

**The land laws of Msinga
and potential impacts of the Communal Land Rights Act**

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**Imithetho yomhlaba
yaseMsinga**



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Chapter One

Introduction: the project and its context

A significant proportion of South Africans live in rural and peri-urban areas under systems of land tenure known variously as 'traditional', 'tribal', 'customary' or 'communal' tenure¹. It is true that post-apartheid South Africa is rapidly urbanizing, but many people who move to towns and cities continue to maintain strong links with their rural families and places of origin, while others construct livelihood strategies that combine activities, relationships and income flows across the rural-urban divide. Land-based livelihoods remain important for many rural and peri-urban people, who, in a context of high unemployment and insecure urban income, rely on contributions from small-scale agriculture or gardening as well as food, shelter, and income sources derived from the use of natural resources. Of course, the significance of these contributions varies greatly between individuals, households and communities. The fact that they are crucial components of the livelihoods of the rural poor, in particular, as well as those of women, means that they are important for policies and programmes aimed at poverty reduction (TIPS 2009). This means that security of tenure in relation to land and natural resources is a key issue for post-apartheid South Africa to confront and address.

Land tenure security is the focus of a key section of the Bill of Rights, sec 25 (6), which requires government to pass a law to give effect to its provisions. Tenure reform is one of three foci in government's land reform programme. It attempts to secure the rights of black South Africans whose rights to land are insecure as a result of racially discriminatory laws and practices in the past. This includes residents of communal areas whose land rights have weak legal status and are vulnerable to the decisions and actions of state officials or unaccountable traditional leaders. Despite its potential impact on a large proportion of the population, however, communal tenure reform lags behind other components of land reform. The Communal Land Rights Act (CLRA) was passed in 2004 to give effect to section 25(6), but implementation has yet to begin. This is in large part due to a legal and constitutional challenge mounted in 2005 by the Legal Resources Centre and other lawyers on behalf of four rural communities.

Whatever the outcome of the legal challenge, it is vital that government's tenure reform programme be informed by an understanding of the complexity and variability of land tenure and land administration regimes. Yet the contemporary literature on communal tenure is somewhat thin, academic research is seldom referred to by officials, public awareness of land issues is often woefully lacking, and misleading stereotypes of communal tenure abound. It is equally important that those citizens whose rights are directly affected by policies and legislation should understand its content and implications, and be 'empowered' to engage with new laws and the officials tasked with implementing them.

This report describes the findings of an action-research project that set out to help bridge the divide between the law on tenure reform and the people whose lives will be impacted upon by the law. It also sought to develop an in-depth understanding of locale-specific tenure systems in their social, economic and local political contexts, and to explore the potential impacts of the Communal Land Rights Act on these systems. This report hopes to contribute to a deepened awareness of the complexity of land tenure reform in South Africa's communal areas.

¹ One estimate suggests that 16.5 million people or one third of the population live in communal areas (Budlender 2008).

The project

Imiithetho yomhlaba yaseMsinga ('the land laws of Msinga') is an action-research project on land tenure laws and practices undertaken by the Church Agricultural Project (CAP) in collaboration with the Learning and Action Project (LEAP), which explores learning approaches to tenure security. The project was initiated in January 2007 and ends in December 2009. Funding was provided by the Joseph Rowntree Charitable Trust. The project was implemented in the two tribal areas within Msinga that CAP has worked in since its inception in 1971, those occupied by the Mchunu and Mthembu².

The objectives of the project are fourfold:

- a) to provide information on the Communal Land Rights Act (CLRA) of 2004 to local residents and authority structures (mainly traditional authorities);
- b) to gain a detailed and in-depth understanding of local land tenure 'laws'³ and practices, as well as emerging problems or tensions in relation to these rules and practices, through field research in selected *izigodi* ('wards') within the two tribal areas;
- c) to assist local residents and authority structures to discuss and propose potential solutions to key problems;
- d) to facilitate discussion of how local residents and authority structures might wish to engage with the CLRA when (or if) it is implemented in Msinga.

Msinga District is located in the Midlands region of KwaZulu-Natal, and incorporates both 'communal land' occupied by 'tribes' and largely white-owned commercial farming land, a high proportion of which is occupied by labour tenants. Land reform is resulting in the transfer of ownership of large areas of land to former labour tenants, land restitution claimants, or beneficiaries of the land redistribution programme. The CLRA applies to all the 'tribal' land in the district but as noted above has not been implemented anywhere in South Africa.

A linked piece of legislation, the Traditional Leadership and Governance Framework Act (the TLGFA) of 2003, is being implemented in KwaZulu-Natal through a provincial version of the Act⁴. Traditional councils, which in most places are 'transformed' versions of the old Tribal Authorities, have recently been established in the Mchunu and Mthembu tribal areas of Msinga⁵. The CLRA envisages that such councils will become land administration committees, representing the 'communities' taking ownership of communal land and administering 'community rules' on land tenure. This controversial provision is a core focus of the legal challenge to the Act (Claassens and Cousins 2008).

CAP was established in March 1965 at the Maria Ratschitz Mission farm near Wasbank in northern Natal, under the management of its founder Neil Alcock. In 1975 CAP moved its operations to a degraded 2,500 ha farm (named Mdukatshani, "the place of lost grasses" by staff) located in the Weenen district. The farm's boundary adjoined the

² Indicate why term 'tribe' is still being used

³ *Imiithetho* is the isiZulu word for laws, customs and statutes. In this project we have used the term to refer to local 'laws' or rules and established practices around land, as distinct from statutory laws.

⁴ The Act is 'framework' legislation only and provinces are required to enact their own, provincially-specific legislation to give effect to it.

⁵ 'Transformation' means that 40% of the members of the council must be elected and one third must be women.

Msinga district of the then homeland of KwaZulu. CAP's main farming project was planned as an environmentally friendly cattle co-operative, which would involve rehabilitation of the land. A large emphasis was put on building trust between CAP and the local people in Msinga in order "to grow grass, and to teach others to grow grass" with them. However by 1977 CAP projects had gradually changed in response to what they were encountering.

During 1979 CAP began to be approached by several different groups of evicted labour tenants who had nowhere to go. The revival of massive removals of labour tenants in Weenen district at this time was caused by the change in government's attitude towards the enforcement of the law against labour tenancy, which it began to pursue with vigour. Alerted to the significance of problem, CAP became instrumental in enlisting wider support for evicted farm residents, through active organising, lobbying and advocacy.

The political change of 1994 led to the new land reform law, policy and programmes. CAP, along with all NGOs, had to find its way into a new set of roles and relationships. The work CAP had been involved in with regard to and put it in a strong position to contribute to the new policy and to assist local communities to benefit from the programmes.

After facilitating successful land reform for the communities it was helping, CAP became more involved with the challenge of land use possibilities. In 2001 it started focusing on land reform management and "post land reform activities". CAP is currently engaged in a variety of development projects in Msinga focused on cattle breeding, poultry production, livestock health, crop production, natural resource use, craftwork, youth groups and HIV/AIDS.

CAP's motivation for initiating the project was based on two considerations. Firstly, CAP staff members felt that they needed to enhance their understanding of land tenure and rules for the management of natural resources in Msinga because these are key aspects of the local institutional environment that profoundly influence CAP's rural development work. A key issue that arises again and again in this work is lack of clarity on the land and resource rights of women, and of unmarried women in particular. A deepened understanding of these would assist CAP in working with local people to develop appropriate and sustainable agricultural development and natural resource management programmes. In addition, it was clear to CAP that local residents and traditional authority structures had little or no information and knowledge about the contents of the Communal Land Rights Act. Given the controversial nature of the CLRA and concerns that it has the potential to impact negatively rather than positively on land tenure security, CAP felt it would be useful to provide information on the new law and enhance the capacity of local people to respond to its implementation. Both considerations led to the formulation of a project which would try to link research to action - in this case, to discussion of potential solutions to emerging problems and tensions around land and natural resources.

The team developed a short 'vision statement' of what would constitute the ideal outcome of the project:

"Community members meet independently at isigodi) level and are able to clearly articulate what local laws are negatively affecting them, which of these they want to keep and which they want to change. Women engage and actively participate in local structures and discussions about laws and issues affecting them and men listen to them. Traditional authorities

acknowledge and support locally accepted and legitimate processes where people can discuss and suggest changes to laws and practices. Men, women and youth from the community voice their ideas and proposals in implementation of government laws and programmes, particularly the Communal Land Rights Act (CLRA) and the Traditional Leadership Governance Framework Act (the TLFGA). Government officials listen, understand people's realities, and take people's views and proposals into account in implementation. NGO staff members better understand land tenure systems and processes of change and are more effective in supporting positive changes at local community level, and are advocating appropriate policy changes."

The research team consisted of six people: four CAP staff members who are all local residents (Rauri Alcock, Mphethethi Msondo, Gugu Mbatha and Ngididi Dladla), a team leader on contract to CAP (Makhosi Mveli), and a research advisor (Ben Cousins of the Institute for Poverty, Land and Agrarian Studies, or PLAAS, at the University of the Western Cape). Makhosi Mveli left the project in early 2009 and Donna Hornby was then contracted in to assist in fieldwork, analysis and writing up the project's findings and outcomes.

This team undertook action-research in two *izigodi* ('wards') of the Mchunu tribe of Msinga in March 2007, and in two *izigodi* of the neighbouring Mthembu tribe in 2008. In 2009 we carried out further research on specific issues, organized training and information sessions, initiated the final analysis and write-up of research data, and planned a provincial research findings workshop. High levels of interest and co-operation with local residents, the Mchunu and Mthembu chiefs (the *amakhosi*), and structures of traditional authority were evident throughout.

The field sites

CAP is based on land which formerly comprised two white-owned labour tenant farms immediately adjacent to the Mchunu and Mthembu tribal areas (Figure 1). Two *izigodi* in each of the two tribal areas were selected as field sites, in part because they are areas in which CAP works and is well known. In both areas the field sites comprised one *isigodi* on a former labour tenant farm and one within the core tribal territory, which provided interesting contrasts in relation to relative resource abundance and land tenure 'laws' and practices (see Table 1).

Table 1. Location of field sites

<i>Tribal area</i>	<i>Izigodi in core tribal areas</i>	<i>Izigodi on former labour tenant farms</i>
Mchunu	Mathintha (in Kwaguqa)	Ncunjane
Mthembu	Ngubo	Nkaseni

In the Mchunu tribal area, labour tenants on privately-owned farms which were originally part of the tribal area have always been seen as full members of the Mchunu *isizwe* (nation). Those located on the CAP farms formed part of Ncunjane *isigodi*, under their

own *nduna* (headman). The farms have now been transferred to Ncunjane through land reform, and are well endowed with natural resources and also relatively lightly settled at present. Ncunjane abuts Kwaguqa *isigodi* within the main Mchunu tribal area, and is immediately adjacent to the sub-ward (*umhlati*) within Kwaguqa known as Mathintha. Mathintha is representative of realities within the wider Mchunu tribal area: it is characterized, for example, by a high population density and severe shortages of arable land, grazing for livestock and natural woodlands to supply fuelwood. A key land tenure issue that emerged in this site was the high incidence of households without fields of their own, who borrow land for short periods of time from land holding households, but cannot obtain secure use rights for longer periods of time.

In the Mthembu tribal area, Nkaseni is an *isigodi* populated by former labour tenants, on farms that are currently being transferred to them through land reform. These are adjacent to the Tugela River, have irrigable soils and irrigation infrastructure, and therefore have good potential for commercial crop production. Ngubo is a densely settled *isigodi* within the core tribal territory, and of interest because it has a reputation for operating an effective system of natural resource management centred on a fenced area that encloses both fields and dry season communal grazing.

The research design

Research was qualitative in character and used an ethnographic approach, seeking to understand land and resource tenure in Msinga 'from the inside out'. The project explored the meaning of local concepts and terms which inform and are informed by individual choices and practices, as well as by changing cultural norms and values. We attempted to locate these meanings within the local version of 'Zulu culture' (seen as a diverse and dynamic set of meanings and resources rather than a homogeneous and unchanging set of rules that determine behaviour). The fact that the research team included both locals and outsiders, one of whom does not speak isiZulu, facilitated the interrogation of ideas and assumptions about land, marriage practices, gender relations and social change, and intensive debate and discussion on these issues within the team informed our choice of research methods and the formulation of specific questions.

The project employed a variety of research methods, some of them 'participatory' in nature, including meetings with traditional authority structures, individual interviews, focus groups, transect walks, time lines, mapping exercises, and feedback workshops. We designed the feedback workshops as an opportunity to provoke discussion of potential solutions to problems around land and natural resources, which themselves could form the subject of research, i.e. as part of a cycle of research > action > further research. However, although a number of wide ranging discussions with a variety of participants took place, no formal decisions were taken as a result of these sessions, as far as we are aware. The 'action' component of the project was perhaps most evident in its sparking off of an ongoing 'conversation' on land issues in these two parts of Msinga District.

The project began with a research methods training session for the team together with a first iteration of key research questions to be explored in the field. Fieldwork then commenced at a first meeting with the Traditional Council and the *Nkosi* (chief), at which team members outlined the project's objectives, methods and work plan and asked for their approval to undertake fieldwork. The main provisions of the Communal Land Rights Act were briefly summarized, and councillors' views on land rights and related issues in Msinga were shared and discussed. In the case of the Mchunu Traditional Council, a

schematic history of the Mchunu was outlined during the construction of a timeline focused on land and natural resource issues.

The next step in the process was to 'cascade' down to the *isigodi* level of social and political organization, which is important for land administration. Focus group discussions were held with the *nduna* and the *ibandla* (a group of older men who advise the *nduna*). A transect walk with leadership figures such as the *nduna* helped the research team to identify key issues and problems in the relevant *isigodi*. Mapping exercises in Mathintha and Ncunjane helped to answer questions about patterns of land use and internal and external territorial boundaries. Focus groups were also held with groups of men and women in order to build an understanding of key features of the land tenure system and to help refine the research questions.

We then reflected on the key issues emerging from this first round of research, and modified and expanded our original set of research questions. The next step in the process was to carry out a number of semi-structured individual interviews, targeting a range of types of key informant: older married women, younger married women, unmarried mothers with children, widows, divorced women or women whose marriages had broken down, older men and younger married men with land, and traditional councillors. In total around 60 individual interviews were carried out. Annex A contains a copy of the interview schedule.

Following these interviews the team held an analysis workshop, developed an initial set of findings, and discussed these at *isigodi* level first and then with the Traditional Council and *Nkosi*. Similar processes followed in the course of 2009, when specific issues such as the registration of customary marriages and their implications for the land rights of women were explored in more depth.

Land and livelihoods in Msinga

CAP works in the broad area called Msinga. Msinga encompasses the areas of Colenso, Weenen and Tugela Ferry. It lies within the Uthukela and Mzinyathi District Municipalities. The area is a two-hour drive from provincial capital of Pietermaritzburg. It is a traditional, rural area (99% of its population lives in rural areas) that falls under the jurisdiction of traditional authorities. Some 99 % of the population is African and speaks isiZulu.

It is still one of the most traditional areas in South Africa with most women wearing the traditional leather skirts and robes, and all men carrying sticks when they leave the home. Polygamy is still widely practiced and families can be very large. Homes are still the round thatched huts with mud walls. The area is notorious for its violence and lawlessness. The area has always been a migrant labour area with the men working in distant cities and coming back twice a year to see their wives and children.

Politically Weenen/Msinga has always been conservative. Traditional authorities in the form of tribal chiefs attempt to conserve much of the lifestyle in the area and local disputes and issues are adjudicated and settled in tribal courthouses that overlap with the state legal system.

Population dynamics

The age distribution profile of Msinga mirrors the national age distribution profile, with 42% of the population being between the ages of 5 and 20 (Census 1996). This

implies large families, a high demand on services and a young population. Population Stability is indicated by the fact that approximately 64% of the people have been resident in the area for ten years or more, and 31% of the people have lived in the area for between 1 and 9 years.

The gender distribution is 54.24% female and 45.76% male. This gives a male and female ratio of 1:1.2, and confirms the provincial trend that a higher proportion of women than men are found in the rural areas.

In view of an increasing rate of HIV/AIDS in the province, population growth rate within the next 5 years to 25 years is expected to be negligible. The Department of Water Affairs and Forestry which designs its water schemes to meet the demand over a period of 25 years already works on a projected zero population growth rate. The highest prevalence of HIV infections is observed among pregnant women in the age group of 25 to 29 years (42.6 %). Women are infected at a younger age compared to their male counterparts.

Income and employment

Households generally have multiple sources of income comprising a mixture of small-scale production of crops and livestock for consumption and sale, labour for large-scale agriculture, some limited other work, such as running taxis and migrant work in places such as Johannesburg. Welfare and social support grants from the government are an important source of income for many households, and older members of the community often support whole families. There is also much illegal activity relying on the relative inaccessibility and poor policing, ranging from car hijacking to gun running. The most common illegal money spinner though is the growing and selling of marijuana (*cannabis sativa indica*). Almost half of the households in Msinga have an income less than R18 000 per annum. This reflects a very high level of poverty.

Due to the youthful population of Msinga, approximately 46% of the population is not economically active. According to the Msinga Sub-regional Plan, about 39% of the population is within the economically active age group. In 1991, only 37% of the 39% of people in the economically active age group was employed. This means that ±40000 members (63%) of the economically active population were unemployed. Members of the employed population are employed in a variety of occupations: 22.98% are involved in "elementary" activities, 21.86% are in unspecified jobs and 20.92% are professionals.

Cropping

Msinga is situated in a dry zone with 600-700 mm rainfall on average and 10 -20 days of frost, it also has very high summer temperatures of up to 44 degrees centigrade. Farming contributes 18% of the income for the area, through the cultivation of maize and vegetables on irrigated plots along the Thukela River. Informal agricultural activities are practiced in areas adjoining the irrigation schemes. Trade and commerce, mainly in Pomeroy, Tugela Ferry and Keates Drift, account for 11% of economic activity. Manufacturing and construction account for 10% of the economic activity. These figures indicate low levels of productive economic activity.

The area has a range of different locations, and villages differ in their proximity to water, their access to grazing land and their endowment with cropland. Thus one finds farms where livestock can range freely, with little signs of cropping; settlements where the systems are agro-pastoral with important dryland cropping areas nearby; and areas

where crops can be grown under irrigation. Some farmers have access to furrow fed irrigation land (from the Thukela river). Commercial farms have an important indirect influence, because many of the farmers were or are descendents of labour tenants. Marketing and services for most farmers are extremely limited.

The farmers that CAP works with on the irrigated plots are experiencing problems in that soil no longer responds to the high input of chemicals and artificial fertilizers, and the productivity of their harvests is decreasing. The costs of production are higher than the profit the farmers make from selling produce in the market.

Livestock

A study conducted in 2003 gives some insight into livestock in Msinga⁶. Livestock have multiple functions. Common species are cattle, goats, chicken and dogs; with sheep, pigs, donkeys, geese and turkeys playing a role, which differ according to area.

Cattle are regarded by most people as the most important livestock species, although not all people do keep cattle. Cattle are used for draught, lobola (bride price), cultural slaughter, hides that are used for traditional clothes, meat and sales. There are clear-cut lines with respect to livestock management responsibilities between genders. Cattle and goats are the responsibility of men, and chickens are typically a women's animal, although men may "have their names" (i.e. own) chicken, which they may get in return for making and fixing an axe-handle. A distinction is made between indigenous chickens and so-called commercial chickens (broilers). Commercial chickens are men's animals although women may feed them). In Msinga a woman is supposedly not allowed to enter the cattle kraal (only older women may get a special status to do so).

In the Msinga study 2 households had less than 10 head of cattle, 5 households between 10 and 20 head and 5 more than 30. The biggest cattle holding encountered was a farmer who kept 73 head of cattle. According to commercial farmers 100 head of beef cattle or probably 20 dairy cows are needed to earn a living exclusively from cattle. African farmers answered that you should have 20 before you can sell and not deplete the herd. Thus, few if any of the farmers interviewed can rely exclusively on cattle.

Land use

Land is used predominantly for residential and grazing purposes, although small 'garden plots attached to the homestead (*umuzi*) are also very common and used to produce small amounts of maize and vegetables. Natural resources on the commons (thatching grass, timber, fuelwood, brushwood for fencing, medicinal plants and wild fruits) make small but significant contributions to people's livelihoods.

Education and literacy

Currently more than 68% of the population is illiterate. The majority of illiterate people are female. This is due to the prevalence of females in the population and the custom of not educating girls. Tertiary education facilities are not provided in the area. The Department of education does not provide accommodation for teachers. As a result, any

⁶ See more detail in "Meat, ploughs and culture, a study of indigenous livestock management in rural KwaZulu –Natal, South Africa", Wolfgang Bayer et al, 2003.

good teachers are attracted to urban areas and to schools that do provide them with accommodation.

Chapter Two

New laws, continuing controversy: the Communal Land Rights Act of 2004 and the Traditional Leadership and Governance Framework Act of 2003

What does the Communal Land Rights Act (CLRA) seek to achieve and why is it so controversial? How does it link to the Traditional Leadership and Governance Framework Act (TLGFA)? This chapter briefly summarises the main provisions of these two laws and outlines the controversies they have generated⁷. The final chapter discusses the possible impact of the CLRA in Msinga in the light of the research findings, and explores the wider implications of the project's research findings.

The two acts are closely inter-related (Murray 2004). The TLGFA allows provincial legislation to provide a role in land administration to traditional leaders. It provides for the establishment of 'traditional councils', with minimum numbers of elected and female members, and allows existing Tribal Authorities to be deemed traditional councils. The CLRA recognises a 'traditional council' (as established under the TLGFA) as a land administration committee. Both laws, individually and taken together, have major implications for the administration of customary law.

The Communal Land Rights Act 11 of 2004

Rationale

Tenure reform in South Africa's communal areas is a constitutional imperative. Section 25 (6) of the Bill of Rights in the 1996 Constitution states that '[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.' Section 25 (9) states that 'Parliament must enact the legislation referred to in Section 25 (6).'

The underlying problem that government policy has to confront is the second class status of black land rights in law, which provides few protections from arbitrary decisions by those with authority over land (whether government officials or traditional leaders). Historical rights of occupation were not adequately recognised in South African land law - and are still not fully acknowledged by some government departments and local government bodies. A linked problem is the overcrowding and forced overlapping of rights which resulted from forced removals and evictions from farms as well as the operation of the pass laws. These led to massive numbers of people being dumped on land occupied by others, either in the reserves or in the few remaining areas of group-owned black land. Some of the new arrivals became tenants; others remained defined as 'squatters', without secure land rights.

Another legacy of the apartheid past is the partial breakdown of group-based systems of land rights (communal tenure). Lack of legal recognition and administrative support for such systems has led to severe internal stresses and tensions, one manifestation being abuse of their authority by chiefs and tribal authorities. In addition, discrimination against women is a fundamental feature of many land tenure systems in rural South Africa, including communal tenure, exacerbated by the exclusion of women from most decision-making structures. A

⁷ For a more detailed summary, see Smith 2008.

high level of insecurity is experienced by many rural women, particularly widows, divorcees and single women with children, who are increasing in number as a result of declining rates of marriage.

Lack of clarity on land rights constrains infrastructure and service provision in rural areas, and contributes to tensions between local government bodies and traditional authorities over the allocation of land for development projects (for example, housing, irrigation schemes, business centres and tourism infrastructure). Tenure reform must aim to secure land tenure rights in ways that will promote economic development and enhance the livelihoods of rights-holders.

Summary of the Act

The CLRA applies to state land in the former 'homelands', as well as land acquired by and for a community through processes of land reform and currently registered in the name of a Communal Property Association or Trust. The Minister of Land Affairs can transfer title of such land from the state to 'communities', who will own the land as juristic personalities, and be governed by community rules that must be registered with the Department of Land Affairs before juristic personality is recognized. Communities must establish land administration committees, which must then allocate land rights, maintain registers and records of rights and transactions, assist in dispute resolution, liaise with local government bodies in relation to planning and development, and other land administration functions. Where they exist, traditional councils established under the TLGFA will exercise the powers and functions of such committees⁸.

'Community' is defined in the CLRA as 'a group of people whose rights to land are derived from shared rules determining access to land held in common by such group'. Senior government officials have stated that they view the population of areas under the jurisdiction of Tribal Authorities as such 'communities'⁹, and this interpretation is consistent with the provision that traditional councils established under the TLGFA will become land administration committees.

Before a transfer of land to a 'community' can take place the Minister must institute a land rights enquiry. An official or consultant is appointed to investigate the nature and extent of existing rights and interests in land (including competing and conflicting rights), options for securing such rights, measures to ensure gender equality, spatial planning and land use, and related matters. After receiving a report, the Minister determines the location and extent of the land to be transferred, whether or not the whole of an area or some portion of it should be transferred to the 'community', with an option of subdividing a part of the land and transferring it to individuals, and whether or not a portion should be reserved to the state. In making these determinations the Minister must take account of the Integrated Development Plan of the relevant municipality.

The Minister must also make a determination on whether or not 'old order rights' (ie. communal land rights derived from past laws and practices including customary law and

⁸ Section 21 (2) of the CLRA states that "If a community has a recognised traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council". However, the word 'may' appears to be permissive, enabling a traditional council to exercise the powers of a land administration committee, rather than to create a choice for rights holders. No other provision of the Act allows for such a choice.

⁹ Dr Siphon Sibanda of the Department of Land Affairs, addressing a meeting of the Portfolio Committee on Agriculture and Land Affairs, 26th January 2004.

usage) should be confirmed and converted into 'new order rights', and must determine the nature and extent of such rights. New order rights are capable of being registered in the name of a 'community' or a person, but where transfer of title occurs to a 'community' as owner, the individual new order rights are not equivalent to title. Their content is not defined in the Act. The Minister may confer a new order right on a woman, even where old order rights such as Permission to Occupy certificates (PTOs) were vested only in men. New order rights are deemed to be held jointly by all spouses in a marriage, and must be registered in all their names.

After making a determination the Minister must have a 'communal general plan' prepared and registered, and have a communal land register opened. New order rights must be transferred to those entitled to hold them by means of a Deed of Communal Land Right. The holder of a registered new order right may apply to the community owning the land for the conversion of that right into freehold ownership, and this application must, subject to community rules and any title conditions, approve or reject such an application.

The holder of an old order right that cannot be legally secured may apply to the Minister for an award of comparable redress, which can take the form of land, monetary compensation or a combination of these. Ministerial determinations following a land rights enquiry must provide for awards of comparable redress where necessary.

Community rules must be drawn up by the 'community' taking transfer of land, and these must regulate the administration and use of communal land. Although not made explicit, it may be inferred that these rules can define the nature and content of new order rights. If consistent with the Constitution, and after considering the report of the relevant Land Rights Board, these rules must be registered by the Director-General of the Department of Land Affairs. Prescribed, standard rules may be deemed by the Minister to be the rules of a 'community' should it fail to adopt and register community rules. The CLRA does not specify the process whereby such rules are to be drawn up and agreed, nor its timing (eg. whether or not the drawing up of such rules precedes the establishment of a land administration committee).

The Minister may appoint Land Rights Boards to advise him or her, to assist communities with regard to land rights, land use and land development, and to monitor compliance with the Act. A Board comprises representatives of government departments determined by the Minister, two representatives of each Provincial House of Traditional Leaders, a representative of the commercial and industrial sector, and seven members representing 'affected communities'. There is likely to be one Board appointed for each province, and the KwaZulu-Natal Ingonyama Trust Board will become the Ingonyama Land Rights Board for KwaZulu-Natal.

The Interim Protection of Informal Land Rights Act of 1996 is amended so that it no longer requires annual renewal, and its protective provisions thus apply to holders of communal land rights should they elect not to have land transferred to them as envisaged by the CLRA, or until such transfer takes place.

The Traditional Leadership and Governance Framework Act of 2003

A key purpose of the TLGFA is to create a national framework of law that clarifies the roles, powers and functions of traditional leadership in post-apartheid i.e. democratic South Africa. It provides for recognition of 'traditional communities' and 'traditional councils', and requires that these operate in line with the principles of democracy and

equality. Traditional communities must transform and adapt' customary law and customs to comply with the Act and the Bill of Rights, specifically to promote equality and progressively advance gender representation. The TLGFA creates an overarching framework and provincial legislation give effect to its provisions in specific provincial contexts.

The Act itself does not provide traditional leaders with much statutory power. Instead, through its transitional mechanisms, it entrenches existing traditional structure and boundaries as the 'officially recognised' traditional structures and boundaries of the future. The reform component lies in the new composition requirements.

The requirements are that 40% of the members of a traditional council must be elected and 30% must be women¹⁰. The women need not be elected - they may be appointed by "the senior traditional leader". Furthermore the 30% quota for women may be decreased where insufficient women are 'available'.

Section 28 of the Framework Act provides for transitional mechanisms. It deems existing tribal authorities to be traditional councils provided they comply with new composition requirements. The Act provided they must meet the requirements within a year. However very few managed to meet this deadline, which was extended by the provincial laws (many of which were enacted in 2005) providing an additional year. However by 2008 many had not yet changed their composition and the 2008 TLGFA amendment bill proposes an additional four years.

Section 28 entrenches the tribal authority boundaries established in terms of the Bantu Authorities Act of 1951. These were established virtually wall-to-wall throughout the former homelands and formed the basic building blocks of the Bantustan political system, functioning effectively as the equivalent of local government in rural areas.

Section 20 of the Framework Act specifies that national or provincial government may enact laws providing a role for traditional councils or traditional leaders in relation to a wide range of issues including (but not limited to) land administration, health, welfare, the administration of justice, safety and security, economic development and the management of natural resources. A traditional council may enter into a service delivery agreement with a municipality.

Controversies

Government holds that the CLRA gives practical effect to section 25 (6) of the constitution and is able to 'legally recognise and formalise the African traditional system of communally held land within the framework provided by the Constitution' (DLA 2003: 19). Critics from civil society and research organizations assert, in contrast, that the Act will 'entrench the autocratic version of 'traditional' customary law that dominated the colonial and apartheid era (Love 2008: xii). At the core of the debate on the Act are

¹⁰ It is important to note that the women need not be elected. Instead they may be appointed by "the senior traditional leader". Furthermore the 30% quota for women may be decreased where insufficient women are "available".

competing views on the meaning of customary rights to land in rural South Africa and associated powers of decision-making on land.

The transfer of title paradigm

The CLRA attempts to combine both land titling and recognition of customary land tenure, but critics suggest that it does so in an incoherent manner that renders land rights less rather than more secure (Cousins 2008: 15). Individual community members will hold only a secondary and poorly defined right to land, and ownership will vest in a large group, or 'community' (the population living under the jurisdiction of a traditional council) represented by a structure (a land administration committee) that will exercise ownership on behalf of the group. Where that committee is coterminous with a traditional council, its legitimacy will supposedly be drawn from 'custom', but adequate mechanisms to ensure a council's accountability to community members are absent - either indigenous accountability mechanisms or those of a more democratic character (Claassens 2008: 290).

The nature of customary rights to land

Key controversies have arisen on the nature and content of communal land tenure systems, with critics suggesting that the CLRA is based on a distorting and overly 'rule-bound' interpretation of the dynamics of existing 'customary' systems of land tenure. In particular, they argue that it does not adequately acknowledge the layered or nested character of land administration but focuses instead on only one level, the chieftaincy, and is therefore likely to reinforce the centralised powers conferred on chiefs by colonial powers and the apartheid state, generate conflicts over boundaries and resource use, and undermine the downward accountability of land administrators (Okoth-Ogendo 2008: 106-07; Delius 2008: 234-35; Cousins 2008: 131).

Gender inequality in land holding

Parliamentary debates led to a number of amendments to the CLRA, and some provide for joint vesting of land rights in all spouses, as a means to achieving gender equality in land holding. According to Claassens & Ngubane (2008: 165), however, the rights of single women and female members of households who are not spouses are not addressed. The CLRA fails to engage with family-based systems of land rights and the result is to formalise rights deriving from unequal power relations, discriminatory laws and distorted versions of custom. Claassens & Ngubane argue that law and policy should seek to engage with processes of social change that are resulting in some single women being allocated land in their own right. An alternative approach to that taken in the CLRA would involve defining and securing use rights exercised by women within family and kinship networks, and strengthening the position of women within social relationships and community structures (ibid: 179).

Land rights, authority and accountability

Perhaps the most controversial issue raised by the Communal Land Rights Act has been the role of traditional leaders in relation to land. Together with the issue of women's land rights, this was the major focus of public debates when the draft law was discussed in Parliament in late 2003 and early 2004, and many of the submissions to Parliament by civil society and community groups focused on this issue.

Delius (2008: 232) and Ntsebeza (2008: 257) argue that under the apartheid government, measures such as the Bantu Authorities Act 1951 swung the balance of power away from popular support for chiefs and towards bureaucratic control. This allowed tribal authorities to make increasing demands on their subjects for labour and cash levies. Tribal boundaries were demarcated, but groups who accepted the new system were often allocated land occupied by those resisting tribal authorities. Chiefs began to assert greater control over land, the powers of lower levels of political authority were diminished, and security of tenure was weakened. Delius suggests that many of the core assumptions of the Communal Land Rights Act are problematic and do not take adequate account of the impacts of this history of state intervention.

Claassens (2008: 289-90) argues that the CLRA, together with the TLGFA, centralises power at the level of traditional councils and makes no provision for localised decision-making and control over land - at the level of the family, the user group, the village and the clan. The laws entrench apartheid-era distortions and undercut the mediation of power between multi-layered levels of authority, and through ongoing contestations over boundaries. This problem is compounded by the CLRA's provision that disputed tribal authority boundaries will become 'default' community boundaries, and by the false assumption that these boundaries enclose discrete, homogenous 'tribes'.

Processual vs rule-bound versions of 'customary' law

Recent Constitutional Court judgments emphasise that customary law derives its validity and legitimacy from the Constitution and must be interpreted to give effect to the Bill of Rights. These judgments reject official versions of customary law which tend to distort the underlying values that inform the 'living law', which constantly adapts to changing social practice (Bennet 2008: 144). Claassens (2008: 368) argues that there is a danger that distorted, rule-bound versions of customary law such as that found in the CLRA will close down processes of transformative social change that attempt to integrate traditional and democratic values. Process-oriented approaches, however, such as 'living law' interpretations of custom, are potentially a way of avoiding this danger. By allowing 'living customary law' to reflect the multiple voices engaged in making and contesting the content of custom.

The court challenge to the CLRA

Four rural communities are challenging the constitutionality of the Communal Land Rights Act (CLRA). The communities are Kalkfontein and Dixie (both in Mpumalanga), Makuleke (Limpopo) and Makgobistad (North West). The communities are represented by the Legal Resources Centre and Webber Wentzel Bowens Attorneys.

The communities argue that far from securing their rights in the land, the CLRA makes them, and key categories of people - such as single women - less, rather than more secure. It does this because together with the new Traditional Leadership and Governance Framework Act (TLGFA), it imposes apartheid era boundaries and structures on their communities.

It proposes the transfer of title to communities that will be represented by imposed land administration committees based on old tribal authorities. The communities argue that this undermines their ability to control and manage their land at different levels of social organisation, for example at the family, user group or sub-community level. Some argue that they were put under the wrong tribal authority during apartheid. Despite strenuous efforts on their part these tribal authorities continue to abrogate their land rights. The

CLRA now confirms the legal authority of slightly modified old structures. Moreover it gives them landownership powers they never had before.

Another key complaint is that the Act will reinforce the patriarchal power relations that contribute to the problems women face when trying to access land and being evicted from their homes at the end of their marriages.

Legal grounds for challenging the Act

Procedural Challenge

The Act has a major impact on customary law and the powers of traditional leaders, both of which, in terms of the Constitution, are functions of provincial government. Thus it should have followed the Section 76 parliamentary procedure that enables input by the provinces. Instead it was rushed through parliament using the section 75 procedure. The Constitution provides that laws that deal with provincial functions should follow the section 76 procedure and those that deal with national functions should follow the section 75 procedures. Because the wrong parliamentary procedure were followed the Act is invalid.

Section 25 – Tenure and Property rights

An intrinsic feature of systems of property rights is the ability to make decisions about the property. Under customary systems of property rights, decisions are taken at different levels of social organisation, including at the level of the family. By transferring ownership at the level of the “community” and individual only, the CLRA undermines decision making power and control at other levels. This is particularly serious when disputed tribal authority boundaries are imposed as the “default” boundaries of communities. The end result will be that the CLRA will undermine security of tenure in breach of section 25(6) of the Constitution.

Within the boundaries of existing tribal authorities are groups of people with property rights in the land. They are deprived of their property rights when ownership of their land is taken from existing structures and vested by the CLRA in imposed Traditional Council structures or other structures created by the CLRA.

Equality

The Act conflicts with the equality clause in relation to both to gender and race. It does not provide substantive equality for rural women because it entrenches the patriarchal power relations that render women vulnerable. The 33% quota for women in traditional councils is not sufficient to off-set this problem because the women may be selected by the senior traditional leader. Moreover, 33% is too low in the context that women make up almost 60% of the rural population. While the Act seeks to secure the tenure rights of married women, it undermines the tenure rights of single women, who are a particularly vulnerable category of people.

The Act also treats black owners of land differently from white owners of land, who are not subjected to the regulatory regime imposed by the CLRA. Moreover section 28(1)-

(4) of the TLGFA entrenches the power of controversial apartheid era institutions that were imposed only on Black South Africans.

Fourth Tier of Government

The Constitution provides for only three levels of government, national, provincial and local. The powers given to land administration committees, including traditional councils acting as land administration committees, make them a fourth tier of government in conflict with the Constitution.

Chapter Three

Land tenure and natural resource management in Msinga

What are the 'land laws of Msinga' (*imithetho yomMhlaba yaseMsinga*)? This chapter describes the workings of existing land tenure and natural resource management regimes in the Mchunu and Mthembu tribal areas. It summarizes the core features of a 'normative ideal', or model, of land tenure that is strongly evident in both areas, as articulated and explained by local informants, and forms Part A of this chapter.

Part B describes a number of variations on the basic model, some of them between *izigodi* located in densely settled tribal areas and those formerly located on labour tenant farms. Both subtle differences and some stark contrasts are described, in relation to Ncunjane and Mathintha in the Mchunu area, and Ngubo and Nkaseni in the Mthembu area.

Key problems and tensions in relation to land and natural resources, and potential solutions to these problems, are identified and discussed in Part C.

Our research revealed several instances where practice appears to contradict or exist in tension with the core features of the normative ideal – as in the allocation of land to single mothers. Many of these divergent cases are described and discussed in Chapter Four, which focuses on women's land rights. One interpretation of these cases is that practice never mirrors rules, and that rules are always an imprecise guide to social reality. Alternatively, they may indicate that the land tenure system is inherently 'processual' and flexible in character, rather than rule-bound, and is adapting and changing as one aspect of broader processes of social change (i.e. this could be seen as an example of 'living' customary law' in action). A third view might be that severe stress within the system is leading to a set of profound changes in its character, for example abandonment of the idea that land is strongly linked to a founding principle of social organization, the patrilineage. Which view best explains the Msinga case study material? These different interpretations and perspectives are discussed in the final chapter of this report.

Part A: the Msinga 'model'

Social organization and identity in Msinga

The Msinga district is reputed to be a stronghold of Zulu culture and tradition, and the Mchunu and Mthembu tribes in particular are said to be highly 'traditional' in character. Land tenure here, as elsewhere, is 'socially embedded' meaning that rights and obligations are often defined primarily through social relationships and membership of a variety of social units, including families, households, kinship groups and 'communities'. This means that social organization is key to understanding land tenure (Berry 1993; Peters 2004; Cousins 2007 and 2008).

The underlying rule in Msinga is that married people with children are allocated land so that they have access to the resources required to support their families. Single people cannot be allocated land, and must reside with either their parents or other family members. Land is allocated to a household, under the authority of the household head, rather than to individuals, and the household head is understood to be a senior male (*umumzane*). There is thus a strong association between land holding and the necessity

of supporting a family from land-based livelihoods, which in the pre-colonial economy would have been virtually the only source of livelihoods for most people.

The underlying 'model' of social organization is that of a homestead (*umuzi*) headed by a man, who might have several wives. These wives live in separate residential structures within the homestead or "*umuzi*", and each constitutes a distinctive "house property complex" (Preston-Whyte: 1974). As part of this complex, each wife is entitled to a site on which to build a home and hearth for herself and her children, a granary and a field or fields of her own, which she cultivates to provide food for herself, her children and her husband when he is eating with her. The property that belongs to each house, while under the tight control of a husband, is heavily "encumbered" (Sansom: 1974) and a husband may not dispose of it without consultation with his wife.

Married men and their wives and their children may continue to live in their parents' homestead for many years before establishing their own homesteads, giving rise to large, three or four generation strong 'compound homesteads' composed of several marital units. Central to the homestead is the cattle kraal, made up of livestock independently owned by husbands, fathers and men generally as well as cattle from *lobolo* that belongs to the house property complex of each wife. The kraal, a specific geographical space from which women are generally excluded, is also the site on which ritual slaughter for ancestors is performed, and which thus binds a particular family to a particular site through the inter-generational, social and material bonds that livestock represent.

The family, meaning here an 'extended family' of close patrilineally-linked relatives and not a 'nuclear' family of a man and his wife or wives and their children, is the most basic unit of social organization. Marriage establishes important relationships between two families or descent groups, symbolized by payments of bridewealth (*lobolo*) that transfer the rights to women's reproductive capacity to her husband's family and ancestral rituals that inform the *amadlozi* that a new wife has joined the family.

Descent is traced primarily through men. It is a patrilineal system, within which there is a central concern with preserving the 'surname' of the descent group, in other words the identity of the male lineage.

Surname is closely linked to the role of ancestors in mediating the past and the future and who ancestors are able to recognize. Land is integral to this mediation because ancestors are only able to recognize communication that takes place from a specific ritualized place on the homestead plot. A specific piece of land is thus integrally connected with a specific family whose name is carried in the male line and is a critical link in the fortunes of that family because of the protection the ancestors give to the living (Hornby and Alcock, 2004: 14-15).

Marriage is virilocal (ie. wives move to the home area or homestead of the husband), and children 'belong' to the husband's family. Together with gender, family membership is a primary determinant of social identity since it forms the basis of a complex web of kinship relationships that provides an extensive network of security, in terms of material needs and tenure. Despite the patrilineal nature of the system, family obligation, if not membership, can also be extended to the wife's natal family including her mother's brothers and sisters, grandmother's sisters and children from these relatives. Obligations

arising from these familial connections can include “temporary”¹¹ residential sites and garden space in times of need.

Family membership and familial relationships thus involve legitimate expectations of support from other members but also obligations to provide similar support when requested. These principles and values continue to inform claims to land and practices of land holding.

Who qualifies for land rights?

All members of the Mchunu and Mthembu ‘tribes’ (or nation, *isizwe*) and their descendants are entitled to land. People from other areas or tribes can be allocated land and settle in the area if the correct procedures are followed, approval is granted, and they become fully-fledged members of the tribe. Rights to land thus derive most fundamentally from accepted membership of the tribe. Equally important, however, is the idea that that rights to land enable a family unit to produce a livelihood for themselves, and thus that only adults who have children to support are entitled to land. The family, in this case an extended family that includes a wide network of kin-related individuals, is thus the immediate social context that influences the form and content of land rights. Between the tribe as a whole and the family are other social units which influence how land is held and used, most notably the *isigodi* or ward, often comprising several hundred households. The *isigodi* is the key social unit for land administration purposes.

Land rights provide for three kinds of land use: land for residential purposes (where an *umuzi* or homestead can be built), land for crop production (arable fields or *amasimu*), and common property, with natural resources that support livelihoods (providing grazing and browse for livestock, trees for firewood and construction, thatching grass, wild fruits, medicinal plants, water for household use and agricultural purposes, clay and sand for building, and so on).

Many people acquire their land through inheritance. The residential site and fields of deceased parents are supposed to be taken over by the eldest son, but if he has already established a separate homestead then another son might take over the land and associated property such as residential structures. Brothers who still live within the same compound homestead might go on living there, if they and their wives are able to cooperate, but once they are married and have children to support, they can request separate land of their own. If there are no sons, the homestead and its land might be held by the extended family and inherited by someone else with the family name. One informant said that a daughter can take over a family’s land if there are no sons, but only on condition the surname of the family does not change as a result.

Orphans are looked after by family members, either on the father’s or on the mother’s side, until they reach adulthood. The residential land allocated to their parents (the *umuzi*) remains vacant and is care-taken by their father’s father or one of his brothers. This might involve them using the building materials on the site for their own purposes. The land remains within the father’s descent group until it is ‘inherited’ by one of the sons.

Women’s land rights

¹¹ “Temporary” can become multi-generational occupation of a homestead so is not necessarily short-term.

The question of what rights to land women in the Mchunu tribe can claim, or should be able to claim, is somewhat uncertain at present, with a range of views being expressed by different informants. Both the normative ideal and emerging practices in relation to women's land rights in Msinga, together with the anxieties and tensions that local people experience and express in relation to these issues, are described in detail in Chapter Four. Some of the key features of the normative ideal are briefly summarized here.

- Married women: a husband, acting as head of the household, allocates his wife or wives a site within the *umuzi* to build their residential structures, as well as fields for cultivation. Some young wives move into a large, compound homestead under her husband's father (or elder brother) rather than a new homestead established together with her husband.
- 'Divorced' or abandoned women: different outcomes are possible, in part dependent on the cause of the breakdown of the marriage e.g. if the wife runs away (*baleka*) from her husband, her brothers must ascertain the reason; if she has left as a result of abuse by the husband, they will demand an apology, but if the abuse continues she can return to her father's home and *lobolo* cattle do not have to be returned (unless she remarries). If the woman is 'chased away' and returns to her father's home (*uxoshiwe*), her brothers, who have benefited or will benefit from her *lobolo* cattle, have to return to the husband's family to ascertain the cause of the problems. If she has committed adultery, her family will pay a fine and she will return to her husband. If she has defied the authority of her husband then she can be disciplined by her brothers. If she has been falsely accused then she cannot be sanctioned.
- Widows: there are several options for women who are widowed. One option for a widow is to be taken as a wife by one of her deceased husband's brothers, a practice known as *ngena*. Another is to return to her father's home. A third option is to continue to reside with her husband's family, with a risk that they might begin to make use of the household's property, including livestock. A fourth is to ask for land in her own right in her ex-husband's home area. A widow does not inherit the family's land, livestock and other forms of property in her own name, but holds these for her children and in particular for the male heir, the eldest son.

The nature of rights to land and natural resources

Residential land

Residential sites are used to establish a homestead (*umuzi*), and are generally large enough to establish a garden (for small-scale cropping), to be used as the site for a small business enterprise, and to bury deceased family members. The *umuzi* is also where livestock are kraaled at night, and fruit trees are often planted. The size of these plots is variable, depending on when the plot was first allocated and the density of current settlement. Older plots tend to be larger than more recently allocated plots.

Land cannot be sold, but buildings (such as houses, but also shops or business premises) can be transacted for cash. If these are sold to an outsider then the purchaser must seek approval for becoming a member of the tribe, using established procedures described below.

Residential land is usually inherited by a family member. It cannot be taken away from anyone unless a person is evicted from the tribe after committing a very serious crime.

If a site is abandoned, and the extended family makes it clear that they no longer wish to use it, the site can be re-allocated to someone else.

Arable fields (*amasimu*)

Once a family has been allocated arable land it holds that land securely, even if it is not cultivated. Fields not in use can be borrowed by others, without any cash being paid (but a gift such as a portion of the crop may be given in thanks). If a family leaves the area permanently, their fields may be re-allocated to another family. As with residential land, arable land can never be sold.

In many areas, there is now a shortage of arable land and not everyone can be allocated fields for crop production. At the same time, not everyone cultivates their fields any more, as a result of various constraints on dryland cropping and the general decline of agriculture, and many fields are fallow or used mainly for grazing. This is creating tensions and in the Mchunu tribe the *Nkosi* is initiating discussion on the re-allocation of uncultivated land.

In areas where arable land is in scarce supply, sharing of fields between family members is common, but often the area of land involved can be very small. Older sons who inherit large areas may 'manage' these on behalf of the wider family, for example by allocating portions to those in need.

Crop residues in arable fields are considered to be common property in the dry season, and anyone's livestock can consume them after the crops have been harvested. However, owners of livestock that damage crops during the growing season can be charged in the Tribal Court and fined.

Thatching grass found on arable land (e.g. in the unploughed areas that mark the boundaries of the fields) belongs in the first instance to the person with rights to that field. Others must ask permission of that person before cutting grass, and anyone not doing so can be charged in the Tribal Court.

In the past, custom required that no-one worked in the fields on a funeral/burial day and for some days thereafter. The extent to which people adhere to this custom today is highly variable, with many people ignoring it and others observing it only on the day that the burial takes place.

Common property resources

Natural resources found on the common lands of the Mchunu or Mthembu tribes can be seen as *common property* resources because rights to make use of them are dependent on accepted membership of the tribe and non-members are (in principle, if not always in practice) excluded from their use unless permission has been granted. The degree to which resource use is regulated by agreed rules that are enforced by authority structures is highly variable, and regulation barely exists in some cases, with some indications that this has declined in recent years.

- Grazing for livestock: any tribal member who owns livestock can place them on the common grazing areas of the tribe, without any restrictions on numbers. The main resource found in the grazing areas is grass, but also found are shrubs and trees that are browsed by goats but sometimes by cattle as well. Donkeys, used by some farmers to supply draught power, also make use of the grazing areas.

- Thatching grass: thatching grass found on the commons can be cut by anyone, without asking permission. Cutting usually begins in June because the grass is not dry enough before then. It is possible to go to another *isigodi* or another tribe's land and ask the headman's (*nduna*'s) permission to cut there, after talking to local residents. Many women from the Mchunu and Mthembu tribes cut thatching grass outside their own areas, on farms at higher altitudes where useful thatching grass species are found.
- Trees: trees found on the commons are a source of wood for fuel, building materials, fencing materials (eg for kraals), traditional medicines, and wild fruit. Any tribal member can harvest wood for these purposes, but the cutting of living trees (green wood) is prohibited. Cutting trees outside the tribe's own land requires the permission of the leadership (i.e. the *nduna* or *iphoyisa*) of that area; if such permission has not been granted then both the wood and the axe used to cut it can be confiscated.

Newly married women (*amakoti*) often cut large bundles of green wood (*amabonda*) from hardwood tree species, which are stored just behind their huts. This is common practice despite being illegal, because an *ibonda* is seen as an important symbol of the status of a married woman. Poles from these bundles are never used for cooking, only for 'warming the hands' in cold weather, and are often not used at all. Given the current shortage of wood for fuel and building, *amabonda* are a somewhat contentious issue.

Demarcation of boundaries

Residential land

When a site for an *umuzi* is allocated the boundaries are demarcated in the presence of neighbours and leadership figures (eg members of the *ibandla*, and the *nduna*) and are generally not contentious. The site is not generally fenced, but a smaller area around the residential structures is often fenced. Small fields or 'gardens' forming part of the *umuzi* are also often fenced, to protect them from livestock. Because of growing population density and overcrowding, disputes over boundaries of residential sites are said to be more common now than they were in the past.

Arable land

The boundaries of fields (*amasimu*) are demarcated either by strips of unploughed land, which can have trees and grass growing on them, or by brushwood and thorn fences. A few individual fields are fenced with poles and wire. Some blocks of fields belonging to groups of homesteads are now beginning to be fenced, using materials donated by government or by the tribal office, and individual fields within the block are often separated and demarcated by strips of unploughed land.

Common property resources

The most important boundaries of common property resources today are the tribes' external boundaries. Within these, most resources can be used by accepted members of the tribe. Outsiders are supposed to ask permission from the *nduna* of the relevant *isigodi* before making use of grazing, thatching grass or trees, or resources such as river sand used for building purposes. Some external boundaries (eg with neighbouring

tribes) are disputed, and this can cause serious tensions over resource use. In the past, when population densities were lower than at present, there were acknowledged internal boundaries within the tribal territory as well. These separated the common property areas of each *isigodi* and people respected the boundaries between them, but this is not the case at present.

Land administration

Land administration here refers to procedures for demarcating parcels of land, accepting outsiders into the land holding community, recording landholdings, resolving disputes over land, and enforcing rules for the use of common property resources. In Msinga these procedures are not formally described anywhere, but are widely understood and generally shared. Some key differences in procedure are found between the core tribal area and the former labour tenant farms now being returned through land reform. Most land administration in Msinga takes place at the level of the ward (*isigodi*), but groups of neighbours at a more local level also play a key role in agreeing to the location of new plots and the acceptance of newcomers from outside the *isigodi*.

Land allocation

'Allocation' here refers to the demarcation of the site for a residential plot to establish an *umuzi* or fields for ploughing (*amasimu*). If a male member of the tribe is married, has children and wishes to establish a new *umuzi* for himself and his family, he must approach the people living in the area (his future neighbours) and seek their approval and agreement on the location of the residential site (and the fields, if arable land is available). Usually the *nduna* will be involved in this process as well, since he is knowledgeable about the history of land allocation, adjudicates land disputes, and will be aware of the potential for dispute in particular locations. The *ibandla* (a local assembly of men, 'old enough to be wise') will often be involved as well. The prospective homestead head must pay a *khonza* ('homage') fee of R15 to the *nkosi* (chief) at the tribal office, which issues a letter of approval (and may require outstanding debts to the tribal office for levies or fines to be paid before the letter is issued).

If a married man takes another wife, the homestead will need more land, both residential (for the huts of the new wife) and arable. If land is in plentiful supply then the homestead can expand without asking anyone's permission, but if land is scarce then the neighbours must be consulted, and possibly the *nduna* and *ibandla* as well. No *khonza* fee is paid in such cases.

Land allocation procedures are a little more elaborate in the case of an outsider (someone from outside the tribe) applying for land. A local 'champion' who can vouch for the applicant is needed, who introduces the newcomer to the neighbours and assures them that he will be a law-abiding person. Then the *nduna* of the *isigodi* is approached and his assistance sought. Alternatively, the *nduna* can be approached first. The applicant must bring a 'letter of reference' from the *nkosi* (ie. the tribal office) of the area he is leaving stating that he is of good character and is not subject to criminal charges, and explaining his reasons for moving to the area. If this is accepted by the *nkosi*, the *nduna* then calls a meeting of the *ibandla* and the neighbours, the applicant provides beer, and the land is demarcated in front of everyone present as witnesses. A *khonza* fee of R15 must be paid to the *nkosi*. In some areas it seems that an additional fee of R15 must be paid to the *nduna* as well.

Payment of fees and fines

A number of 'customary fees' and fines have to be paid to the Mchunu tribal office, only some of them related directly to land. Some are fines for living as a couple without being properly married according to custom (involving payment of *lobolo*), some are fees due when a beast is slaughtered and a beer drink is held (requiring the *iphoyisa* of the *isigodi* to attend and help prevent fights occurring), and others are administrative fees due when bringing a case to the tribal court, or for issuing letters of proof of residence enabling people to apply for ID documents or birth certificates, or open bank accounts¹².

The *khonza* fee of R15 is the main fee due when land is allocated. However, it is often linked to the fine for 'living in sin' ie without being properly married, which is R30 per annum, plus an additional R50 for living with a Mchunu girl without marrying her. No letter approving a site allocation is issued by the tribal office is issued until the total fine of R80 is paid. The annual fine of R30 is disregarded by many.

If someone builds a 'European' type house and a bank loan is required, then a Permission to Occupy (PTO) certificate can be issued by the Ingonyama Trust Board; this will require a Tribal Authority Consent form to be supplied by the tribal office, upon payment of a fee. A similar process is followed when a site is allocated for a business, a school or a church.

Records of land rights

No documents recording land rights are issued, other than the PTOs described above. However, the tribal office does keep a register of all applications for land and of the *khonza* fees paid, and issues receipts as well as a letter of approval to take to the *nduna* who will oversee the local land allocation process.

Dispute resolution

Disputes over land (eg over the location of boundaries) are resolved at the local level in the first instance, the *ibandla* and the *nduna* acting as mediators and adjudicators. If the dispute cannot be resolved at this level then it will be taken to the tribal court presided over by the *Nkosi*.

Management of natural resources

In relation to grazing, a key issue in relation to the management of grazing is the date in the dry season after which livestock are allowed into the arable fields to graze on crop wastes such as maize stalks – an important feed resource in agro-pastoral systems of production. Many informants said that in the past there were established procedures for making a decision on this date, with most stating that the *nduna*, together with the *ibandla*, would consult crop farmers and those with livestock before announcing the date, and other stating that the *Nkosi* would make the decision, after consultations with farmers. However, this practice has fallen away in recent years, despite the conflict and tensions that occur between those crop producers who plant and harvest crops later than the majority and livestock herders eager to access crop residues as soon as possible after the end of the cropping season.

¹² Elected local government councilors are now also providing these letters of reference, without requiring payment, and so this source of income for the tribal office is beginning to fall away.

In relation to trees, some informants say that the *izinduna* of each *isigodi* are supposed to prevent people from cutting down living trees or green wood, but others say the *amaphoyisa* are supposed to police such resource use. Many people say that policing has broken down, in part because there is a shortage of wood, in part because the authority of the *izinduna* is no longer respected as much as it used to be.

Part B: Local variations on the general model

Field research revealed a number of significant differences of detail between different *izigodi*. These are summarized in Tables 2 and 3.

Table 2. Local variations in land tenure rules and practices within the Mchunu area

Mathintha	Ncunjane
Densely settled, scarcity of land, borrowing of fields	Ex-labour tenants returning to farm after land reform
Shortages of grazing and fuelwood; use natural resources on Ncunjane land	Relatively low population density, resources relatively abundant
Shortage of water sources for livestock: move livestock across boundary with Mthembu tribe to access water from Thukela River	Unhappy about Mathintha people using their natural resources but resigned to it
<i>Khonza</i> fee paid to Nkosi & tribal office	No <i>khonza</i> fee paid to <i>Nkosi</i> & tribal office
<i>Nduna</i> oversees land allocation	Self-allocation of land by local residents rather than oversight by <i>nduna</i> (now changing?)
	Not represented on Traditional Council

Table 3: Local variations in land tenure rules and practices within the Mthembu area

Ngubo	Nkaseni
Densely settled, shortages of arable land and grazing	Ex-labour tenants returning to farm after land reform
A few people have plots on irrigation scheme, & many more desire to have plots	Relatively low population density; resources relatively abundant (e.g. irrigated land alongside Thukela River)
Large fenced area for fields and winter grazing, shared with two other <i>izigodi</i>	No <i>khonza</i> fee paid to <i>Nkosi</i> & tribal office
Ngubo residents maintain fencing through	<i>Nduna</i> plays no role in land allocation;

contributing cash and labour	used to be the Committee; now unclear
Heavy fines imposed for livestock found inside fenced area in cropping season	Cash was paid to Committee in early stages of land reform ('own contribution')
Lack of clarity around fines causing concern	Lack of clarity on role of traditional council in relation to land
Tensions with neighbouring <i>izigodi</i> arise over uneven commitment to maintenance of fencing	Strong opposition by men to idea of unmarried mothers being allocated their own land
Many residents open to idea of unmarried mothers being allocated their own land	

Detailed description and discussion (incomplete):

Ncunjane *isigodi*

Land administration

There are localized variations in these land administration procedures. The most significant is evident in Ncunjane, on the old labour tenant farms, where for some time people have been allocating/demarcating land by themselves, without oversight by the *nduna* or the *ibandla*, and have not paid a *khonza* fee to the *Nkosi* when doing so. In addition, they have not been paying the stipulated fees to the tribal office when an animal is slaughtered and a beer drink is held, as required by all other members of the Mchunu tribe. In the past, tribal members who were labour tenants took their disputes to a special chief *nduna* for the labour tenants, who presided over a separate tribal court.

These practices are now changing, however. Unresolved disputes in Ncunjane are now being taken to the main tribal court presided over by *Nkosi* Mchunu. He in turn is asking why the stipulated *khonza* and other fees are not being paid to the tribal office, which needs that income to support its services. The increase in the number of homesteads, both as a result of people returning to Ncunjane and due to married sons establishing their own homesteads, has led to residents agreeing that the *nduna* and the *ibandla* should oversee land allocation, in the same manner as elsewhere in the Mchunu tribe.

Boundary between Ncunjane and Mathintha

There is a recent history of exclusion from the commons on labour tenant farms of livestock from neighbouring *izigodi*, made easier by the existence of boundary fencing. Many of the former labour tenants, who have always considered themselves to be members of the tribe, feel that these boundaries should still be exclusive, even in the absence of fencing – probably because the resource base on these former farms is still in relatively good condition or is less densely stocked with animals than are the common property areas of their neighbouring *izigodi*, and they wish to keep it that way.

Other issues to be discussed:

Population densities and livelihood systems, and attitudes towards newcomers being allocated land; differences and tensions between upper and lower Ncunjane; social conservatism; underlying 'ownership' rights to land; representation on *isigungu*.

Key issues and problems in relation to land and natural resources

- Changing marriage practices & women's access to land
- Widows are particularly vulnerable
- Variations in land administration rules/practices (eg main tribal area vs land reform farms, between different *izigodi*)
- Boundaries between different *imizi*, *amahlati*, *izigodi*, *izinsizwe* are flexible to a degree (eg for grazing, wood cutting, water)
- Boundary disputes can lead to conflict, but are 'managed' for most of the time
- Underlying ownership of land reform farms is different
- Shortages of land for fields, but not all fields are cultivated
- Problems in farming: fencing of fields to prevent livestock damage; stock theft; insufficient water
- Lack of agreement around fines for livestock damage to crops
- Interest in irrigated plots but water supply is limiting
- Authority of *izinduna* for regulating natural resource use is not as strong as it was
- Role of Traditional Councils/*izinduna* not clear
- Inadequate government support for Tribal Office

Discussion (incomplete):

Changing marriage practices and the implications for women

Field research indicates that fewer and fewer people are getting married 'properly', ie. according to the old customs and traditions, with the full set of ceremonies being performed and *lobolo* being paid as negotiated and agreed between the families of the husband and the wife. In many cases the woman gets pregnant, and only 'damages' (*inhlawulo*) are paid (2 or 3 cattle; 3 goats). In many other cases no 'damages' are paid, and the couple just live together at the man's home. Also, more and more women are having children without moving to the home of the man, and stay with them at her parent's home.

These changes in relation to marriage and families are having the following consequences:

- single mothers with a son are now asking for and being allocated land for a homestead (*umuzi*) of their own; and some women are suggesting that even single mothers with daughters should be allowed to ask for land;
- women who have not been properly married according to custom, experience problems in relation to inheritance of property (eg of the husband's livestock, on behalf of her eldest son);
- women who have not been 'properly' married according to custom also experience problems when the relationship breaks down, since her father (or brother) may not accept her back at the family home.

These issues are discussed in greater detail in Chapter Four.

Land administration and community rules

Our research shows that there are similar land administration rules throughout the Mchunu and Mthembu areas, but that there are also some differences between the main tribal areas and the farms where people used to live as labour tenants. For example,

people on the farms do not pay a *khonza* fee when they are allocated land for a homestead (*umuzi*).

When the Communal Land Rights Act (CLRA) is implemented the community will have to adopt a set of agreed rules around land rights and land administration. It is likely that the Traditional Council will be expected to play a leading role in this process. Two important questions then arise:

- how will the Traditional Council make sure that everyone in the community is consulted, when not all the *izigodi* are represented on the Council?
- will there be just one set of rules for the whole of the tribe which are applied uniformly throughout all *izigodi*, or will it be possible for different *izigodi* to have slightly different rules?

Authority to enforce rules on land use and natural resources

Many key informants said that the traditional practice that the *nduna* of each *isigodi* announces the date when livestock are allowed to graze in the crop fields is no longer followed. They also said that the rule that green trees cannot be cut is no longer enforced by the *nduna*. In the case of *amabonda*, the bundles of poles cut by the young married women (*amakoti*), no-one thinks this a problem, yet everyone says that green trees should not be cut. Some people say that the reason why the authority of the *nduna* is no longer respected in relation to these rules is that too many men have guns and threaten the *nduna* if he tries to enforce the rules.

Shortages of arable land yet arable land is not fully cultivated

In some areas there is a shortage of arable land and many people who want fields to cultivate crops cannot be allocated arable land. In Mathintha *umhlati* in Kwaguqa *isigodi* this is estimated to be a problem for 7 out of every 10 families. At the same time, those families who do have fields do not always cultivate them, sometimes for many years. Yet these fields are not re-allocated to those in need.

Some families borrow fields for a year or two from those who are not using them, but this is unreliable and insecure. Some people say that there is an old rule that says that fields that are not cultivated for a long time can be re-allocated to others, but that it is not being enforced. We also heard that the *Nkosi* is considering the issue and has asked *izinduna* to collect information on the number of fields that are not being cultivated.

Chapter Four

Women's land rights in Msinga

This chapter focuses on a key issue in Msinga – the question of women's rights to land. This arose again and again in our field research as a question that is troubling to both ordinary people and leaders, and is provoking anxiety and tension within families and kinship networks. The land tenure system appears to be undergoing a profound shift, towards acceptance of the idea that single women with children should be able to be allocated land in their own right. The chapter explores the evidence for this, and links it to changes in the form of marriage as well as a decline in the overall rate of marriage. Interviews reveal differences in this respect between core tribal areas and former labour tenant farms, which perceive themselves to adhere more strongly to 'traditional' norms and values. The final chapter in the report discusses the wider implications of these processes and shifts in land tenure, with a particular focus on the potential impact of the Communal Land Rights Act.

Land, family, and marriage – the traditional ideal

Chapter Three outlines the 'traditional' Zulu ideal of marriage and family structure. In summary, the general 'rule', or normative ideal in Msinga area is that only married people who have children to support can be allocated land. Single people cannot be allocated land, and must reside with either their parents or other family members. Land is allocated to a household, under the authority of the male household head, rather than to individuals, because land is seen as necessary for supporting a family. The underlying ideal of social organization remains that of a household headed by a man, who may have several wives.

The family, meaning here an 'extended family' of patrilineally-linked relatives, is the most basic unit of social organization. Marriage establishes important relationships between two families, symbolized by payments of *lobola* that transfer a woman's reproductive capacities to her husband's family. Descent is traced primarily through men, and within the patrilineal system there is a central concern with preserving the 'surname' of the descent group. Marriage is virilocal, with wives moving to the home area or homestead of the husband, and children 'are seen to 'belong' to the husband's family. Family membership and gender are primary determinants of social identity. Family obligation can also be extended to the wife's natal family, for example to her mother's brothers and sisters, grandmother's sisters and their children. Such obligations can include the provision of 'temporary'¹³ residential sites and garden space in times of need.

Social change and marriage: changing forms and declining rates of marriage

Land tenure is socially and politically embedded, but 'socially embedded' does not necessarily mean that land tenure regimes are static, or even stable. Processes of social change can produce uncertainties and ambiguities as to the nature and content of rights and obligations. This seems to be the case in Msinga in relation to the land rights of women, where a wide range of variation is emerging within an evolving and strained patrilineal and virilocal system. When changing economic realities (such as the decline of migrant job opportunities and the availability of child grants) are combined with social

¹³ "Temporary" can become multi-generational occupation of a homestead so is not necessarily short-term.

changes (particularly gender equality) that are altering ideas of self and social identity, these emerging variations in land rights suggest a system under extreme stress. Whether the changes constitute ruptures to the system rather than simply adaptations that attempt to maintain system coherence remains to be seen.

The two changes that are most commented on are:

- The number of women living within their father’s (or brother’s) homesteads who have children outside of a stable, co-residential relationship,
- Changes to marital practices that result in co-habiting couples being “partially” married in terms of customary practice, along with a shift to registration of marriage as a more important priority than completion of customary marital processes.

Along with these changes, although less frequently noted in Msinga itself, is the number of female relatives being accommodated within the homestead but outside of the patrilineal system. These include unmarried, divorced or separated sisters, aunts and great-aunts on both the husband and wife/wive’s side who may have children from multiple partners, as well as their descendents. Because their names and/or the names of their children may differ from the household name, they are not viewed as members of the family but they are provided with a site for building a home within the homestead, and are also sometimes given fields.

As a Traditional Council member, who commented on who should get land, said: “A person who gets land is a person who is married (*oganiwe*), and a woman who has a son.” This is consistent with the patrilineal nature of the system. What is in tension with this principle is the increasingly visible need for land by growing numbers of women who have themselves and their children to feed.

Table 4: Changes in marriage within the AbaThembu and AmaChunu

<i>Type of arrangement</i>	<i>Number of girls now doing this</i>
Pregnant but remains in her father’s house, probably secures child grant	Most girls do this
Ukugana (move after damages is paid)	Less now than women having children outside marriage
Registered civil marriage but lobolo is incomplete	More now than full marriage
Completed lobolo including registration	Hardly any

Source: Focus sessions with women from Mathintha and Ngubo izigodi

The causes of these changes are complex but are partly due to the difficulties of fulfilling all the obligations involved in a traditional marriage. These include the cost of cattle required for payment of *lobolo*, as well as the necessity to complete the marriages of ancestors prior to one’s own marriage, but also have to do with the financial independence provided by child grants and changing notions of identity, including gender equality. Older informants say that in the past it was ‘shaming’ to have children outside of marriage but that norms and values seem to be changing.

The following variations in marriage can now be observed:

‘Proper’ marriage according to Zulu custom:

- A virgin (*itshitshi*) is courted; she becomes a *qhkiza* when she is acknowledged as in a relationship with a man, she becomes an *inkehli* when she is ready to marry and negotiations over *lobolo* have begun
- 11 cattle are ideally agreed as the *lobolo* fee; the first payment can be 5-6 cattle and the rest are then paid off over many years
- Various ceremonies involving gifts and slaughtering of livestock (for the ancestors) must take place, including a final ceremony of dancing (*ukugida*) during which the new wife is introduced to the in-laws' ancestors
- The new wife, commonly known as *umakoti*, is allocated a household site and a granary and, after initially working in her mother-in-law's fields, is eventually allocated her own fields.

This may have been the norm 30 years ago, but is less and less common today.

Marriage today: 'Incomplete' processes of marriage ("ganile"):

- A virgin is courted and before or while she becomes *iqhkiza* may fall pregnant or be abducted to her boyfriend's homestead (*ukushaqwa*)
- If she gets pregnant, 'damages' (*inhlawulo*) are paid
- The distinction between *iqhkiza* and *umakoti* becomes blurred
- Goats are slaughtered and some cattle are paid; 1 cow is paid as damages per child and these cattle are subtracted from the *lobolo* agreed
- This form of incomplete marriage is now referred to by many as *ganile* (from *gana*, to ask for marriage, originally also the name of the first ceremony to be performed in the marriage process)
- Often full *lobolo* is never paid in the lifetime of the couple

Changing practices: Unmarried woman lives with man at his family's homestead:

- No cattle are paid or goats slaughtered
- The woman has low status in the homestead; she cannot inherit property on behalf of her eldest son; she cannot call upon her father or brothers for protection; and has to be buried at her father's homestead
- If the man asks for land for his family he will have to pay a fine at the Tribal Court for bringing the tribe into disrepute by not getting married
- It would seem that women in these arrangements have less social standing than women who have been *ganiled* but more than women who have children at their father's homes

Changing practices: Unmarried woman lives at her father's home:

- The most rapidly emerging "family" type is the unmarried women with children who continues to live in her father's homestead
- Many women have more than one child and sometimes with multiple partners
- If the partner recognizes the child as his and pays a fine for impregnating the girl, the child will carry his surname and belong to his family
- If the partner refuses to recognize the child, then the male child cannot inherit in his mother's homestead because he doesn't "belong" to her family. He is, in effect, without family and must remedy this by paying damages himself on behalf of his father. This will then allow him to approach his mother's father to allocate him a stand where he can build a homestead using his father's surname. For the

female child, *lobolo* paid for her will go to her mother's family, although father's will sometimes dispute this.

Changing practices: Unmarried woman establishes her own umuzi:

- Under some conditions, a woman may now ask for land to establish a homestead (*umuzi*) of her own
- If she has a son, his father's surname will become established at the homestead
- It is seen as problematic if she has sons by different men – 'whose surname is here'?
- This change has not yet been accepted on the "land reform" farms within these tribal authorities, where women are not allowed land outside of marriage.

Ganile'd/married woman who returns to her father's homestead when marriage or partnership ends:

- She returns to her natal homestead after the death of or rejection/divorce from her spouse, often choosing this in preference to *ukungena* (the levirate in which she is married to her deceased husband's brother).
- She may or may not have her children with her depending on whether or not damages were paid for them
- She gets allocated a residential plot within her father's homestead but she and her children are often not considered members of the family
- In 20 household interviews done in Msinga, every one of them had one or two women in this situation.

In addition to the changes described above, there exist some variations between *izigodi* living on tribal and land reform land, as shown in the table below.

Table 5: Estimates of the incidence of marriage, co-habitation and single parenthood in Mathintha and Ncunjane, Mchunu tribal area

	<i>Mathintha (tribal land)</i>	<i>Ncunjane (land reform land)</i>
Proper marriage with <i>lobolo</i> payments	3-4%	45-50%
<i>Ganile</i> (damages only)	50-60%	45-50%
No payments/ woman lives with the man	10-15%	1%
No payments/ woman lives at her father's <i>umuzi</i>	20-30%	0%

Source: field team discussions, based on impressionistic evidence

Another difference between Mathintha and Ncunjane is thus in relation to marriage practices, with 'proper' marriage according to Zulu custom being much more common in the latter. It is not clear why exactly this is so.

Possible reasons for the decline of traditional marriage with full *lobolo* payments have been discussed with traditional councillors and with local residents in meetings and focus groups. A number of different reasons were put forward by different people:

- From a male perspective, if a woman has already moved in with a man there is no need for him to marry her; his sons will bear his surname in any case, and there is no need for him to pay *lobolo*
- Fewer people own cattle for *lobolo* payments these days, and cattle are very expensive
- High levels of unemployment mean that there is a shortage of jobs to earn the cash required to buy cattle for *lobolo*
- Child support grants now provide a guaranteed income for women with children, so they are less dependent on men as husbands
- Norms and values are changing: 'children no longer respect their elders'; 'boys are not governed by their fathers'; 'mothers support their sons no matter what they do, even if they make a girl pregnant'.

Patti Henderson (2009) argues that poverty and death in the girl's natal household makes the option of moving into her boyfriend's father's household without any *lobolo* being paid a strategic one that gives her the prospect of some social security and standing. However, this was not given as a reason in our Msinga fieldwork.

Ideals versus practice: the variable composition of households in Msinga

While extended compound families are still common in Msinga, a number of variations in the composition of households can now also be observed. At one end of the extreme are very small, single generational households and at the other large, compound families with many generations within them. Some are male-headed, some female-headed, some independent and others adjacent to close relatives:

- One generation: WidowM lives in her own house, next to her father's homestead, with two children she did not give birth to. She considers the property to be her own and says her brother would inherit it if she were to die because he is her closest living relative.
- Two generations, women-headed small household: Ma'X is a widow who lives with her adult grandson and a domestic worker.
- Two generations, widow headed household: MaM is a widow, who was not properly married, who lives in her own house with her two children. She was evicted by her husband's relatives after he died.
- Three generations, a women-headed household: MaS is a divorced woman who lives alone with her daughter and her daughter's two children. She acquired land for her homestead from her brother on her father's land after her marriage broke up.
- Four generations, medium size household: MaX is a 59-year old widow who lives at her husband's homestead with her grandchildren and their children. She supports the household by selling grass mats, which is supplemented with child support grants for the eight great grand children.
- Two generations, one medium sized house: MaK's household has five members: herself, her sister-in-law (her deceased husband's sister) and her three children: two daughters (aged 21 and 15) and a son (13). MaX applied for and received land after her husband, to whom she was not properly married, died and his brother did not offer the levirate (*ukugena*).

- Two generations, two small houses: MaN has two sons, aged 15 and 1 and lives in the same homestead (*umuzi*) as the wife of her husband's older brother i.e. the two sons live in the *umuzi* inherited from their deceased parents. Her husband's brother has no children so the families stay together to "prevent the house from falling". Her oldest son will inherit all the property.
- Three generations, 14 houses: KaMaS shares a homestead with her husband, his other wife, his deceased brother's three wives, her son's wife and the eight wives of her deceased brother-in-law's four sons. The homestead has three generations and a total of twenty eight children.
- Three generations: MaN lives with her husband, their two sons, their sons' three children, three daughters and their children (who come home during holidays) and the four orphaned children of a deceased sister-in-law. There are 6 dwellings at the *umuzi*, with another for one of the unmarried daughters in process of being built. Both sons have their own separate dwellings.

Ideals versus practice: Women's land rights

'*Umfazi akagedwa*' is an old saying that means it is very difficult to complete the *lobolo* payments. Was the ideal ever fully practiced? In our focus session with older women from Nkaseni who described the ideal or traditional marital processes, it emerged that in only one of the five marriages was full *lobolo* ever paid. Both the normative ideal and emerging practices in relation to women's land rights in the Mchunu area are briefly summarized here.

Married women

In an elementary or simple household, a husband, as the manager of the household assets, allocates his wife or wives a site within the *umuzi* to build their residential structures. These include a living area, hearth and granary, as well as fields for cultivation. While husband will undertake the heavy labour related to crop production (such as ploughing), the wife is the primary food producer and crops produced to feed her family belong to her house and cannot be appropriated by her husband without her consent (Preston Whyte: 1974). Some young wives move into a large, compound homestead under her husband's father (or perhaps his elder brother) rather than a new homestead established together with her husband. She may then work on her mother-in-law's fields (the house property) for some years before being allocated fields of her own; such women sometimes state that they were 'given' their fields by their mother's-in-law when the latter became too old to engage in crop production.

Unmarried women

As a result of the decline in marriage and increasing numbers of unmarried women with children to support, this category of women is now being allocated building sites within their father's *umuzi*, and sometimes also a garden to cultivate crops. Some informants are of the view that unmarried women can also apply for land in their own right, and be allocated residential plots and arable land through the usual procedures. Some informants suggested they can also ask for land at the home of the children's father. The norm is that an unmarried woman asking for land must have sons (who carry the 'surname' of a family i.e. the patrilineage) before she can be allocated land, but some

women are beginning to say that even women with daughters only should be allocated land and indeed that single women and men without children should, under some conditions, be allocated land.

The distinction between 'married' and 'unmarried' is not quite so clear cut, however, given the increasing number of unions which are stable over time, that involve the payment of *some* livestock by the male partner's family to the female partner's family as 'damages' or *inhlawulo* (i.e. for causing a pregnancy outside of marriage), and a consequent blurring of the distinctions between the status categories of *iqhikiza* (an unmarried woman in a relationship with a man, possibly with a child) and *umakoti* (a young wife).

'Divorced' or abandoned women

Norms around the breakdown of a marriage derive from the cultural ideal of families entering into reciprocal relationships embodied in the payment of bridewealth in the form of cattle. Since this ideal is less and less in evidence, there is currently some ambiguity as to what 'rules' should apply when a relationship can no longer be sustained. The normative ideal is still strongly articulated, however.

Different outcomes are possible, in part dependent on the cause of the breakdown. When a woman who has gone through a full customary marriage is 'chased away' (*uxoshiwe*) and returns to her father's home, her brothers, who have benefited or will benefit from the *lobolo* cattle paid to the family when she was married, have to ascertain from the husband's family the cause of the problems.

If she has committed adultery, her family will pay a fine and she will return to her husband; if she has performed witchcraft then she will often remain with her family of origin but her *lobolo* cattle will have to be returned; if she has defied the authority of her husband then she can be disciplined by her brothers. If she has been falsely accused of these misdemeanours then she cannot be sanctioned. If her return to her father's home is permanent, she can then be allocated land for an *umuzi*, through the usual procedures. She might also remain in her husband's *isigodi* and be allocated land in the name of her son.

If the wife runs away (*wabaleka*) from her husband, her brothers must ascertain the reason; if she has left as a result of abuse by the husband, they will demand an apology, but if the abuse continues she can return to her father's home and the *lobolo* cattle do not have to be returned (unless she remarries).

A third possibility is when the wife is 'rejected', for example, when her husband refuses to sleep with her. This is known as *ukwaliwa*. She may decide to stay, or she can leave her husband and return to her father's home. Such an outcome is legitimate, but a ceremony must be held to end the bond between the two families.

If no *lobolo* has been paid, then the woman can leave and return to her family of origin at any point and her brothers will not be involved at all.

A view expressed by some informants was that the question of which spouse leaves the homestead depends on who is to blame for the breakdown of the marriage; if the husband is deemed responsible, he might have to move and ask for more land elsewhere. There are cases where adult or older children take their mother's side in a dispute and put pressure on their father to leave.

Widows

There are several options for women who are widowed:

- One option for a widow is to be taken as a wife by one of her deceased husband's brothers, a practice known as *ukungena* (known in anthropological terms as 'the levirate'). This practice seems to be in decline, and some informants speculate that this might be because of the risk of being infected with HIV
- Another is to return to her father's home
- A third option, for women in compound homesteads, is to continue to reside with her husband's family, with a risk that they might begin to make use of the household's property, including livestock
- A fourth is to ask for land in her own right in her ex-husband's home area.

A range of views was expressed on the question of whether or not a widow can take a lover and live with him. Some informants said she could do so on condition her married surname remained unchanged, while others indicated she could not openly live with a lover.

In the normative ideal, a widow does not inherit the house's land, livestock and other forms of property in her own name but holds these for her children and in particular for the male heir, the eldest son. She often has decision-making powers over the household property while she is alive, but in many cases other members of her deceased husband's family begin to use these resources for various other purposes (eg using cattle for rituals related to unveiling ceremonies, particularly where previously deceased relatives have not undertaken these ceremonies; or, taking cattle to pay *lobolo* for a man getting married). This is a major cause of disputes in the Mchunu area, with many cases ending up in the tribal court. Widows who were not married according to custom (i.e. through payment of *lobolo*) are particularly vulnerable to loss of property since her brothers will not speak on her behalf.

Women who have registered their marriages, whether or not the *lobolo* was completed, are now inheriting pensions or life insurance pay outs from their husband's estates, and as a result, registration of marriage has become elevated as desirable and 'urgent'.

Land and property rights for women: key issues and problems

The question of what rights to land women in the Msinga area can claim, or should be able to claim, is somewhat uncertain at present, with a range of views being expressed by different informants. The declining rate of the fully-fledged form of customary marriage, and the increase in women having children within their father's households, is one obvious reason for the uncertainty. Another might be the influence of processes of social and political change in the wider society, such as gender equality becoming a constitutional right. Given the central importance of family and marriage in all property systems, such fluidity and uncertainty is bound to provoke a good deal of anxiety about the nature and security of land rights, but here an additional concern is the integrity of the principle of patrilineal descent that underpins social relations, identity and spiritual life in Zulu culture.

The major fault line with respect to marriage and land in Msinga appears to be in relation to unmarried women with children who are living in their father's homesteads. There is a pent up demand, based on pragmatic as well as value-based considerations, for such

women to be allocated their own plots (mainly residential), particularly when their mothers and fathers are deceased and the homestead moves under the control of her brother and influence of his wife/ves. It seems both necessary and legitimate to allow women in this position access to residential sites and gardens, in that the underlying value or principle is that adults with children to support need resources. However, such a move is hard to reconcile with the principles of the patrilineal system and its social identity and spiritual logic. This tension between fundamental system values is manifested in the degree of discussion around these issues and has probably contributed to the recent decision of the Mchunu traditional council (*isigungu*) to open land allocation to single people.

Wives

A woman who is fully married through customary processes and whose marriage has been registered has the most protection of her rights to land and property in this system. However, very few women now conform to this normative ideal. Instead, women may be partly married (*oganiwe*) with a registered marriage, securing her access to her husband's pension and life insurance policies, if he has any. To be incompletely married leaves a woman vulnerable to eviction by her spouse's family.

"I was once *ganile* to When my husband died I came back home because my mother-in-law evicted me after accusing me of trying to finish off his left over possessions when I am not even married to him."

A newly married woman, *umakoti*, will stay with her mother-in-law for a period before being given a site for her own house and kitchen, in order to be taught the habits of the family. During this time, she may work in her mother-in-law's fields and only when she is more senior or her mother-in-law becomes tired of working the fields, will she be given a field in her own right. A newly married wife therefore has little control over land-based livelihood assets.

The cattle are owned by separate houses within the homestead, their ownership being clear and known to all through the individual markings of the cattle. Only one ear clip pattern is used by the homestead as a whole. All cattle, the purchased as well as the *lobola* cattle, are divided between houses of the different wives. The same applies to goats.

Decision-making over the use of the land (eg. land allocated for a new *makoti's* house) rests primarily with the male household head, although this is not absolute and is rather subject to negotiation and consultation within the family, which can include wives, sons and brothers. The exception in terms of decisions is in relation to the wife/ves' fields, which belong to her house property. Here a wife has significant levels of decision-making in terms of use and re-allocation to family members, particularly daughters-in-law. Women who are not completely married in terms of customary marital processes may not enter the cattle kraal, which can compromise livestock health management if her husband is away from home.

Widows

When a fully married woman is widowed, two options can occur; she can be *ngena'd*, that is married to her husband's brother; or she can continue to live alone in her husband's homestead. If she is *ngena'd*, the property (livestock, money, cars etc) she inherited from her husband is protected by her new husband for her and her children's

use. If she is not *ngena*'d, she is vulnerable to losing property she's inherited from her husband during the two or three years of mourning required as male relatives make decisions on her behalf at a time when her behavior is expected to be subdued and submissive.

It would appear that quite a number of women, whether or not they were fully married, choose not to be *ngena*'d and opt to leave their deceased husband's households. Reasons for not remaining in the household vary but may include her brother-in-law refusing to *ungena* her, her husband's relatives accusing her of causing her husband's death, relatives evicting her or other makoti of making her life sufficiently miserable that she chooses to leave.

“After her husband's death the brother-in-law did not ask for *ungena*. He did not treat her well and she decided to leave the homestead and establish her own umuzi.”

Widows with children are often able to access land in the names of their sons if they are not able to remain in their deceased husband's households.

“At Ncunjane a widow can ask for her own land, and might need to go if another wife is causing her problems and she needs her own place 'to have peace of mind'.”

A relatively frequently related story is of widows losing control to their husbands' relatives, of property that should fall under the widow's trusteeship for her children's benefit.

“My husband passed away in 1990. I used to live at his homestead, but after he died, my in-laws abused me. They did not allow my relatives to visit and at some point they plotted to kill me because they wanted to inherit my husband's money as he was employed in Johannesburg. They seized my husband's livestock. I mourned for him for two years, and in the third year I was cleansed out of mourning. At his time my father and mother-in-law and brothers-in-law told me that I had move out of the homestead. I was told to give them my husband's pension money and leave the homestead and find myself another man to marry. I had two children, a boy and a girl. I was not fully married to my husband, but even if I had been, I don't feel it would not have made any difference.”

When a husband dies, he must be buried. Cattle and/or goats must be slaughtered. After the wife's mourning period, she must be cleansed and more livestock must be slaughtered. However, if her father-in-law or husband's older brother had died before her husband and ceremonies for cleansing them had not been performed, they would now have to be done before her cleansing ceremony could be done. So if these relatives did not have the property to be able to perform these ceremonies, her husband's relatives would now take the property she's inherited in order to perform these ceremonies.

If a widow has no children or does not wish to access land in her own right, she will usually be able to access a residential site in her father's household, even if her father is deceased and the household now falls under the authority of a brother. Her position within this household is somewhat ambiguous, however. She is not a member of the household, since she “belongs” to her husband's family, but her house is within the broader homestead's boundaries.

Women from broken marriages

While the normative ideal is that the wronged party in a marital break-up is not punished, the reality appears to be somewhat different. If a marriage begins to break up, the reasons for the problems are determined by the husband's relatives and the wife's father or brothers. Depending on who the "wrong-doer" is, lobolo may have to be repaid to the husband's family and a wife may or may not be supported by her brothers. Ideally, it is possible for a women whose husband has rejected her to remain in her husband's relatives household while her husband is made to go and live elsewhere.

However, many interviewees suggested a different scenario from the ideal.

"If conflicts occur within a marriage, it is always the wife who must leave, even if the husband is to blame, since he cannot leave his home. At best, she can be given a stand on the land belonging to the family, but outside the fence of the *umuzi*, and in the surname of the family."

And in Ngubo, an interviewee said:

"I am a divorced woman, and I now live in my own house on my father's land. I was allocated this site by my brothers and didn't need to go to induna or pay a khonza fee for it. I was divorced in 1979 when I had one child, a girl who is now 23 years old. The fight with my husband, which led to the divorce, was that I was not getting children."

Single women with children

The principle of the patrilineal system is that a married man is entitled to access land in the area where he has *khonza'd* the *inkosi* in order to provide shelter and food for his

family. With the changes in family structure resulting in many women having children outside of marriage, the patrilineal principle is under some stress. On the one hand, the principle is that the *male* head of family may access land and on the other is that land is accessed in order to be used to provide for families. The single women with children are asking for land in order to provide for their children. This tension is being resolved in various ways across Msinga.

In Ncunjane, young women with children have been given residential land and fields but these are given to her in her father's surname. If her children are sons from different men and therefore do not share her surname, they will have to approach the *ibandla* either in the area where their mother resides or where their fathers reside when they want land and receive it in their own surnames.

Some unmarried mothers in Ncunjane remain in their father's homesteads but are allocated a site on which to build a home where they can cook separately for themselves and their children. This is seen as a partial solution to the problem of sharing resources with other *amakoti*.

This is the only solution available to unmarried mothers in Nkaseni, where the community holds the rule firmly that only married men with children are allowed to be allocated land. However, it is not always a solution that works for all single mothers:

"I want land to build my own house because the conflict does not end, and I do not know if I will get married any time soon. I approached my father and told him I wanted land, but he told me that people in the area do not allow a single woman

to have her own house, even if she has children. I know two other single women in the area who also want land, but the community does not allow a woman to get land on her own.”

There is clear evidence here of pent-up demand from women for residential and small plots of adjacent arable land, and while this places pressure on some of the principles of the patrilineal system, it can also be legitimately asserted in terms of other values within this system.

Conclusion

The communal tenure system is in flux and social processes are under way that are likely to transform the way that rights to land are understood and administered. This is most evident in relation to women’s land rights. If the CLRA is implemented in a simplistic and rigid manner, many women who currently enjoy security of residence and access to some arable land, may find themselves the victims of exclusionary practices as families and members of families stamp their claims to the land that these women believe they are entitled to. The CLRA could fix in place patrilineal and virilocal practices that are in tension with underlying values, where land is viewed as a resource available to all who have children to support. Equally, forcing change too rapidly will exacerbate the anxieties already present in a society grappling with a system on the brink of fundamental ruptures, with the possibility of deepening people’s insecurity and vulnerability.

Chapter Five

Implications for the Communal Land Rights Act

Women's land rights

- Many women gain access to land through being members of households, without always being a 'spouse' (whether formally married or not)
- Women with children who are allocated land within the homestead (*umuzi*), or on the edge of the *umuzi*, are not always regarded as being part of the main household, but forming a separate household
- Under the CLRA, if only 'spouses' are entitled to register their land rights, and only one household is listed and registered for each *umuzi*, then many women will not have their land rights secured
- Will the 'community rules' required by the CLRA reflect the views of the majority of local residents in relation to the land rights of women? Will the process of drawing up these rules create space for a diversity of views to be expressed?

Fluidity and flexibility in household composition

- The composition of households and homesteads is inherently flexible and fluid, and can be very complex and multi-layered at times
- Will the registers of land rights holders required by the CLRA, and the Deeds of Communal Land Right that it will see being issued, be able to capture this complexity?
- Will registers of land rights be able to be accurately updated so that they capture ongoing changes in household and homestead composition i.e their inherent fluidity?

Local variations in rules

- If CLRA is implemented, the community will have to adopt a set of agreed rules around land rights and land administration
- Will there be just one set of rules for the whole of the tribe which are applied uniformly throughout all *izigodi*?
- Or will it be possible for different *izigodi* to have different rules?
- Will the 'community rules' required by the CLRA reflect the views of the majority of local residents in relation to land rights? Will the process of drawing up these rules create space for a diversity of views to be expressed?

Boundaries

- Boundaries between different *imizi*, *amahlati*, *izigodi*, *izinsizwe* are flexible to a degree (eg people cross boundaries for grazing, wood cutting, water ie 'common property')
- Unresolved boundary disputes can flare up into conflict, but for most of the time are 'managed' and kept in check
- Advantages of flexible boundaries?
- Dilemma for CLRA: if transfer of ownership to 'communities' under Traditional Councils, then boundary disputes will have to be resolved first, then surveyed, recorded on title deeds
- But these latent tensions could flare up into severe conflict

- Might be best to 'manage' boundaries rather than try to resolve tensions through surveying and transfer?

Land administration at different levels or layers

- Most land administration takes place at the level of the ward (*isigodi*)
- Groups of neighbours must agree to the location of new plots and the acceptance of newcomers from outside the *isigodi*
- The *nduna* will be involved (he is knowledgeable about history of land allocation, helps in resolving land disputes)
- The *ibandla* (a local assembly of men, 'old enough to be wise') can be involved as well
- Disputes over land (eg over boundaries) resolved at local level first, the *ibandla* and the *nduna* acting as mediators and adjudicators.
- If the dispute cannot be resolved at this level, then it will be taken to the tribal court and *Nkosi*
- CLRA does not recognize these local processes; gives powers to the Traditional Council only
- Yet Traditional Councils can have very large tribes under their jurisdiction

Status of land reform farms within tribal boundaries

- Labour tenants on farms have always seen themselves as part of AbaThembu and AmaMchunu
- In the past they took disputes to tribal courts under *izinduna nkhulu* appointed for their areas by the *Nkosi*
- Sometimes they did not pay *khonza* fees to the *amakosi* and tribal offices, and some of their rules and practices were different from those in the main tribal areas (eg the *nduna* did not always lay a central role in land allocation)
- Under land reform these farms are being returned to their current occupants and to those who were forced to leave by the former white owners
- Committees were set up on these farms to assert claims and to negotiate with government and land owners, and CPAs or Trusts were established to take ownership. In most cases these committees and CPAs no longer function.
- The farms are less densely settled than the main tribal areas and have more grazing, woodland and other natural resources; some have access to irrigation water
- Those who continued to stay on the farms as labour tenants under white owners want to maintain low settlement densities i.e. relative resource abundance
- According to government these farms now belong to their occupants
- But people want to remain part of the AbaThembu and AmaMchunu
- How will the CLRA impact on this situation?

Underutilization of fields

- In some *izigodi* there is a shortage of fields, but some fields are not ploughed (eg 70% of families in Mathintha)
- Fields not being ploughed by owner can sometimes be borrowed by others for a year or two, (eg in return for share of crop, or for paying for ploughing of other fields)
- Owners often reluctant to lend fields for long periods (perhaps fear losing their rights?)
- Reasons given for decline in crop production:

- Lack of permanent fencing
- Lower rainfall & lack of irrigation water
- *Nkosi* Mchunu is discussing re-allocation of uncultivated fields to those without *amasimu*
- Could good records of borrowing of fields create more security? Who would keep these?
- How can a flexible system of crop production be supported by the CLRA?

Roles and powers of Traditional Council

- Some *izinduna* are members of the Traditional Council
- Some members of the Council are not *izinduna*
- Also some *izinduna* who are not in the Traditional Council but carry on their functions in their *izigodi* & in Tribal Court
- The 'community' still recognises *izinduna* as well as *Nkosi*, but some are not members of the Traditional Council
- This is causing confusion about who has authority over land issues
- Mthembu tribe: there are 3 (4?) Tribal Courts under different *izinduna nkhulu* – should there be more than one Council?

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