems in making land tenure reform policy. In this context, the first step should be to discuss and understand the current practices of land administration and the role of traditional leaders in those practices.

4.2. Case study area and research methodology

The study area is located in E *isigodi* (village) under the jurisdiction of Mchunu traditional council in the Msinga local municipality of the KwaZulu-Natal (KZN) Province. The *isigodi* (pl. *izigodi*) is a territorial unit under a traditional Zulu leader, and usually refers to an area marked by physical boundaries such as hills and rivers. South Africa's government system does not give it any administrative recognition. Each *isigodi* has an *induna* (pl. *izinduna*) who is a traditional caretaker equivalent to a headman. The E *isigodi* is located in the border area where the former homeland and the former white farming district meet.

The author conducted semi-structured interviews with 94 people who lived in eight sub-divisions (sin. *umhlati*, pl. *imihlati*) and cultivated plots on a small-scale irrigation scheme situated in E *isigodi* in 2014. Furthermore, 21 people from three sub-divisions, one *induna*, and one agricultural extension officer of the KZN provincial Department of Agriculture were also interviewed by the author in 2015 and 2016[10]. Respondents were not selected randomly, as interviews were conducted on the irrigation scheme in 2014 and 2016 with anyone who was working on the plots at the time of interview and was willing to participate in the research[11]. Therefore, it cannot be claimed that they represent the owners of the plots in the irrigation scheme completely. We could not obtain any statistical information on who among the residents of the E *isigodi* owned plots on the irrigation scheme, apart from a vague understanding among the respondents that those who owned plots are mainly descendants of those families who had lived in the area since the time of their grandfathers. We had to conduct the interviews in this way because neither the provincial Department of Agriculture nor *induna* knew the number and names of plot holders in the irrigation scheme.

Nonetheless, this research will give several important insights for understanding the current practices of the customary land tenure system. The breakdown of respondents in the 2014 interviews were as follows: 20 males and 74 females. The majority were married, including those who were cohabiting (51 people, 54%) or widowed/widower (33 people, 35%). This is in line with the conventional understanding that the majority of agricultural producers in former homelands are female. As for the age breakdown of respondents, about 40%

[10] The interviews in 2014 were conducted in collaboration with Mr. Mnqobi Ngubane of the Institute of Poverty, Land and Agrarian Studies (PLAAS), University of the Western Cape, and we were assisted by two research assistants. One of the research assistants also accompanied me as an interpreter in the 2016 fieldwork.

[11] Of the 21 respondents in the 2016 interviews, only six people were also interviewed in 2014. We attempted to look for the same respondents from the 2014 interviews, based on personal information (name, sex, age and *umhlati* etc.), but most could not be found.

(38 people) were 60 years old and above and, thus, were pensioners. Thirty respondents were in their 50s, 13 in the 40s, five in the 30s, three in the 20s and I could not attain answers for the remaining five respondents. Fifty-four respondents (57%) did not receive any education. Conversely, 37 respondents (39%) answered that they could both read and write in *isiZulu*. A further 12 respondents said that they could read and write in English.

The main livelihood activities of respondents are mixed subsistence farming of grazing livestock such as cattle and goats[12] and agricultural production. However, the area has one major difference from other former homeland areas. That is, respondents can use plots on the irrigation scheme. While social grants (child grants, pension and disability grants) are the most important sources of income in many former homeland areas, the residents of E *isigodi* who had access to plots on the irrigation scheme also gained income by selling crops and vegetables they grew. Seventy-seven respondents (82%) answered that they had income from this activity. A few respondents received a salary as local civil servants of the provincial Department of Agriculture, while another few received remittances from family members in the cities. Apart from these, local employment and income-generating opportunities are minimal, and many men were absent as they went to the cities as migrant workers.

4.3. 'Living' customary law of land allocation and administration in the case study area

The land in the research area legally belongs to the KwaZulu-Natal *Ingonyama* Land Trust, but the residents also have various land rights in accordance with the customary land tenure system. Regarding residential land, 51 of the 94 respondents interviewed in 2014 stated that land belonged to their households. This includes 16 people who inherited land from their parents and other relatives, and 35 people who moved to their husbands' houses through marriage. Conversely, 33 people answered that they built a house with permission from traditional leaders such as the *induna* or chief. Also, five responded that they first attained permission from neighbours living near their residential land, and then went to see the traditional leader to acquire further permission. Furthermore, three people answered that they received permission from their neighbours only[13].

Eight out of 43 people, excluding those who said that it was the households' land, answered that they gained permission from neighbours to acquire their residential land. Although it is proportionally small, on a later day a local *induna* explained to me the following procedure for people to obtain residential land. Those who are seeking residential land first have to visit future neighbours and introduce themselves. Then, the neighbours would instruct them to go to a local *induna*. After that, the *induna* reports the matter to the chief and receives permission from him. According to the *induna*, there is a record register that describes which

[12] However, among the respondents in the 2014 interviews, only one-third had cattle and 60% owned goats. One third of respondents did not own a cow or goat.

[13] Of the remaining two respondents, one answered that s/he acquired some residential land from the previous owner and another said that s/he was 'dumped' at the current residence by the government truck after being evicted from a farm.

households live in each sub-division (*umhlati*). The *induna* also said that, in recent years, immigrants from outside the area are rare, and the acquisition of new residential land is limited to a new household that is becoming independent from existing households[14]. In other words, not only traditional leaders but also residents (neighbours) are involved in the allocation process of residential land.

As for an agricultural plot in the irrigation scheme, the largest number of people (56) out of all plot holders (82) answered that their plots belong to their households and they inherited plots from parents and other relatives. In contrast, only 12 people answered that they acquired it from traditional leaders. There were also seven people who gained land from the previous owner. The latter cases were different from normal transactions involving money and, usually, the borrowing of the land preceded it. In the event that the previous owner of the plots became too old to continue cultivation, or that none of the family members of the previous owner were interested in agricultural production, the borrower eventually received the plot. Twenty-three people borrowed the plots at the time of the interviews in 2014. Most lease contracts were verbal. In most cases, there was no rental payment in cash and, instead, a part of the agricultural products was handed over to the lender of the plots after harvest.

One of the reasons why the authority of traditional leaders seems to be weaker concerning the agricultural plot may be related to the fact that the plot is located on the irrigation scheme. According to the oral tradition, Chief Mchunu took the initiative of constructing irrigation furrows at the end of the nineteenth century[15]. By the first half of the twentieth century, the South African Department of Agriculture managed the irrigation scheme, and it collected land rental fees from users of the plot[16]. During the time of the KwaZulu government, the KwaZulu Department of Agriculture took over the irrigation scheme, but after its dismantlement, it was again taken over by the KZN provincial Department of Agriculture. According to an extension officer of the KZN provincial Department of Agriculture, while his Department was responsible for the maintenance and management of the irrigation scheme, it did not have the right or authority to allocate land. He said that this authority belongs to the chief[17]. However, when I asked the local *induna* about who has the authority to allocate land on the irrigation scheme, he answered that the government was responsible for that role. Thus, the opinions of both parties were inconsistent, and it was not clear who had the authority to allocate plots on the irrigation scheme at the time of fieldwork in 2016. However, the *induna* also told me that the authority to allocate and administer land would soon be transferred from the KZN provincial Department of Agriculture to the chief[18]. Even though a new law to reform the land tenure system of the former homeland has not been enacted, there was already a local initiative to strengthen the chief's authority over the land.

[14] Interview with induna, 17 August 2016, Msinga.
[15] Interview with an elder of the E *umhlati*, 13 August 2016, Msinga.
[16] In reality, many people did not pay rental fees. WR Wilson, resident inspector Mooi River Works, Muden, 1 September 1908, NAB (Pietermaritzburg Repository of the National Archive): SNA: Vol. I / 1/410, 1908/2706; Financial, irrecoverable revenue: Mooi river and Tugela irrigation works, NAB: CNC: Vol. 343, 1918/3461.
[17] Interview with an extension officer of the KZN Provincial Department of Agriculture, 5 February 2015, Tugela Ferry.
[18] Interview with *induna*, 17 August 2016, Msinga.

Next, I would like to discuss the patterns of the inheritance of plots, especially whether there was any difference between men and women. Of the total number of 82 plot holders (20 males, 62 females), 56 (16 males, 40 males) answered that they acquired their plots by inheritance. In the case of men, all but two inherited plots from parents (or fathers). Of the two exceptions, one inherited it from his grandmother, and another from his brother. Conversely, in the case of women, only nine said that they inherited plots from their parents. Nearly half of the women inherited plots from their female relatives, such as their mother-in-law (12), own mother (5), and grandmother (2). Women also inherited plots from other relatives such as the husband's family (5) and husband (4)[19]. The vulnerability of women's rights to land in the customary land tenure system has been frequently indicated. However, this research shows that the inheritance of land from female members of the family to other female members of the family is common even in a Zulu society that has traditionally been considered a paternal society. A plot in the irrigation scheme is minimal, i.e. about 0.1 hectares. Although some people have multiple plots, it is not realistic to make a living based on agricultural production alone. In a society where it became normal for men to be absent from the rural areas as they went to the cities and mines as migrant workers, perhaps it has become an important livelihood strategy for women and rural households left behind to inherit plots and supplement their income from agricultural production.

Nevertheless, the rights that people have to the plot are not the same as private ownership. I asked them the following series of questions regarding their rights to the plot in 2016: whether they have the right to dispose of (sell) the plot, the right to lend it to someone else, and the right to give it as inheritance to someone else, and whether a person who borrows a plot has a right to sub-let it to a third party. Almost everyone answered as follows:

- The land belongs to the chief. No one has the right to sell it.
- However, one can lend his/her plots to others and/or give them to their relatives as an inheritance.
- Those who borrow a plot do not have the right to sub-let it to a third party.

Once the land is allocated to the households and/or individuals, they have strong rights to it, but they deny the right to dispose of/sell it by declaring that the 'land belongs to the chief'.

Finally, to ascertain the relationship between the residents and traditional leaders, I asked the respondents whether they knew the name of their traditional leaders and on what occasions they met with traditional leaders. Regardless of age and sex, the respondents knew the name of their chief and who their *induna* was (2016 fieldwork)[20]. Some consulted with *induna* when they had conflicts with neighbours. Others participated

[19] Of the remaining three female respondents, one answered that she acquired it from her relative, and we could not get an answer from the other two.

[20] The details of the 21 respondents of the 2016 interviews were as follows: five men and 16 women, and in terms of age breakdown, eight were 60 years old and above, five were in their 50s, five in the 40s, and three in the 30s.

in meetings convened by *induna*. However, very few people have met the chief. Even in that case, it was explained that, because the problem was not solved by *induna*, they needed the chief's intervention. In other words, people are connected to the chief through *induna*. This shows a relative autonomy of a community living in *isigodi*, a smaller unit within the Mchunu traditional council.

5. Conclusion

The purpose of reforming the customary land tenure system in South Africa's former homelands is different from other African countries. It was not to promote agricultural development of the area. Nor was it to improve the livelihoods of people living in these areas. The purpose was to guarantee the land rights to people who had been deprived of it in the past. The first guiding principle of land tenure reform, described in the White Paper and inherited in the CLaRA, stated that the existing land rights of the people in the customary land tenure system should be recognised and guaranteed by law. It was ground-breaking in the sense that it recognised land rights other than private ownership. However, this can be criticised as preserving the status quo and not bringing about a solution to the historical problems of former homelands, such as poverty and underdevelopment (Nagahara 2016).

Therefore, the success or failure of land tenure reform depends on whether it can achieve the second guiding principle of the White Paper, i.e. democratisation of land administration systems in former homelands. The CLaRA intended to strengthen the power of traditional leaders, particularly of the chief, by giving the traditional council the authority to allocate and administer land. However, an objection was presented to the prospect that 'tribe' would become a basis of communal land ownership. This problem could be applied not only to the four rural communities that filed the lawsuit but also to other areas where the ethnically diverse people lived within the jurisdictional area of traditional council due to forced or voluntary migration.

The former KwaZulu rural area discussed in this paper, has a relatively higher continuity from its pre-colonial chiefdom and a higher degree of homogeneity regarding ethnicity. Nevertheless, it is evident that the current practices of allocating and administering residential and agricultural lands and the relationship between residents and traditional leaders—even if the residents recognised the authority of chief—means that the daily business of allocation and administration of land is principally done in a smaller units (*isigodi*) than the 'tribe' as a whole. Furthermore, not only traditional leaders but also the opinions of the neighbours are considered when residential land is allocated to a new person/household. It was also evident that households and individuals have a strong right to decide how to use the land and/or give it to a family member as an inheritance, once a particular piece of land is allocated to them. In particular, this research found that many women who were traditionally considered to have only vulnerable rights in the customary land tenure system inherited agricultural land from their mothers-in-law and/or their own mothers. This case study re-affirms the importance of understanding the customary law as something that changes continuously.

After the CLaRA was declared unconstitutional, a fresh discussion over a new law to reform the

customary land tenure system has begun. A policy document titled Common Land Tenure Policy was made available at a workshop held by the Department of Rural Development and Land Reform in August 2013. It stated that, in the area where customary law is applicable, traditional councils would administer people's rights to the land, while in other areas 'communal property institutions' would play such a role (DRDLR 2013: 13). Thus, of the three categories of land covered by the CLaRA, two categories of land are removed from the future administration of traditional council, i.e. land acquired by black people collectively before 1913, and land transferred to communities/groups by post-apartheid land reform programmes. However, the new policy document maintained that the traditional council would administer land in former homelands. Once again it affirmed the intention to strengthen the authority of the chief. Subsequently, a new bill was introduced in the parliament in July 2017, but it remains to be seen if and when this will become law. As long as it ignores the existence of autonomous communities/groups within the jurisdiction of traditional councils, it will be difficult to form a consensus on the way forward for tenure reform in South Africa.

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