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# The endurance of apartheid notions of property law in Bloemfontein and surrounds: Response to Danie Brand

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## 1 Introduction

Danie Brand's chapter deals with the complex issue of how to ensure that the majority landless South African population obtains legally recognisable, protectable and registrable tenure rights. Access to secure rights to land continues to be the preserve of a small minority in South Africa. Many citizens, mostly blacks, remain functionally landless, occupying land owned by state institutions or the minority private owners. An estimated 60 per cent of South Africans live on land or in dwellings held outside the land titling system, and approximately 80 per cent of its urban dwellers have no legally recognisable rights to land tenure.[1] African communities not only experience widespread landlessness, but also have land scarcity. Approximately 72 per cent of land in South Africa is held privately in freehold and leasehold, while 14 per cent is held by the state and a further 14 per cent held under customary law.[2]

Brand proposes that the legislature and courts should contribute to the transformation of land tenure systems so as to afford security of tenure to the majority landless South African population. He calls for transformation of apartheid notions of property law and ownership underpinned by the Roman-Dutch legal system. In response, I add that the communities themselves, through their traditional leadership

1 The Presidential Advisory Panel on Land Reform and Agriculture (4 May 2019) 'Final Report of the Presidential Advisory Panel on Land Reform and Agriculture for His Excellency the President of South Africa', 4 May 2019 Foreword & Part III, https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_1.pdf (accessed 29 February 2024).

2 Presidential Advisory Panel (n 1) Part V.

institutions, can also contribute to the transformation of South Africa's land tenure systems and to the integration and harmonisation of such tenure systems into the formal legal system. Reform of customs and traditions touches on the interaction between customary law, legislation dealing specifically with customary law and the Constitution. Sections 211(2) and (3) and 39(2) of the 1996 South African Constitution recognise the roles of traditional authorities and the courts in observing, applying and developing customary law. Both the communities, through their traditional leadership institutions, and the courts, therefore, have constitutionally recognised roles to play in the transformation of South Africa's land tenure systems. Courts and traditional authorities can be complementary in reforming South Africa's land tenure systems even though the courts are the ultimate decision makers on matters of law. Courts should defer to traditional authorities when transformations emanate from the traditional authorities themselves. I divide this response into three main parts, with the first part being a discussion of living customary law relating to land tenure in South Africa. The second part analyses the interaction between these communal tenure systems and the formal legal system. The third part proposes the inclusion of impacted communities in the reform programmes for more effective transformation of land tenure systems in South Africa.

## 2 Living customary law can afford security of tenure to the majority African population

African communities in South Africa have not always been landless. The roots of their landlessness can be traced back to 1652 when Johan Anthoniszoon 'Jan' van Riebeeck of the Dutch East India Company landed in Table Bay at the Cape of Good Hope and began the process of annexation of African land and the disruption and distortion of their land tenure systems.[3] African communities can be conceptualised as not just the individuals making up the community, but also their laws, customs, cultures, ancestors, communal lands, waters, and other elements that each community system considers essential to its continuity and survival.[4] The

3 C Rautenbach & JC Bekker (eds) *Introduction to legal pluralism in South Africa* (2014).

4 *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* [2020] HCA 3.

communities, historically, have been determined to preserve, develop and transmit to future generations their ancestral values, communal lands, and their ethnic identities, as the basis of their continued existence as peoples, and in accordance with their own cultural patterns, social institutions and legal systems. Successful integration of changes in land tenure systems into community systems requires a greater understanding of the inherent characteristics of community systems, especially their power ingredients, and the extent to which these community systems respond to change. Inducing change the wrong way can lead to a weakening of a community's power ingredients and interfere with the community's state of equilibrium for generations as happened to the majority African population in South Africa.

In 1652 the Dutch found the South African communities exercising diverse forms of communal tenure under the custodianship of their traditional leadership institutions. These communal tenure systems of South African communities are part of the constellations of power factors that communities, in general, develop with the passage of time to effectively and efficiently interact with the environment in which they live and to develop the resilience necessary to persist and thrive as community systems.[5] These communal tenure systems and other customary practices enable the communities that practice them to nourish themselves better, reproduce better and, generally, dominate other communities that lack the same power ingredients within the same time, space and context.[6]

Communal tenure systems are largely unwritten and do not enjoy recognition in law and money-lending institutions. They are part of the living customary laws of South Africa and may be interpreted, applied and, when necessary, amended or developed by the communities themselves or by the courts. In *Tongoane*[7] the Constitutional Court confirmed the existence of these communal tenure systems despite their being largely unwritten and not specifically defined within the formal legal system. The Constitutional Court observed that '[t]here is at present a system of

5 J Diamond *Guns, germs, and steel: The fates of human societies* (1999).
6 As above.
7 *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010).

law that regulates the use, occupation and administration of communal land'.[8]

Communal tenure systems among South African communities are also not static, definite and uncontested, but are historical, fluid, dynamic and contested processes of interaction within each community system and with other communities. The communities are able to maintain their integrity and stability by constantly reorganising while undergoing change, in order to retain essentially the same function, structure, identity and feedback loop mechanisms.[9] It is these negative and positive feedback loop mechanisms that help to maintain each community system within a state of equilibrium with its internal and external environment that ensures its survival or long-term stability as a community.[10]

South Africa's colonial and apartheid legacy creates limitations that impede efforts to accurately identify the communal tenure systems of the communities inhabiting it. In addition, the social and economic organisation of these communities have changed over the course of time, making it practically impossible to determine with certainty the past communal tenure systems of these communities. Although most of the participants in the interviews that were conducted as part of Brand's research described their property interests in accordance with the Roman-Dutch legal system's notion of private property, they also hinted at communal tenure practices that may provide a better historical understanding of the communities' communal tenure systems. An example was that the majority of respondents claimed to have acquired ownership of their houses through inheritance or through a grant from a family member as opposed to purchase. In addition, the interviewees who claimed to acquire ownership directly from family members did not take steps to have the ownership legally recognised under the Roman-Dutch legal system. The interviewees, instead, rely on evidence of use and occupation of property to prove their ownership of the property. Interviewees also rely on the widespread acceptance of their ownership interest by the community and would not consider selling their property

8 *Tongoane* (n 7) para 79.
9 M King 'The "truth" about autopoiesis' (1993) 20 *Journal of Law and Society* 2.
10 A Calnan 'Torts as Systems' (2018) 29 *Southern California Interdisciplinary Law Journal* 301.

so that it remains available to other family members. He concludes that the interviewees were 'in fact operating within a different, part customary, part *ad hoc* community practice-based system'.

From the interview responses, case law, journals and other publications, we can observe some common understandings among the African communities of what constitutes communal tenure practices in South Africa. The communal tenure systems had communal land as their central feature.[11] Communal tenure systems were based on principles of negotiation and had their own dispute resolution systems that relied on traditional leadership institutions. The dispute resolution process was designed to achieve a state of equilibrium within the community's internal and external environment to ensure its long-term stability and survival. Access to communal land was linked to the peoples' livelihoods and the land was considered indivisible and sacred.[12] It was held in trust by the traditional leaders on behalf of the people and could not be alienated or divided into farms for private ownership. South African communities were denied the opportunity to continue developing their communal tenure systems by colonialism and apartheid.

## 3 Land tenure reform through legislation and judicial intervention has proved to be inefficient and ineffective

Widespread land tenure insecurity and landlessness among the majority black population in South Africa is not by accident. It is the result of well-planned, orchestrated and deliberate policies, laws and regulations by the Europeans. Colonial settlement and expansion initiated a process whereby indigenous people were dispossessed of the land they occupied, mostly through invasion and conquest by the Europeans.[13] The Europeans then used Roman-Dutch law to distribute the land to European settlers as private farms without any compensation to the African communities. This dispossession of African communities was justified and maintained by the Europeans through what Brand refers to as a 'hierarchical, exclusivity-geared, rights-based understanding of property law'.

11 *Tongoane* (n 7).
12 See *Love* (n 4).
13 *Tongoane* (n 7).

The Roman-Dutch law (the uncodified law of Holland as it was at the time of the original Dutch settlers in the mid-seventeenth century) was first introduced in the colony of the Cape of Good Hope as common law around 1652.[14] The Roman-Dutch law was thereafter received in the Crown Colony of Natal, Transvaal and the Orange Free State. Similar to the trend in other sub-Saharan African states, the colonial and apartheid regimes in South Africa alienated African communities by using repugnancy clauses in the formal constitutional and statutory frameworks through which African customary laws were not to be enforced if contrary to public policy or natural justice.[15] The South Africa Act 1909 of the Parliament of the United Kingdom and the Black Administration Act 38 of 1927 gave colonial administrators the power to determine and enforce the customary laws of African tribes or natives. The dominant voices that shaped the native law or 'official' version of African customary law in the colonial and apartheid era were members of the ruling racial minority intent on protecting their accumulated inequality of generations of suppression, domination and apartheid. Under this Roman-Dutch legal system, a holder of a legally recognised property right could, as Brand, citing Van Der Walt, puts it, 'exercise absolute, exclusive control over the [property] against everyone else, regardless of anything else'. According to Brand, Roman-Dutch law contains a 'traditionally recognised closed list of property rights'. The colonial and apartheid South African state passed various pieces of legislation, including the Natives Land Act of 1913 (now the Black Land Act) and the Native Trust and Land Act, 1936 (now the Development Trust and Land Act) to actualise this Roman-Dutch notion of private property.

The effect of the legislation passed since 1913 under the Roman-Dutch legal system was to preclude African people from purchasing land in most of South Africa.[16] These laws and policies effectively turned Africans (Natives) into tenants and labour tenants on land on which they had lived for many generations and disrupted their communal tenure systems. The result was a thriving European minority living

14 Rautenbach & Bekker (n 3).
15 PhJ Thomas & DD Tladi 'Legal pluralism or a new repugnancy clause' (1999) 32 *Comparative and International Law Journal of Southern Africa* 354.
16 *Tongoane* (n 7).

in the midst of socially and economically marginalised South African communities. The ruling racial minority used apartheid ('apartness' in the language of Afrikaans) to preserve, perpetuate and promote this hierarchical arrangement. Apartheid was a system based on a statutory framework and state policies that segregated non-white citizens from whites in South Africa.[17] To this day, this interface of dominance by one community over another continues to cast a shadow over the interaction between the state's statutory regulation and communal tenure systems of South African communities. Brand observes that the Roman-Dutch legal system's notion of private ownership is unsuited to South Africa's reality of land being subject to different overlapping, intertwined, even unfolded interests, especially as regards communal land tenure.

The post-apartheid regime in South Africa has taken steps to redress colonial and apartheid era injustices by creating a constitutional and statutory framework that intends to reverse the effects of the disruption and distortion caused by colonial and apartheid policies to communal tenure systems. Specifically, section 25 of the 1996 Constitution provides as follows in part:[18]

> (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
>
> (6) 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.
>
> (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

Section 25, therefore, provides a redress mechanism for the widespread landlessness and tenure insecurity prevalent among the majority South African population. However, implementation of section 25's redress mechanism requires legislation that must also comply with the constitutional protection for private property owners against arbitrary

17 D Posel 'The meaning of apartheid before 1948: Conflicting interests and forces within the Afrikaner nationalist alliance' (1987) 14 *Journal of Southern African Studies* 123.

18 Secs 25(5)-(7) Constitution of the Republic of South Africa, 1996.

deprivation of their property. Section 25 provides that '[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'.[19]

As a result of the constitutional protection for property rights, legislative enactments aimed at addressing landlessness and tenure insecurity in South Africa have faced court challenges. In *Rahube v Rahube & Others*[20] the Constitutional Court agreed with the High Court's decision to uphold the applicant's constitutional challenge to section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA) that provided for the automatic conversion of land tenure rights into ownership without any procedures to hear and consider competing claims. The High Court reasoned that people who were not holders of certificates or deeds of grant, especially women, were prevented from acquiring ownership of properties in which they had a substantial interest. The *Rahube* decision illustrates the complex interaction between informal communal tenure practices and the Roman-Dutch notions of land registration and titling. It involved an untitled occupier asserting ownership over land that she had occupied courtesy of a family member who purported to obtain ownership rights by virtue of ULTRA. The *Rahube* decision means that any legislative attempt to automatically convert land tenure rights into ownership without due process for competing claimants risks being struck down as unconstitutional.

In *Tongoane* the Constitutional Court dealt with a constitutional challenge to the Communal Land Rights Act, 2004 (CLARA), which was also enacted to provide legally secure tenure to South African communities. The Constitutional Court declared CLARA unconstitutional in its entirety because it was not enacted in accordance with the procedure prescribed by the Constitution. Other examples of pieces of legislation enacted post-apartheid to address tenure insecurity include the Land Reform (Labour Tenants) Act 3 of 1996 (LTA) (seeking to secure the rights of labour tenants by prohibiting illegal evictions); the Interim Protection of Informal Land Rights Act 31 of 1996 (recognising informal land rights and how they may be deprived); the Extension of Security of Tenure Act 62 of 1997 (ESTA) (providing occupiers of

19 Sec 25(1) Constitution (n 23).
20 *Rahube v Rahube & Others* (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018).

agricultural land with legal protection against illegal evictions and procedures for securing their tenure rights); and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) (protecting home occupiers against evictions without a court order).

These post-apartheid legislative enactments do not prevent eviction altogether and, therefore, do not confer ownership rights under the Roman-Dutch legal system to the landless majority. At most, they provide procedural and substantive guidance as to the manner in which evictions may occur. Therefore, they make it more difficult to evict the majority landless people, but otherwise fail to protect them from harassment and eventual eviction altogether. Where actual eviction does not occur, constructive eviction may still be possible through intolerable living conditions for the occupiers to the point where they are forced to leave. Brand also describes the existence of 'a stubborn judicial culture of reasserting the centrality of absolute ownership' that presents an obstacle to statutory efforts to address landlessness and tenure insecurity in South Africa. In practice, this means that a legislative and judicial path to land tenure reforms will continue to be ineffective and inefficient for the landless majority in South Africa.

## 4 Effective land tenure reform programmes should empower communities to effectively participate in the change programme

In this part I discuss the constitutionally recognised role of communities in the transformation of South Africa's land tenure systems. Effective and efficient land tenure reform programmes in South Africa must include the participation of empowered communities and their leadership institutions. The South African government has engaged in efforts to create a policy framework for traditional leadership. The White Paper on Traditional Leadership and Governance that was issued by the Minister for Provincial and Local Government in July 2003 calls for laws and policies that will enable traditional authorities to play a role in the performance of their functions in accordance with their communities' customary laws and practices. The Traditional Leadership and Governance Act 41 of 2003 assigns traditional leaders the role of dealing with matters of culture and custom.

The interaction between states and traditional authorities in other sub-Saharan African countries is similar to the experience in South

Africa with states progressively integrating traditional authorities into their formal structures. The table below compares various state efforts to integrate traditional authorities into the formal structures in sub-Saharan Africa:

| **Role of Traditional Authorities** | **South Africa** | **Ghana** | **Sierra Leone** | **Uganda** | **Tanzania** | **Malawi** | **Zimbabwe** | **Swaziland** | **Botswana** |
|---|---|---|---|---|---|---|---|---|---|
| Limited to traditional and customary affairs | | X | | | X | | | | |
| Mobilising and linking communities | | | | X | | X | X | X | X |
| Represented in local government | | | X | | | X | X | | X |
| Incorporated in local government service | | | | X | | | | | |
| Perform judicial functions | | | | | | | | X | X |
| Role defined in statute | X | | | | | | | | X |
| National House of Chiefs | X | X | | | | | X | | X |
| Reviewing customary law | | | | | | | | | |
| Legislation aimed at transforming traditional authorities | X | | | | | | | | |

(Adapted from Kanyane 2007)

The trend in sub-Saharan Africa, as shown in the above table, is for states to give traditional authorities the opportunity to act as custodians and protectors of their communities' customs and traditions, including communal tenure systems. As custodians of customs and traditions, traditional authorities can give meaningful input to the transformation agenda of their communities and thus promote a healthy balance between tradition and modernity.

South Africa's land tenure reform programmes, therefore, should build the capacities of traditional leadership institutions and give them the autonomy necessary for them to function as power ingredients of their community systems. The 2003 White Paper on Traditional Leadership and Governance recommended capacity-building programmes for traditional leadership institutions in terms of more funding, skills building, human resources and facilities to enable them to perform their functions.[21] Those functions should also include advisory roles at the national, provincial and local state level in the definition, interpretation and review of communal tenure systems. The reform programmes should also aim to refocus accountability of traditional authorities away from the state bureaucracy to the communities they serve. The participation of South African communities in the change programme will help to dismantle the Roman-Dutch notion of absolute and exclusive control of land and infuse the transformation process with ideas of communal land tenure.

The critical challenge in the interaction between the state bureaucratic machinery and the community systems, as it relates to land tenure reform, is to ensure that communal tenure systems are transformed in accordance with the 1996 Constitution and the Bill of Rights. The transformation of communal tenure systems does not mean restoring them to their pristine precolonial/pre-apartheid forms but adapting them to change in order to strike a healthy balance between tradition and modernity. The reforms must also safeguard the stability and integrity of the community systems and support the growth and recovery of these communities from the effects of colonial and apartheid era disruptions

21 Minister for Provincial and Local Government 'The White Paper on Traditional Leadership and Governance' July 2003, https://www.cogta.gov.za/cgta_2016/wp-content/uploads/2017/05/WHITE-PAPER-ON-TRADITIONAL-LEADERSHIP-AND-GOVERNANCE-2003-CO.pdf (accessed 29 February 2024).

and distortions. As the traditional authorities cautioned before the Constitutional Court in *Mayelane v Ngwenyama and Minister for Home Affairs*,[22] such interventions risk destabilising the impacted communities by disrupting existing community structures and thus interfering with the community's state of equilibrium, there where such equilibrium exists. The change management process, therefore, involves identifying such risk factors and managing them appropriately to maintain the stability and integrity of the community system.

The land tenure reform programmes should also be implemented in a way that taps into the community system's mechanisms for change. The community system has its own stabilisation mechanisms that for centuries have determined the repression, activation, and re-setting of community elements in a way that maintains stability and integrity of the community system and that should be allowed to operate as part of change management. Community-initiated land tenure reform programmes are possible where the state affords community systems genuine opportunities for self-correction of customary practices. These options for self-correction may be effective if the communities are able to re-gain the structures and institutions that they lost when they were disrupted by colonialism and apartheid. Capacity-building programmes for traditional leadership institutions in terms of more funding, skills building, human resources and facilities are therefore necessary to enable them to perform their functions, including formulating and implementing land tenure reform programmes.

## 5 Conclusion

My contribution in this response has been to highlight the need for the South African state system to collaborate with African communities in the formulation and implementation of land tenure reform programmes. South African communities exercised diverse forms of communal tenure under the custodianship of their traditional leadership institutions before these tenure systems were disrupted and distorted by colonialism and apartheid. The communities had their own understanding of property law, especially as pertains to communal land, through which

22 *Mayelane v Ngwenyama & Another* (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) (30 May 2013).

land remained central to the peoples' livelihoods, was sacred and to be held in trust on behalf of the people. The result of the colonial disruption of the communal tenure systems was widespread landlessness and insecurity of tenure for the majority African population. The post-apartheid era has provided an opportunity for South Africa to advance African solutions to the land question. Effective land tenure reform programmes are possible where the state complements the efforts of empowered community systems in formulating and implementing land tenure reform programmes.

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