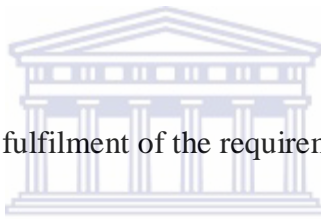


The Map is not the Territory: Law And Custom in ‘African Freehold’:
A South African Case Study

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A thesis submitted in fulfilment of the requirements for the degree of

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ABSTRACT:

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ABSTRACT

The thesis examines the characteristics of land tenure among African families with freehold title who trace their relationship to the land to their forebears who first acquired title in the mid-nineteenth century. The evidence was drawn from two field sites in the Eastern Cape, Fingo Village, Grahamstown and Rabula in the Keiskammahoek district of the former Ciskei.

The evidence, supported by evidence in other Anglophone countries, shows that African familial relationships reminiscent of 'customary' concepts of the family, were not, and are not extinguished when title is issued, though they are altered. Africans with title regard the land as family property held by unilineal descent groups, challenging the western notion of one-to-one proprietorial relationships to the land and its devolution.

By exploring the intersection between tenure, use and devolution of land, the main findings reveal that local conceptions of land and use diverge considerably from the formal, legal notion of title. Title holders conceive of their land as the property of all recognised members of a patrilineally defined descent group symbolised by the family name. Because freehold is so intimately linked with inheritance, the findings significantly illuminate the social field of gender and kinship.

The implications of the findings are that differing concepts of the 'family' and 'property' are fundamental to the lack of 'fit' between the common-law concept of ownership and what I term in the thesis 'African freehold'. The thesis dissects the implications of culturally constructed variability in familial identities for recognition and transmission of property. Title is legally regulated by Eurocentric notions of *both family and property*, which lead to significant divergence between western and African interpretations of ownership, transmission and spatial division of land. The deficiencies of the South African legal mindset with regard to property law are thus fundamentally affected by the deficiencies in recognising the broader field of gender and kinship relations.

The findings fundamentally challenge the dualistic paradigm currently prevalent in much of South African legal thinking, since the factors that are found to affect land tenure relationships cannot be reduced to the binary distinctions that are conventionally drawn in law, such as 'western' vs. 'customary' or 'individual' vs.

‘communal’ tenure. Instead, the important sources of validation of social (importantly, familial) and property relationships are found to be common to *all* property relationships, but are arranged and calibrated according to different normative patterns of recognition. In the case of the subjects in the field sites, these do not fit into the main ‘categories’ of property defined in law. Neither of the main bodies of official law, the common law and customary law, adequately characterise the relationships among the African freehold title holders. The source of legitimation is, therefore, not the ‘law’ but locally understood norms and practices.

The findings suggest that the practices of the freeholders, derived from constructed ideas of kinship and descent, have relevance for a wide range of diverse African land tenure arrangements and categories, and not only ‘African freehold’. The findings therefore have significant implications for law reform more broadly. The thesis suggests that law reform should move away from models that do not match reality, and in particular should heed the warnings that titling policies as presently designed are particularly poorly aligned with the realities presented in the thesis.



KEY WORDS:

Land tenure (South Africa), land titling, land tenure reform, freehold title, African customary law, South African land law, family property, property, inheritance, succession.



DECLARATION:

I declare that *The Map is not the Territory: Law and Custom in 'African Freehold'. A South African Case Study* is my own work, and that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Full Name: Rosalie Anne Kingwill

Date: 9 December 2013

Signed:



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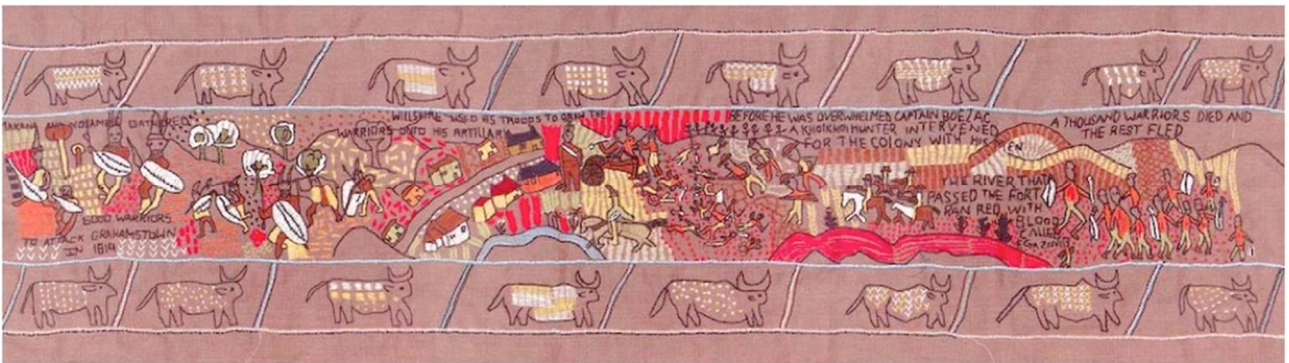
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The Map is not the Territory



Law And Custom in ‘African Freehold’: A South African Case Study



The image is from the “Keiskamma Tapestry” that hangs in the Houses of Parliament, Cape Town. The entire tapestry is 120 meters long, crafted in the Bayeux tapestry tradition. The 100 women artists who produced it are members of the Keiskamma Art Project, a project of the Keiskamma Trust, Hamburg, situated at the mouth of the Keiskamma River, Eastern Cape.

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CHAPTER 1 INTRODUCTION

1.1 'African Freehold' in question

Freehold title is a concept derived from western property law that was imported into the Anglophone African countries by colonial governments. The concept is designed to function as a complete 'package' that links title to land, interpreted as 'ownership', to the transmission of land via laws of succession and inheritance and to spatial division of land via laws and technical procedures of survey and subdivision.

Freehold title is often thought of as a monolithic concept that holds a preeminent moral status as a symbolic and material representation of 'progress' in an evolutionary process of social development. The historical evolution of freehold tenure is little known, and is usually suppressed, due to the solidification of rules governing land title in legal texts, which are taken as 'doctrine'. In fact, 'freehold' and 'title', as separable concepts, have meant different things to different actors over the course of the long historical trajectory of the growth of ideas about 'individualised' property concepts, both in their metropolitan and colonial contexts.

Freehold title is closely associated with concepts of 'private property'. It is only in recent times that private property has assumed the dominance in society that it currently holds, and through a process of elision, the word 'property' has become synonymous with 'private property'. Since the latter is closely associated with freehold title for the purposes of land ownership, defined as 'immovable property' at law, freehold title, private property, and property have become fused in the legal and social imagination. The combined effect is that title in land has become closely identified with ideologies associated with liberal 'possessive individualism' of recent origin. The precise meaning of 'freehold' title in England has itself diffused into a general association with any form of 'registered title' in the Anglophone world. The concepts of both 'title' and 'registration' can in fact be traced to diverse and separable origins, with a long gestation in the western and colonial world.

In South Africa, the fusion, and diffusion, of these concepts is not a matter of great concern when it comes to owners of land who follow Eurocentric notions of one-to-one relationships between people and property objects. It is taken for granted that the land they own is an asset for purposes of capital formation and disposition to one's heirs. For purposes of the legal doctrines that support title, the linkages between the forms of land tenure recognised in law, on the one hand, and the form of the family recognised in law for purposes of inheritance on the other, tend to blur into the background.

A central concern in this thesis is to bring these linkages into the foreground. In the process, considerable lines of divergence between the Eurocentric notions of freehold, and the version practiced according to local normative values among the subjects in the research sites emerged during the course of the research for this thesis. For this reason I have labelled the African version 'African freehold' as a marker of this distinction.

1.2 Rationale and significance

The transplantation of concepts of 'land titling' to a range of colonial and post-colonial contexts in Africa and other parts of the world has had a mixed and controversial reception. The topic has led to decades-long debates and a vast and wide-ranging literature as to the appropriateness and sustainability of land title in contexts where previously title had not existed. The thesis does not directly address these debates, which I briefly summarise below. Instead, the thesis interrogates some of the more invisible threads that hover in the background, namely the social relational nature of land tenure.

The imposition of land titling on indigenous forms of tenure in Africa, and other parts of the world, is itself the subject of a long and contested historiographical tradition, which I summarise briefly in Chapter 2.3 below. Titling has waxed and waned in national and international policy discourses in response to different impulses and ideologies. The magnetism of titling in the mid- to late-colonial period lay in its perceived solution to the socio-economic crisis in rural Africa, where colonial officials believed that private property rights would stimulate agricultural production and address poverty.

Recent times saw the re-emergence of debates about the appropriateness of extending policies of titling to formerly colonial contexts around the world, rural and urban. The age-old debate was re-ignited by the popularity among financial institutions and western governments of the views of Hernando de Soto in his publication *The Mystery of Capital* (2000). De Soto stressed the outstanding feature of 'private property' in the sense of alienable property, extolling its virtues precisely on account of its exchangeable, monetary value, which, with title, would constitute a capital asset enabling processes of private accumulation (de Soto 2000: 46).

The debate sparked simultaneous interest in the various attributes of 'legalisation' and the character of the 'illegal' and 'extra-legal', leading prominent scholars to question the nature and assumptions of the alleged 'divide' between legal and illegal. The debates about titling, while not new, excited renewed and sometimes emotive arguments about land tenure that centred on titling in the context of de Soto's claims, as well among sceptics who have long claimed that customary tenure stunts agricultural growth and investment. The debates prompted a great deal of empirical research on titling. A spate of research findings in the late 1980s refuted the automatic association between improved productivity and titling. The research did not establish causal links or positive associations between private rights and transformation of agriculture. On the

contrary, the literature shows that no positive correlation can be established between any particular tenure system and agrarian processes. Instead, the track record of titling in rural and urban contexts reveals that titling throws up complex social, legal and technical problems in its application. The intended benefits of titling fail to materialise, and title holders themselves tend to evade the very legalities that legitimate 'ownership' in the eyes of the law. The scholarship demonstrates that there are complex multi-causal socio-economic and political factors that influence the trajectory of land tenure, whether entitlements to land are formally registered or not. This scholarship, though influential in raising considerable doubt into the theories of economic development, has not replaced the beguiling, but elusive, appeal of titling in post-colonial discourses of rural development. The results of academic research invariably go unheeded by state officials whose mandate is to deliver a product, frequently in the form of title, through the formal channels and institutions of the country's political framework.

More troubling is that this paradigm has fed into, and generated, a misleadingly dualistic mindset among legal and land professionals in South Africa that 'land tenure' splits along lines of 'individual' (i.e. western) and 'communal' (i.e. African or 'customary') which unquestioningly associates Africans with collectivities, and title with individuals. This has resulted in hard binary distinctions in law between different models of tenure that take their cue, not from social relations, but from preconceived and dogmatic views of what is regarded as appropriate for predetermined social groups and classes in South Africa.

There has nevertheless been a positive trend in the scholarship on land tenure and related fields, in Africa (see Chapter 2). Many current debates about land tenure are increasing resurrecting and acknowledging the idea, mostly 'hidden' in positivist legal doctrine, that property is embedded in social relations, and that failure to recognise the sociological dimensions of land tenure leads to many of the failures in the performance of land tenure reforms. I briefly review some of this literature in Part One of the thesis. This emphasis represents a notable advance on theories that simplistically reduce land tenure to sets of prejudicial notions about rigid models that link 'security' or 'productivity' to 'social progress', and so forth.

A notable distinction can nevertheless be seen in the European literature on land tenure, which foregrounds notions of 'property' and 'family', and the African literature on land tenure, which foregrounds political concerns about entire groups and collectivities, and thus analysed in terms of discourses of 'communities', 'dispossession' and 'land tenure security'. The vulnerability of African society to the predations of first, colonial and currently global capital and country elites, helps explain the emphasis on 'security' and 'equity', underlying a defensive characteristic in the literature. Yet, these concerns tend to blind the land tenure 'lobby', including NGOs, land professionals and government officials, and academics, to the linkages between land tenure and notions of 'property' and 'family'.

The thesis attempts to address this gap in the debates and the literature by examining, in Part Two of the thesis, the impact of title on families in one small social field in the Eastern Cape i.e., the two sample field sites where Africans own land in freehold title. The different socio-spatial contexts, an urban and rural field site, increased the comparative value of the research across the rural-urban nexus. This is significant because land tenure discourses tend to divide along the lines of urban and agrarian sociological landscapes.

The somewhat exceptional circumstances of historic title in the Eastern Cape provided me with an unusual opportunity to interrogate some of the lines of concern. The presence of title lends a visibility to processes of land holding and transmission by and within families that are less easy to observe in 'communal' contexts. Individual parcels are clearly delineated by survey and removed from the direct control of traditional authorities, and 'ownership' is recognised. Land under title thus provides a prism into processes otherwise disguised by more complex layers of nested relationships and customary controls. The research reveals that title is filtered by norms reminiscent of 'customary' relationships. A far more ambiguous correspondence than is generally assumed thus emerges between notions of the 'individual' and the 'collective'. The freeholders appeared to occupy a position in the interstices of the common law and customary law, representing a local normative order captured by neither of the official sources of law

The research embraced a methodology of exploring narrative accounts of ownership that reveal the social relationships involved in land tenure. The research methodology laid emphasis on the responses by family members to issues concerning ownership of land with title. Their narrative accounts are complemented with documentary sources to chart the trajectory of familial property over a long period of time. The oral testimonies in turn coaxed open an emerging normative account of land ownership. The research scope, though pertaining to a relatively small social field, and therefore far from exhaustive or quantifiable, began to reveal a 'folk' view of tenure that I believe has wider application.

The result is a diachronic analysis of the outcomes of land titling among families whose relationships to the properties can be tracked back over time. The focus of the research involves a switch from the more conventional wide-angled view of the impact of titling among bigger 'communities' at a single point in time, to the impact of titling on a small number of families over a long period of time. This approach simultaneously represents a switch in focus from 'forms of tenure' to the nature of intra-familial relationships, since the intersection between law and property lies in processes of devolution.

The research explored the correspondence between variables such as family organisation, devolution of property and intra-familial transmission practices with the view to assessing the incongruity between vernacular norms and the common-law norms concerning the registration and transfer of property. There were significant methodological implications of a diachronic, micro-scale approach to the study. The research involved probing familial accounts of the historical trajectories of individual properties over time;

examining the official records of these properties to assess the rate and levels of formal registration, subdivision and interaction with the market; comparing the documentary records with family narratives; and comparing the family accounts across a wide number of families in each field site. The objective was to establish whether there was a coherent, alternative normative account according to which the record of titling could be interpreted. The objectives broadened when the empirical research revealed a significant impact of kinship and familial relationships on the way property is managed and conceived, requiring a major shift in focus towards (a) ethnographic methods; and (b) the historical context of European concepts of ownership and family form, which impact on the jural relationships involved in property transmission.

The evidence that emerged showed a high degree of consistency across both field sites in the way families conceptualise the meaning of title (i.e. ownership), how they conceive of their familial (including gender) relationships and how they regulate access to, and transmission of their properties. The dimensions connected up into an internally coherent explanation of how families manage their properties. The significance of the findings lies in the considerable divergence that was found between the normative pattern established for the research sites, and the formal legal system that regulates title. This has significant implications for policies that promote titling, and for law reform more generally. The findings show that Africans with title have adapted customary principles and rules to land title, and modified indigenous norms to accommodate the challenges of contemporary society. There are contradictions, strains and tensions, as there are in any relationships involving property, but at the same time there is a logical and coherent thread that links a range of variables together to form a comprehensible whole.

The main findings of the thesis suggest that differing concepts of the 'family' are fundamental to the lack of 'fit' between the law and 'African freehold', and the thesis dissects the implications of culturally constructed variability in familial identities for recognition and transmission of property. There is a strong suggestion that the findings are of wider relevance than the freeholder families discussed in this thesis. The evidence of enduring and persistent inflections of culturally constructed ideas of kinship and descent among the landowning families are present in a range of contexts in South Africa. Here, rigid models of land tenure reforms are being imposed that seldom match up to the sociological realities suggested in this thesis, contributing to increasing disjuncture between local practices and national law.

There are two corollaries to the assumption that privatisation and accumulation occurs only under titling regimes. The first is that under titling, traditional social relationships *will be* transformed, giving way to legal controls. The second is that accumulation and concentration do not occur under customary systems. Some research suggests that individualisation and commercialisation of rights in land may develop where no private, registered title exists.

The post-apartheid state, faced with the overwhelming task of turning around the legacies of colonial and apartheid inequities, has followed mixed and often fraught trajectory of reform. Attempts were made, drawing values from the constitution and evidence from real-life situations, to match reality with law by scrapping old and designing new legislation. The signs of gaps and ruptures that emerged from the ruins of anachronistic administrative practices found theoretical answers in new laws, land management frameworks and a plethora of planning laws. Some gaps were filled substantially, but others have widened, and problems persist.

One of the approaches gaining widespread traction among law reformers is the notion of the ‘living law’ as a means to both respect people’s cultural affinities as well as Constitutional injunctions of equity and cultural rights. The ‘living law’ approach is a modern rejoinder to official customary law that was set in stone by colonial interests. The ‘living law’ idea therefore simultaneously acknowledges the evolution of law in line with social change, detached from its ‘ossified’ colonial mould and giving voice to modern democratic values. The challenge remains to rehabilitate the ‘living law’ idea with an alternative to the misguided stress on dualism and dichotomy, where different cultural interpretations of land tenure have been blown up into *essential* differences.

I attempted to explore the connections between these issues by looking at cross-cutting lines of argument which emanate from a range of varied discourses about land tenure. In Part Three I broaden the focus on African tenure relationships by looking at a range of social settings cross-culturally, demonstrating the evolutionary process of laws regarding freehold title, succession, inheritance and spatial division among white society.

1.3 Historical context

The historical setting of the thesis is the eastern region of the Eastern Cape, the former Ciskei and Albany sub-regions. Here a mixed and varied range of land tenure models were overlaid on new colonial settlements, resulting in complex layers of claims to land rights, frequently overlapping.

The settlements that typify the two research sites from which my evidence is drawn were established by the colonial authorities for Africans considered allied to the colonial government. At that time the Cape Colony stretched only to the Keiskamma River, beyond which a separate colony called British Kaffraria, ruled directly by Great Britain, had been established. Fingo Village, the urban site, was located within the old Cape Colony, where colonial law applied across the board, with its emergent ‘representative’ structures of governance. British Kaffraria was ruled directly by Britain by force, edict, martial law and experiment. Though the historical-political contexts were somewhat different, the land tenure arrangements in both field sites were similar, and the social composition of the land holders somewhat homogenous.

Both the urban and rural village from which the evidence is drawn emerged in the context of continuing conflict between the colonial forces and the indigenous inhabitants of the eastern region of the present-day Eastern Cape province in the mid-nineteenth century. The interests of the inhabitants represented by the title holders in the research sites were closely linked to their incorporation under colonial law, and the expansion of the colonial borders. The corollary was that they were awarded grants of land. The prevailing idea among colonial officialdom was to integrate allied Africans more closely to white society. One of the means to achieve this was to divide the land by survey and issue individual titles to the land. In most cases title was issued in quitrent tenure. In contrast, the residents of the two study sites acquired land in freehold tenure, in both cases in the 1850s, which was novel for Africans, and relatively new among the white settlers in the region.

The progression of 'assimilationist' policies was cut short by the rapidly changing dynamics on the eastern frontier of the Cape Colony, which saw the consummation of colonial expansion beyond the Keiskamma and then the Kei Rivers. The mineral discoveries, the growth of white commercial agriculture and the birth of an industrial economy created new policy imperatives. The title holders in the two study sites found themselves at the cross-roads of new approaches to colonial rule, which saw the subjugation of black society to the interests of white settler society. The thesis explores some of the impacts and implications of freehold titling in the light of these changes, which cast considerable ambiguity on their status as land owners.

In colonial Africa, freehold title was rarely applied due to the emergence of a strong colonial tradition of 'indirect rule', which was premised on units of traditional authority holding land in trust on behalf of collectivities, commonly labelled 'communal tenure'. In general, the intention of colonial interventions was to transform and subordinate African systems of land tenure according to state law and institutions, cemented in 'native administration'. The new forms of colonial tenure involved state sovereignty over black-held land, the state taking upon itself the role of allocator in place of the chief (Chanock 1991 64; Cousins 2008: 114), which at the same time helped to validate dispossession of large tracts of land (Okoth-Ogendo 2008: 98).

The eclipse of earlier policies granting title can be seen in the reappraisal some decades into the twentieth century and a growing assertiveness by the native administrative in communal tenure, but nevertheless couched in disparaging and strongly social evolutionary conceptions of tenure, even among even the more liberally-minded colonial administrators. Howard Rogers, a lawyer in the Native Affairs Department in the 1930s (later its Under-Secretary), assessed the situation thus, that "evidence is not lacking to show that in the early days the necessity for inculcating European ideas and methods amongst the Natives by a *gradual process* was not sufficiently appreciated." (Rogers 1949: 115, original emphasis). He went on to argue that when the earliest individual grants in title were made:

... the Natives neither desired nor understood the European systems of individual ownership of land, which was entirely different from their own customs and ideas. The change was introduced before the people were ripe for it and consequently the earlier Native location surveys did not prove a success. (1949: 115).

By the turn of the century, the evaluations of government officials and commissions reveal the extent of official amnesia of the earlier policies, reversing the actual order to reflect a continued ideational commitment to individual tenure and 'civilisation' sometime in the undefined future:

The policy followed by the Government of the Cape Colony in respect of Native land tenure has been to begin by adopting the communal system of occupation observed by tribes in their independent state, and, by gradually adapting it to the changing conditions of life attendant upon the march of civilisation, while at the same time establishing a just and sound administration of their personal as well as tribal affairs, to prepare the way for the recognition by the people of the advantages of an individual system tending towards assimilation of European methods (South African Native Affairs Commission 1903-1905, quoted in Rogers 1949: 104)

Belying Rogers' apparently sanguine reassessment of the virtues of adopting 'traditional' tenure, a great deal of water had flowed under the bridge, as mentioned above. The mineral, agricultural and industrial revolution had generated a political economy very different from the circumstances that gave birth to the idea of title for Africans. The migrant labour system, among other considerations, was clearly better suited to a version of 'communal tenure' sanctioned by the native administration.

The realities resulting from the earlier policies of individual tenure presented a dilemma for the authorities, since evidence was mounting that the holders of individual title were not conforming to either the spatial or the registration requirements of title. With each generation the problem mounted exponentially. The 'failures' were a cause of concern since the earlier titling could neither be 'undone', nor sustained.

Synthesising various official perceptions of the causes of the breakdown of earlier titling policies, Rogers concludes that:

It would obviously have been futile to incur considerable expense in placing the question of the ownership of land in the Ciskeian locations on a proper basis unless steps were at the same time taken to prevent any recurrence of the former chaotic state of affairs and to ensure sound and efficient administration of the locations in the future. (1949: 117).

It was only in the late colonial period of the twentieth century that colonial officials in many parts of Africa resurrected the idea of individual titles as an answer to the mid-century agrarian crisis in Africa. Officialdom diagnosed the problems in poor agricultural productivity as a sign of insecure tenure, which in turn hampered the application of technical solutions for 'agricultural improvement'. Behind the legalistic and technical formulations was increasing social and political unrest and instability. The most celebrated and

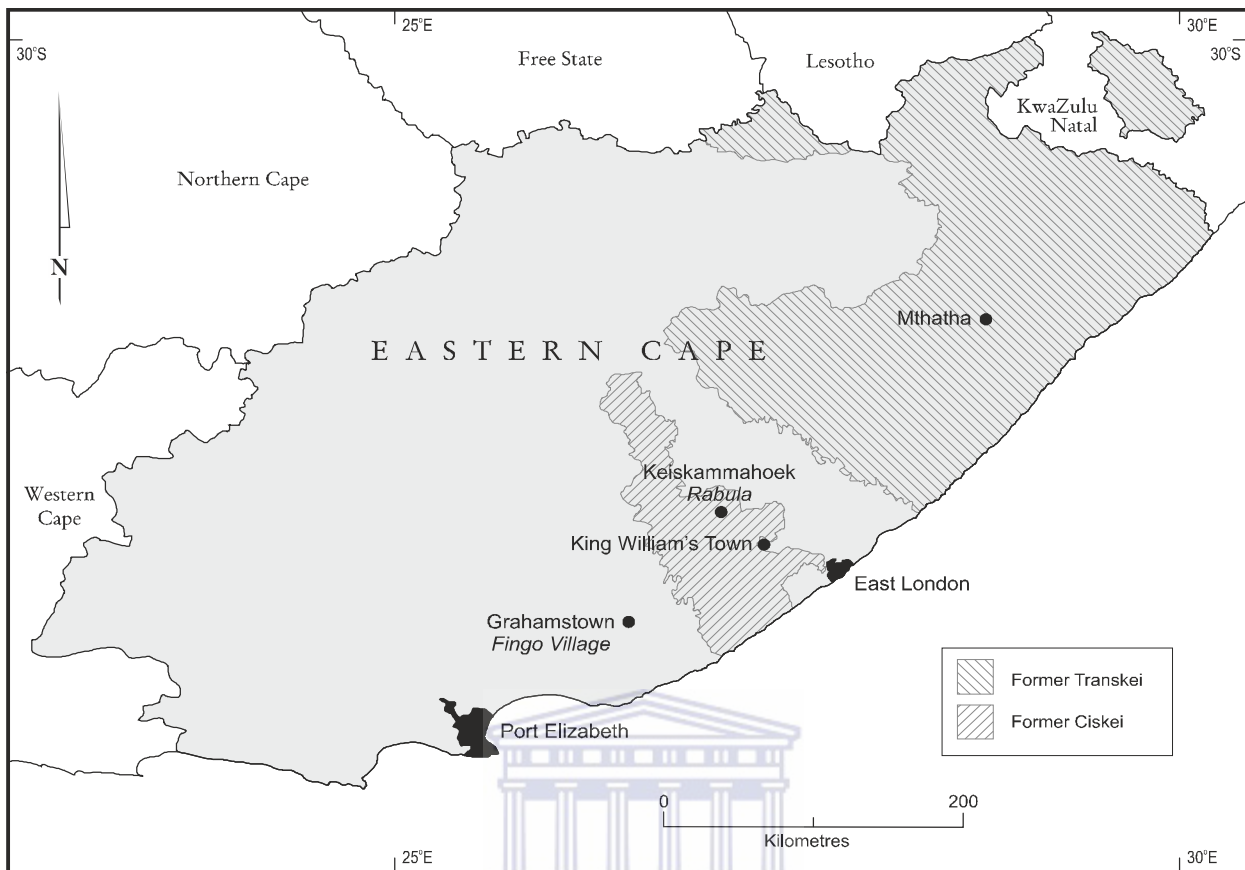
comprehensive plan to super-impose freehold on customary tenure occurred in Kenya in the mid-1950s, which was conceived as a counter-insurgency strategy to stabilise rural revolt (Berry 1993: 85; Mackenzie 1989: 92; Haugerud 1989: 63, 76-7). In South Africa at that time, discourses about creating a class peasant producers and rural proprietors were quashed by the apartheid government. The policies laid increasing stress on 'indirect rule', taken to the delusional extremes in the establishment of homeland self governance and independence.

Freehold title was thus an exception to the general trend of colonial land tenure for blacks in South Africa, and in theory contrasted sharply with the mode of authority constructed to manage the holding of land under 'communal tenure'. Before this model had become generalised in the late nineteenth century, and a full century before titling became the mantra of colonial officialdom in parts of Anglophone Africa, a small minority of Africans in the Cape colonial territories took up the opportunity of individual freehold title over their land.

1.4 Research sites: Fingo Village and Rabula

The two research sites are the urban black township of Fingo Village in Grahamstown and the rural village of Rabula in the district of Keiskammahoek, which was in the heart of the former Ciskei. The land in both these settlements was surveyed into individual parcels and issued in freehold title in the mid-nineteenth century. In Rabula, 164 properties were surveyed and purchased by Africans between from 1858 till the close of the century. In Fingo Village, 318 properties were surveyed and titles issued in 1856 to families who were already living there under informal conditions. In both sites, the owners had to pay the surveys and transfer costs. The Rabula plots ranged from 4 — 40 ha, while in Fingo Village the plots were all uniformly 1,000 sq m, laid out in a grid.

Freeholders manage their land as individual families. Since titles were recognised by colonial law, people no longer depended on local traditional institutions at the level of the community for access to their land, nor control of it. Families manage the land as individual spatial units, without reference to traditional authorities. Each family regards its property management as 'private', and there is widespread acknowledgement that families all have their own distinct 'ways' that 'differ'. Nevertheless, a distinct pattern emerged from the individual narratives of the families, as mentioned above. Across the families, and across the field sites, there is a strong sense of identification with the land based on older traditional family values with regard to the way in which they recognise their family relationships by patterns of descent. These relationships were, and continue to be, relevant for the definition of both personal identity, and access to the family property held under title. Some concepts of territorial control of land formerly exercised by interlocking traditional units of authority, from neighbourhood through clans to chiefships, were translated into lineage control of family land as heritable property.



Map 1: Eastern Cape Province with field sites, Fingo Village and Rabula

The individual control of family land had methodological implications for how I conducted the research, which I elaborate further under ‘methods’ below. The organisation of families according to distinct spatial units under the control of families meant that I explored discreet family biographies with reference to their land ownership.

Many of the present inhabitants trace their ownership to their forebears who acquired the first title in the mid-nineteenth century. Although they view their particular connection to their own properties as discrete family units, they view their connectedness to the land in general in terms of a collective African history, with a shared social and cultural perspective of their ownership, and a common experience of colonial subjectivity. The forebears of title having been first exposed to policies of incorporation during the mid-nineteenth century, their descendants were later exposed policies of segregation that sought to separate the regulation of African land and family institutions from the common law and from parliamentary oversight, introduced a confusing sets of historical contingencies over time. The contradictory policy contexts exacerbated tensions that already began to surface soon after titles were issued.

The African freeholders in the field sites shared, and still share, common social, linguistic and cultural features, which provide a common thread in the tapestry of family land management. These are all the more remarkable considering the contrasting geo-political contexts of the research sites, which I discuss further under ‘historical context’ below and elaborate in Chapter 4.

The urban versus rural context meant that there were, and are, significant contextual differences that frame the management of ‘African freehold’ title. For example, issues such as agrarian production systems and emergent distant employment markets influenced the outcomes of land tenure more directly in the rural site. Changing urban dynamics saw the progressive tightening of urban land tenure policies and new structures of black urban administration, which had an effect in the urban site. The rural owners purchased their highly priced land in Rabula, and paid for the surveys and registration, which meant they were drawn from a relatively wealthy class of cattle-owners. Historical evidence shows that many were able to translate their relative material advantage into education for their children, which in turn improved their access to employment in the civil service. The urban owners, by contrast, began from a more modest socio-economic base, and from secondary accounts it would appear that many were relatively poor. Since they were already established occupants of the locality where Fingo Village was eventually laid out, they were only expected to pay for the surveys and registration of their plots, and not the land.

Over time the rural owners were marked by another distinction with material consequences for their land ownership, and that is that they were subjected to the emerging ideology that blacks should live (that is, maintain their identity) in native reserves and be ruled indirectly, even if they worked in the white sector of the economy. The reserve in question was the future Ciskei, which at that stage was not a consolidated territorial jurisdiction. There was a significant white population living within the borders of what later became the Ciskei. This sociological distinctiveness meant that territorial segregation was something that had to be brought about by force when segregation became official policy. These changes had an effect on the trajectory of freehold title in the rural field site of Rabula, which I discuss in Chapter 5.

In spite of these differences, the trajectory of freehold title in both research sites, seen from a diachronic perspective over a long period of time, reveal a remarkable consistency in the broad normative framework that emerged among the title-holding families. This thesis is largely concerned with the underlying principles that inform the framing of the concepts of land ownership among Africans with title, which has a broader relevance in South Africa. Scholarship and anecdotal evidence suggests that similar norms and principles can be seen in a range of other contexts where titles regulate land tenure, including cases that are emerging in more recent attempts to issue title to Africans in urban townships. This is a significant cause for concern in policy discourses and laws that appear to disregard the historical evidence, and continue to base legal reforms on shaky understandings of the impact familial social institutions and relationships on the outcome of land tenure, including title.

1.5 Research Design and Methods

The main research objective was to assess the interface between the formal legal procedures for managing property and local practices among African landholders with the view to diagnosing the previously observed disjuncture between them. A related objective was to establish whether there is a coherent, alternative normative account according to which people's local practices can be interpreted.

As mentioned, the aim of the research was a diachronic analysis of the outcomes of land title among families whose relationships to properties in the field sites can be tracked back over time. The specific objectives were to explore:

- the correspondence between variables such as family organisation, devolution of property and intra-familial transmission practices with the view to assessing the incongruity between vernacular norms and the common-law norms concerning the registration and transfer of property;
- people's interpretations and understandings of what it means to have title, i.e. to gain insight into the philosophical and semantic underpinnings of people's views on ownership of land.

Disassembling the objectives above, my concerns were to:

- (a) understand how the individual families think about their ownership, and how they manage their properties;
- (b) draw connections between the individual narratives and in turn link them to norms held in common across families and research sites;
- (c) identify the common norms and logic of the social institutions that families identified as mechanisms of access to, and control of the land;
- (d) compare the norms that emerged from the narratives to the norms of the legal system that in theory regulates freehold title;
- (c) understand the norms and logic of the formal legal institutions of the national system, particularly those into which freehold title links;
- (d) identify areas of convergence and disjunction between formal institutions and family systems;
- (e) analyse the trends wider still, with the view to extrapolating some of the findings to questions of land tenure more broadly.

The overall focus on familial relationships and family law resulted in a study with a strongly ethnographic character — leaning on legal-anthropological interpretations — on the one hand, and a historical and legal-historical character on the other.

The objectives had major methodological implications as mentioned above. The switch from a broad spectrum of people often viewed collectively in a single snapshot of time to a narrower range of individual families over a long period of time (i.e. a diachronic approach) occasioned a combination of archival, documentary and field research. I reasoned that intersection between law and property lies in processes of devolution (the etymology of which is ‘descends’) which is best observed through deep and penetrative research into a smaller number of family cases extending back in time. The objective was to observe and identify processes that influence the way property passes from one generation to the next — both broadly, i.e. looking for patterns in the norms in a given social and cultural context, and more narrowly, to embrace the particular mechanisms that families use to transmit property between members.

These processes intersect with a great many factors, some of which are located in family law, e.g. rules, norms or laws of succession and inheritance and of marriage, others in property law, e.g. spatial subdivision, formal registration of transfers, regulation of transactions, etc.

The research design took into account these multi-faceted dimensions, i.e. legal frameworks, local normative orders and family practices. The study thus draws on multi-disciplinary sources and discourses. The result was the use of multiple methods, mostly of a qualitative nature. These included:

- in-depth interviews, mostly unstructured, with family members in the field sites;
- interviews, unstructured, with a range of officials in the national government, provincial government, local municipalities and municipal ward councillors;
- interviews with officials in the Magistrates Office and the Master of the Supreme Court concerning the administration of deceased estates;
- interviews with the Registrars of Deeds in King William’s Town and Cape Town;
- interviews, unstructured, with two professors of customary law at Rhodes University;
- observation and participant observation;
- analysis of relevant documentation:
 - title deeds, recovered from the Deeds Registry and produced by respondents;
 - documents of various sorts produced by families as evidence of ownership, e.g. municipal bills; official correspondence or notices, particularly from Titles Commissioners; official records or correspondence concerning deceased estates administration;
 - genealogies of Rabula lineages;

- archival documents;
- cadastral maps showing property boundaries;
- comparative analysis of relevant research
 - an inter-disciplinary study conducted by the Institute of Social and Economic Research (ISER), Rhodes University in 1952 in several Keiskammahoek villages, including Rabula;
 - other studies conducted by ISER researchers, particularly Prof Chris de Wet, who did extensive field work in Rabula in the 1980s;
- review of theoretical literature on property in Africa;
- review of legal texts on South African property law;
- review of selected secondary historical literature of the Eastern Cape;
- review of anthropological literature on kinship and descent.

Time frame of the research

The primary evidence on which the thesis rests is a set of interviews with family members in the two field sites. In some cases I conducted these interviews longitudinally, following up on sequences of events or details that needed to be verified.

The bulk of the interviews were conducted in 2006, and a further set of interviews was conducted in 2008 and again in 2010. In 2006 I interviewed 33 families (represented by one or more family members), in Fingo Village, and in the same year 18 in Rabula. During 2008 I followed up on many of the same families, but in a few cases I interviewed additional families. During 2010 I interviewed several more families in Fingo Village (some more than once) and a smaller number in Rabula. Interviewing in time sequences helped me to track various cases and follow up on general trends in the two field sites.

In many cases I followed up family cases over a period of time, or with other members of the family identified by the respondents. These sometimes took me further afield than the research sites, since families are stretched across a wide social and spatial field. Some of the younger generation of the Rabula families live in the urban centres around East London, King William's Town and Dimbaza. Some members of Fingo Village families live in other townships in Grahamstown, or in the former white suburbs, and also in the big cities, mainly Port Elizabeth and Cape Town.

Implications of diachronic analysis of individual family units

The method of diachronic, individual, unstructured interviews was chosen as a means to explore the trajectories of individual case histories over time, and to build a more general pattern from individual cases. This approach can be contrasted with the research on titling that examines the impact of titling at a particular moment in time. The single-moment research is often conducted across a wide range of socially connected people delineated, not by individual family unit, but by jurisdictional units, such as urban townships, traditional communities or rural villages. This latter method requires rigorous sampling, since the results are quantified according to bulk data.

My research method did not seek to quantify data. The qualitative approach was aimed at understanding historical processes, textured responses and detailed accounts of family and property 'biographies'. These in turn provided a means to construct a normative pattern in the processes that regulate the holding and transmission of land in the two study sites. An important aspect of this approach was to listen to *how* family members explained the trajectories of their property histories, which was invariably an account of their relationships with other family members (even if the problem being discussed might be about the payment of municipal bills).

Through their narratives of familial relationships in relation to the details of everyday matters concerning their properties, I was able to reconstruct the methods people used to trace their kinship relationships. This in turn sharpened my ability to angle questions in a way that resonated with the emerging normative patterns.

The process of interviewing was therefore a dialectical process of exchange, building patterns, identifying the links and making the connections. Over time a distinct coherence and consistency in their responses emerged, and it became easier to semantically interpret the expression of the details of their relationships, transactions, problems and conflicts. I did not impose my legal understanding of how the system 'should work' (unless this proved to be relevant), since this approach would have put obstacles in the path of following what people 'actually do' and 'actually think'. The qualitative interview methods provided the necessary flexibility to allow for considerable variability between family narratives.

Respondents seldom conceptualised ownership in jural or legal language, and I did not encourage this approach. My task as researcher therefore involved translating their descriptions of every-day relationships into the categories and maps of the legal language for the purpose of argument in the thesis. This involved a necessity for reflexivity on my part and that of my interpreter.

This qualitative approach means that I was not concerned with sampling techniques for the purposes of a 'representative' category of people in each site. My objective was to identify and explore particular themes

that emerged, and to gradually build up a picture of the patterned responses across the research sites. This was a ‘discursive’ methodology that depended on iterative processes of interaction between myself and the narrators.

This approach may have led to a bias towards ‘trouble cases’ in Fingo Village, where it quickly became known that I was conducting research into ‘title deeds’ and this coincided with a general concern about title deeds on account of the pressure people were under to produce ‘updated’ title deeds for the purpose of housing subsidies. My interpreter lives in Fingo Village and therefore became a magnet for people who hoped that my research could help them resolve problems regarding their properties. In some cases the problems concerned conflicts within families regarding access rights and rights of disposal.

This was less of a problem in Rabula, where both my interpreter and I were unknown, and I began the process of interviewing somewhat randomly. Over time I became familiar with the names of prominent families. If there is a bias in Rabula it is likely to be that I interviewed the more affluent families. I did attempt to balance this by interviewing families of more modest means. I stayed with a family in Rabula when doing my field work, and became familiar with the more everyday dynamics of social life.

In summary, the momentum of the process propelled the research. This meant I do not necessarily have representative spread of interviewees and there is a limited quantifiable data set. On balance I judged the advantages of the more ‘organic’ approach outweighed the potential advantages of a more rigorous scientific approach.

Language

Many interviewees have a basic, or even fluent, grasp of the English language, but the interviews were generally conducted in *isiXhosa*, translated by my interpreter. This means that there was always the possibility of mistranslation. I became aware of problems with words that have ambiguous meanings, such as ‘inheritance’ and ‘property’. As I became more sensitive to the nuances, I would write down the expressions people used in *isiXhosa*. When literally translated, these expressions diverged significantly from the more sophisticated translations my interpreter used, particularly when the expressions were referring to meanings of ‘family property’, ‘home’, ‘house’, ‘family’, etc. I had to very consciously probe these inflections in language, and only grasped the significance of some of them over time.

Social space

Interviews were conducted in the homes of the families, which provide the ‘social space’ for narrators to explain their ownership arrangements in their own terms, and not with reference to any particular legal or regulatory framework, or with any sense of formality, decorum or officialdom.

Deeds Offices

I worked extensively in the relevant Deeds Registries to secure documentary evidence of titles deeds to provide the means to track the passage of legal title over time. These provided me with the necessary backdrop against which to compare the family narratives.

The quality of the documentary records of titles differed between the two study sites on account of the different methods of storage between the King William's Town Deed Registry, where the Rabula deeds records are kept, and the Cape Town Deeds Office where Fingo Village titles are housed. There were methodological implications. I discuss these in Chapter 5 and 10. These 'official ethnographies' are instructive in pointing to the contours of official logic and legal ideology. The South African system of Deeds registration (which differs from a Titles system) also has methodological implications in the sense that, with each transfer under a Deeds system, a new title deed is issued. This pertained to Fingo Village, but in Rabula, 'simplified' methods of endorsement especially designed for 'native titles' obviated the issuing of fresh title deeds every time a transaction occurred.

I was able to track the title biographies of all the Rabula properties and quantify the results on account of the simple storage methods in books per property. I was unable to do that for the Fingo Village properties, which are stored according to date of each transaction, along with all the others in the Registry. The composite of Rabula title biographies provided insight into the passage of property over the entire period from when titles were issued in the previous century to the present. In the case of Fingo Village, I tracked a dozen or so individual 'title biographies' by locating each title deed by the date of the transfer. A single property that has undergone changes might involve four to five separate searches.

Archival research

I conducted archival research near the beginning of my study in the state archives in Pretoria. Once again the unusual histories of the two study sites had methodological implications in that they were not historically archived with the body of 'Native Commissioner' files that usually provide the most fruitful avenue of archival research into rural black villages. I found documents related to the early history of the Rabula commonage (mainly in forestry files), as well as some correspondence regarding headmen, which gave me a general flavour of the early development of the settlement, but the scope of this thesis precluded detailed reference in the thesis.

The archives were less useful for Fingo Village. However, since consent was required from the Governor General for all land transactions pertaining to African freehold title, there were volumes of references to individual applications for transfer. These early records provided a contextual framework for me to

understand some of the general dynamics of the early development of the two field sites, but I made only limited use of them in the text of the thesis.

Implications of the research approach

There were significant methodological implications of a diachronic, microscalar approach. The emphasis on the historical trajectories of individual properties over time meant that family narratives were orientated towards the passage of property over time, and not simply the 'here-and-now'. The 'long view' is sensitive to familial social relationships that unfold slowly over time. These do not change dramatically and suddenly in response to external changes.

Since families embrace a strongly unilineal descent group ideology, their narratives naturally tend towards links to the past and the distant past, mostly conceptualised in terms of their relationships with their forebears, and in particular the 'first man' to acquire title. Their memories do not necessarily extend to the precise details of names, genealogical links, dates or details of significant events. Validation of family relationships traced through descent groups does not require memory of all the names and inter-linkages.

In order to add additional veracity to the family narratives, and to help me follow sequences that are not always narrated in a clearly consecutive way, I compared significant events in their stories with documentary evidence wherever possible. This added coherence to the threads of their stories, and helped me grasp the significance of events and transactions. It also gave me a comparable framework with which to examine other family narratives. The most important documents were title deeds, genealogies and in Fingo Village, municipal bills. The latter gave me important clues about the dynamics of the family properties.

In some cases I provided families with their title deeds information recovered from the Deeds Office, particularly in Fingo Village where families feel more vulnerable, or because officials were putting pressure on the owners to produce current title deeds.

There is always a danger in research of this kind, which sometimes involves intimate family and community social relationships, that one may become embroiled in family or community disputes. In Fingo Village the potential was there on account of family conflicts, while in Rabula there were community disputes between the freeholders and the non-title holders regarding commonage rights. In each case I represented a potential 'resource' to be used to channel the particular grievance. I had to consciously strategise to maintain a neutral stance, whilst at the same time remain within earshot of the unfolding dramas. These issues represent considerable moral dilemmas for the researcher. One way in which I could rationalise my distance was to give respondents copies of documents, including title deeds and archival documents.

The choice of an urban and a rural field site put constraints on the scope of my research. My research focus, which was already multi-faceted, precluded further detailed research and analysis of other important issues, such as production systems in the rural study, or municipal and urban dynamics in the urban study. A separation of rural from urban concerns may have provided the context for more detailed contextual analysis of tenure relationships in relation issues of political economy. On the other hand, by considering a rural and urban site in terms of the same framework provided a unique opportunity to explore the convergences in the thinking of landowners across these contexts. The consistency in my findings across the two sites lends weight to my overall conclusions of the saliency for land tenure of African familial social institutions, which are critical in defining property relations.

Diagnostic Events

The insights I gained into the norms of family ownership and familial property relations meant that I was able to discern particular events or transactions that indicated a possible change in the direction of the rules and norms reflecting the general normative order. Moore describes these as ‘diagnostic events’. (Moore 1987: 730).¹ I have tried to show both continuity and changes of these sorts in family narratives in Part Two of the thesis.



1.6 Structure of the thesis

The thesis is structured into three parts to take into account the different frames of reference within which I have presented my material.

Part One raises various conceptual lenses that I selected as useful frames of reference for making sense of the complex material discussed and analysed in Parts Two and Three.

Part Two presents my findings from field research and Deeds Registry information. The findings are presented in terms of particular family case histories that shed light on the concepts that inform the property systems of the African freehold families. I analyse the evidence in the light of my interpretation of the patterns that emerged from my field and documentary research.

¹ Moore describes a ‘diagnostic event’ as “the kind of event that should be privileged is one that reveals ongoing contests and conflicts and competitions and the efforts to prevent, suppress, or repress these. Of course, the field-worker cannot always know in advance what event-contexts will carry this burden of historical meaning. Yet there are certain kinds of incidents, one might call them “diagnostic events”, which have a strong likelihood of exposing such information. Thus, for example, the transfer or acquisition of major items of property can be considered a likely “diagnostic event”. So, in a farming area, if land is normally inherited from father to son generation after generation, one is in the presence of some apparent continuity. But if at some point some fathers start to sell their son’s patrimony to nonkin, some part of the pattern of local replication is being broken. This kind of event is a telling historical sign visible in fieldwork. Quickly one must try to find out how often it is happening and what people are saying about it. (Moore 1987: 730).

Part Three examines various facets of the legal-institutional orders that have historically framed land tenure relationships in South Africa. This section is to some extent a mirror image of the social-relational realm in Part Two. The legal concepts discussed in Part Three include an overview of the formal property systems based on common-law principles.

The chapter headings and key themes are as follows:

Part One is entitled “History or Tradition?” to underline the different interpretations of the history upon which present relationships are built, and claims validated.

Chapter 2: New Maps, Old Territory

This chapter considers the approaches of various scholars who have grappled with the problem of law and custom in the colonial context, with particular reference to the conceptual challenges thrown up by the phenomenon of ‘African freehold’ discussed in this thesis. The concepts relate to the multiple fields of law, custom and social norms, which interact in complex ways when legal interventions are introduced. Some norms are reflected in state law and others in locally observed ‘rules’ and practices. I sought out literature that helps to conceptualise land tenure beyond the conventional binary that divides ‘western’ and ‘African’ concepts of land tenure and who have identified patterns and trends in new categories and structures of land tenure relationships in the context of colonial conquest. I was particularly concerned with interpretations of property and property relations, and the paradigm shift from thinking of property as a ‘thing owned’ to more abstract concepts which Africanist scholars have embraced as highly pertinent to the multiplex social arrangements of African tenure.

Chapter 3: Concepts of family and passage of land

This chapter explores changing concepts of ‘family’ and the on-going importance of affiliation, affinity and other socially constructed identities, such as gender and seniority in the links between social identity and land holding. These concepts have been crucially affected by external changes that have resulted in new rules or channels of access to land and its transmission, but the concepts and ideologies themselves have also affected the way in which these changes have impacted familial life and property. The legal implications for property distribution flow from people’s conceptions of the basic social unit that holds and transmits property, and which in turn relates to the spatial unit in question. I built on existing literature on the phenomenon of African freehold in three contexts: in Kenya, where the most celebrated titling programme in Africa was undertaken in the mid-twentieth century, in Zimbabwe; and in Keiskammahoek district, South Africa, where a multi-disciplinary study was conducted in 1952. All the studies stress the persistence of African customary kinship relationships, and significance of gender relationship. I go on to examine kinship concepts, African descent groups such as lineages and the importance of these concepts for processes of transmission of property.

Chapter 4: The Grey Areas of the Grey Era: fixing Africans to measured map

The chapter is mainly concerned with general historical and social background of the forebears of the residents of the study sites, to whom they were, and are culturally aligned. The inhabitants of the two field sites are culturally, linguistically and socially homogenous. Their history is unusual in that the people concerned were allied to the British government, and their integration into the Cape economy and polity was part of the process whereby they received grants in land. I discuss aspects of the 'colonisation of space' and new land maps in the old Cape Colony and British Kaffraria, where the two sites were respectively situated. I am also concerned with various interpretations of the early history resulting from variable patterns of demographic settlement and land tenure regimes, which cleaved along a range of distinctions between various categories of the population as well as along land tenure lines.

Part Two is entitled "In the Shadows of the cadastre" to capture the idea that 'African freehold' emerged and was sustained in the interstices of the common law, and to stress the importance of spatial division. I traverse some of the spatial and conceptual contours of 'African freehold', including concepts of ownership and transmission. I show how the freeholders have struggled to align their symbols, concepts, language and ideas about land ownership with the official systems. I show through both stories and written records the problems of 'translation' between the symbolic and language-maps of the authority and those of the owners. I explore the disconnections between them and also the synergies.



Chapter 5: *Notenga*

Notenga is isiXhosa for 'those who bought' their land. This chapter discusses the specific histories and social and spatial characteristics of each study site respectively. I use official and documentary sources to trace the particular trajectories of property in each study site. I trace patterns and trends from these documentary sources as a backdrop the chapters that follow, which follow the narratives of the respondents in the field sites.

Chapter 6: "The Law Cannot Produce a person to represent the home"

In this chapter I look at the concepts African freeholders employ to adapt the concept of the family descent group and the identification of land as 'family property'. I discuss the divergences between these concepts and the legal concepts that officially regulated freehold title. I focus particularly on the concept of 'custodianship' that has emerged among African freeholders.

Chapter 7: Making Anomalies Work: continuity and change in property relationships

In this chapter I discuss the devolution of property over time. Social and property relations are revealed in the process of transmission of land. I discuss the problems of language in adapting old institutions to new.

Chapter 8: Kinship, Gender and the Devolution of Land

In this chapter I look more carefully at the agency of, and implications for the role of women in the transmission of freehold land in the context of their continued adherence to the way in which kinship relationships are structured in families and the specific implications of terms like ‘inheritance’ and ‘succession’ to the transmission of land.

Part Three

Part Three covers selective ‘slices’ of the legal and institutional framework in the Eastern Cape; both the formal-legal property framework and the alternative tenure configurations that emerged under administrative systems of governance. The section includes the way in which the Deeds Registry information reflects, or does not reflect, property transactions, transfers and devolution of the properties. Part Three comprises the legal ‘map-work’ that shaped the land tenure domain in the Eastern Cape. Through selective engagement with particular aspects of the institutional environment, I consider the development of multiple, subordinated tenure regimes that were constructed during the colonial era, and reinforced under apartheid. Law and norms governing ‘African freehold’ pulled in contradictory directions as a result of the application of local norms, as well as the development of segregation and ‘customary law’. I look at some of the sources of these tensions.

Chapter 9: The Law, The Family and Social Change

In this chapter I examine the adaptation of colonial ideas of inheritance of land to customary law. This involved the application of the rules of ‘primogeniture’ to inheritance of land via male-to-male succession, validated by customary law. These legal ‘reforms’ impacted on ‘African freehold’ in that colonial administrators attempted to force-fit African title into one or other of the two legal paradigms, that is, the common law and customary law, neither of which, in reality, reflected the situation on the ground. I briefly discuss the post-apartheid Constitutional reforms in marriage and property in the context of gender equity, which, far from resolving the contested area of family law, has raised more questions than answers.

Chapter 10: “Away in the Locations”: spatial control and Segregation

In this chapter I discuss spatial controls and the various legal devices that were adopted by the administration to shoehorn ‘African freehold’ into the segregated realm of African administration, whilst at the same time striving to maintain African title within the framework of the common law. The colonial authorities also intervened in the *legalities* of African title, i.e. the way in which the law recognises property, in order to close the gap between law and local practices. These interventions resulted in technical modifications to the law.

Chapter 11: South Africa’s Tough Rope of Ownership

This chapter considers the historical construction of freehold tenure and the national cadastre as it affected the white minority, and how ‘ownership’ came to be associated with white property and surveyed land parcels, which concepts also changed and adapted to local circumstances over time. I followed the logic that in order to understand the dualistic paradigm of law inherited by the post-colonial state, it is necessary to bring the construction of the common law into the picture, since the two were mutually constructed as mirror images of each other. “... customary law cannot be understood without its white ‘other’” (Chanock 2001: 35).

Chapter 12: Conclusion presents key findings and a synthesis of the key concepts and arguments raised in the thesis.

A key distinction that helped me to conceptualise and structure the thesis is between the ‘categorical’ dimensions of tenure, and ‘concretised’ property relationships as theorised by Von Benda-Beckmann *et al* (2006b: 14-25). Von Benda-Beckmann *et al* point out that a significant problem in property theory is the failure to distinguish between categorical and concretised property relationships. The authors point out that there is a tendency in the economic and policy discourses is to privilege state law and property rights, while non-state normative orders are neglected. This problem is exacerbated in situations of legal pluralism.

The authors define concretised property relationships as “the layer of actual social relationships ... between property-holders with respect to concrete valuables”, which are often expressed in relation to wider social networks “where property relations form one important component of multiplex relationships” (ibid: 19-20).

The case studies in Part Two reflect this layer of social relations vis-à-vis property, while Part Three focuses on the layer of state law and rule-categories. I have reversed the conventional order of prioritising the categorical elements. The concretised and categorical dimensions are not cut off from the other as if in a self-contained capsule. For analytical purposes they may be dissociated from each other, but in reality, concretised property relationships are shaped by categorical criteria. Nevertheless there is theoretical utility in differentiating between them, as “they are different social phenomena and constitute different constraining and enabling elements for social interaction” (ibid: 25).

I have found the distinction between the concretised and categorical domains particularly relevant for the study of ‘African freehold’ on account of the lack of synchronicity between the social relational, or ‘concretised’, realm of property relations on the one hand, and the layer of state laws, rules and categories on the other. Yet, it is clear that the layers cannot be examined in isolation of each other.

I have arranged the material in a manner and sequence that takes into account the conceptual concerns arising from the distinctions I draw between categories (legal prescripts and ‘forms’) and concretised relationships (social relationships). The chapters are contained within an overall structure of three parts.

1.7 Maps and Territories

The title of my thesis is derived from the insight of the Polish-American scientist and philosopher, Alfred Korzybski. He authored the dictum “the map is not the territory”, encapsulating his view that an abstraction derived from something, or a reaction to it, is not the thing itself (Korzybski 1933:xvii; 61). Korzybski held that there is a tendency for people to confuse *models* of reality with concrete manifestations of reality. In this aphorism the ‘territory’ refers to life, or the external world, while the ‘map’ consists of generalizations and abstractions that we use to make sense of it. Marxian theory distinguishes between the ‘abstract’ and the ‘concrete’, not as distinctions between the realm of ‘ideas’ and ‘reality’, but between abstractions on the one hand, and the myriad combination of determinants that make up the concrete world. Both contain elements of the ideational and the real, and mapping new legal frameworks can never take into account the indeterminacies that impact on relationships in unpredictable ways.

An obvious analogy is the distinction between geographical territory and a map of it.

A map can describe a territory in a structure of symbolism that allows us to traverse the land, which gives us a useful tool, but our perception of the map can never equal the territory, only our version of it, our map. All information comes to us as second hand and is processed into linguistic symbols, and transferred into marks and words on maps (Wilson, 2004).

I employ the idea of the map-territory relationship to illuminate the interconnectivity between the abstract representation of property and the social relationships that animate property objects. Maps, as interpretations, mediate claims to property by acting as filters of the concrete world, but these can never match up to the manifold ingredients of ‘life in the round’, and if they did, would not be much value as maps! If they tried to depict everything we *could* be aware of, they lose their symbolic value. A specific abstraction or reaction does not capture all facets of its source (Wilson, 2004).

I do not intend to stretch the metaphor too far. The word ‘territory’ is also used by scholars to refer to spaces of governance, or jurisdictional spaces, while ‘maps’ can mean a representation of particular spaces with limited meaning. The key distinction I draw in the conceptualisation of the complex terrain of law and social relations, is between ‘maps’ as abstractions of reality and territory as the aggregate of concrete forces made up of a range of determinants that are sometimes referred to as the external world.

This thesis is about land tenure and property relationships in a small social domain in the Eastern Cape, to illuminate an infinite potential world of maps and territories in South Africa. The idea of ‘land tenure’ is

itself a set of representations of complex external social and physical worlds. Land tenure as a concept is inherently a process of mental mediation using symbolic filters and markers. In order to make sense of the complexity, legal texts and official discourses as well ordinary people employ the use of 'categories' to capture or describe the patterning of powers, rights and obligations involved in relationships to the land and property. The categories frequently get confused with the real or 'empirical' world that involves infinite subjects and objects, and include beliefs, relationships, emotions, social identity, and political networks. Attachment to ideas represented by 'maps' as interpretations of reality build on sets of beliefs, from where they easily harden into fixed ideological positions that may lose their correspondence with concrete manifestations, the 'territory', that give rise to them. These tend over the course of time to rigidify into beliefs and ideas that may obscure or mystify the underlying social relations. Karl Marx used the term 'reification' for this phenomenon.

Maps are therefore useful and necessary, but lose their utility, even becoming counter-productive, if they engage in attempts to 'resemble' reality. Maps that coincide 'point for point' become a self-defeating exercise, such as a map the same size of the world! (Borges 1935). Maps are useful precisely because they are able to 'lift' the information that is relevant for the purpose intended. This is, however, only socially useful if their *structure is analogous* to the empirical world². Maps therefore need constant re-alignment.

I find the map-territory analogy useful for the thesis for several reasons. Firstly, for maps to be useful interpretative devices, they need to be analogous in structure to the world they represent. My thesis is first and foremost about official land tenure laws and policies (the 'maps') that do not correspond to social realities in a range of social and political domains in South Africa, illustrated in this thesis by land tenure relationships, and the very concept of land ownership itself. There are two ways of looking at this. On one level this may simply reflect maps that are out of alignment with reality, suggesting the need to search for alignment. The evidence in my thesis demonstrates the disjuncture between state laws and social territory. The map-territory relationship, however, goes further. If one accepts that maps never depict 'society in the round', which by its very nature defies point-by-point comparison, then attempts to bring greater correspondence between them by instrumental interventions (e.g. land reform), create a new round of dialectic exchange on account of the indeterminacies that enter the terrain of changing political and economic relationships. The map-territory relationship helps to *make visible* the ongoing patterns of contestation over interpretation of meaning and struggles to access and control resources, which means that the gap can never be filled in any absolute sense, but help to *make sense* of the processes in motion.

² Korzybsky (1933, fifth edition, 1994: 61) wrote: "If words *are not* things, or maps *are not* the actual territory, then, obviously, the only possible link between the objective world and the linguistic world is found in *structure*, and *structure alone*. The only usefulness of map or a language depends on the *similarity of structure* between the empirical world and the map-languages.

Secondly, the domain of land tenure is rich in conceptual systems, particularly in the context of conquest and social change, where sets of concepts based on the values and economic interests of the dominant society are imposed on the beliefs, values and productive systems of subordinated societies in a range of cultural contexts. The political filters or maps of the authority ignore or disdain select aspects of the conquered territory, but they also transform the territory, and therefore the maps, of the subjects. The process is a dialectical one, which defies neat dualistic divides between the dominant and the subordinate. Maps can, and do, change the territory, just as the territory can, and does, change the maps. The map-territory relationship challenges the conventional binaries that depict national or global, but especially colonial or post-colonial contexts in terms of separate and separable institutional ‘systems’ or political domains. The switch to a relational realm helps overcome both semantic and legal dualism in the conceptualisation and actualisation of land tenure ‘rights’.

Thirdly, the language and codes of land tenure are rich in symbolic markers or ‘maps’ of people’s relationship to the earth’s surface: in unwritten and flexible spatial markers; in cartography; in printed records, titles, registers and surveyed boundaries; and in rules, laws and other social or legal frameworks or normative ‘orders’³. The myriad social layers which these symbols represent results in unusually complex relationships which can be rendered more intelligible by sharpening the analytic distinctions between categories and concretised social relationships (von Benda-Beckmann 2006b: 10-22).

Fourthly, symbolism involves linguistic and semantic expression. Abstractions are derived from both non-verbal impressions and verbal indicators. Korzybski said: “[a] language is like a map; it is not the territory represented (ibid: 498). My thesis is also concerned about problems of ‘translation’ and how language can ‘filter out’ or ‘filter in’ symbolic social codes and belief systems, often struggling to align old maps with new territory, and vice versa. Language, as a form of linguistic mapping, may obscure asymmetrical relationships of power. A similar analogy could be applied to texts, such as legal texts, which are the maps of formal law. On closer examination the supposed coherence of formal legal maps reveal a far less systematic order than conventionally attributed to highly developed legal doctrine and principles.

Fifthly, the distinction between maps and territories has provided a rational basis for organising the structure of the thesis. It has allowed me to discuss the realm of concepts in Part One, to analyse people’s own representations and interpretations of property relationships in Part Two and to extract some of the broader context of the legal-institutional framework and land mapping in Part Three. My interpretation and understanding is in turn ‘my map’ of their maps and territory. All three involve a dissection of both the abstract and the concrete manifestations of changing land tenure relationships.

³ The concept of ‘normative orders’ (elaborated in the scholarship of Max Weber) provides a bridging concept between formal law and local regulatory domains beneath the control of the state. The idea is particularly useful in the culture-laden field of land and property, and helps overcome the sharp division between ‘legal’ and ‘customary’ or other social domains.

In my conclusion I raise questions about how the current post-apartheid dispensation in South Africa continues to struggle to align emerging land tenure maps with the country's super-map, the Constitution. To what extent can the Constitution reflect the existing territory?



PART ONE Tradition or history?

Part One introduces (a) the conceptual lenses that I selected for making sense of the complex material discussed and analysed in Parts Two and Three of the thesis (Chapters 2-3); and (b) the general historical context of the field research sites (Chapter 4). The title raises a question about the history upon which present relationships are built, and claims validated, suggesting that people draw from a range of sources to legitimate their understandings of their rights to property, including self-validating ideas of tradition and recorded events which changed how things had always been done. The bricolage of interpretation underlines the importance of the specific context in which history *and* tradition are made.

CHAPTER 2 NEW MAPS, OLD TERRITORY

2.1 Introduction

We saw in the Introduction that titling has a long and contested historiographical tradition as well as mixed record of application, with ambiguous results. The scholarship in the main shows that titling has not significantly improved rural agrarian production, nor had a conclusive impact on promoting tenure security in informal or formalising urban contexts. Titling nevertheless makes an impact on social and political relationships; only these may not be in line with the expectations of policy makers. In Kenya the evidence suggests that most of the outcomes have been contrary to expectations and exacerbated the problems that titling was supposed to solve (Berry 1989b, 1993; Haugerud 1989, Mackenzie 1989, 1993).

When imposed under conditions where identifiable individuals do not have effective control of investment in, and disposition of land the outcomes of titling have been ambiguous and sometimes volatile, and cannot be causally related to social differentiation or capital accumulation; while the impact on tenure security depends on who in the family benefits, and who loses. The literature shows that commercialisation and concentration of wealth in Africa occurs with or without formal title. The corollary is that title in itself does not promote the conditions for agrarian transformation, economic development or long-term sustainable tenure security for the vulnerable. The factors that influence both micro and macro-economic changes are more complex and multi-faceted than legislating tenure; and examples of unintended effects of legal mechanisms are legion in Africa.

Despite the rootedness of titling in the imported common law of the colonial power, with all the attendant powers accorded to the owner of individual use, control and disposition of land, over the long-term the administration of titles for Africans became mired in legal dualism. Colonial rule changed the mechanisms of access to land, but it did not dissolve African social and familial relationships, and might even in some

respects have strengthened reliance on traditional social networks, in altered form (Berry 1989b: 43, 46). The resulting intersection between law, the social organisation of the family and social production systems called for legal and administrative adjustments to accommodate African practices, as well as to restrict African accumulation. These adjustments, along with changing economic and political circumstances, altered customary practices and created new classes and categories of people as well as new sets of resources. This in turn led to the proliferation of both legal mechanisms and social and political networks of access to, and control over, resources. Neither the common law nor customary law kept up with these ongoing situational adjustments and dynamic forces of change, which could not always be predicted.

Furthermore, land ownership is subject to intersecting sub-systems of law, such as land tenure legislation, succession, inheritance and family law. These aspects are common to statutory law, the common law and customary law, and these sources of law responded in varying degrees of synchronicity with realities on the ground, frequently diverging significantly from them. Berry (1989b; 1993) has charted the proliferation of processes of access to, and control of resources and the exponential and dynamic manner in which changes built upon each other to create the conditions of ongoing transformation of relationships, with recursive patterns of maintaining and reproducing social networks and kinship relationships.

The result is usually a *mélange* of local ideas and practices that resonate in varying degrees with the principles in the main bodies of official law, none of them decisive. It was (and is) not uncommon for confusion to set in over what laws actually apply in certain contexts where normative and legal intersections have fused to create new principles or social institutions, which might as yet be unnamed.

Despite the bricolage of customary and colonial modes of access to, and control over resources, the legal system remained split between two systems of law that met the ideological interests of both colonial officialdom and segments of African society for whom entrenchment of by-gone tradition created new opportunities of authority. These sets did not in reality operate in a neat parallel, but were each influenced and affected by the interaction of colonial and African law, so that customary law was itself transformed in the process. As various scholarship points out, legal pluralism was a “contradictory blend and not a neat parallel” (Peters 2006: 86). The very concept of land tenure is “a contested, shifting terrain; an integral part of making claims to land can involve debating the nature of tradition” (Pierce 2013: 143, cf Chanock 1991: 63). The result was not two “‘systems of jurisprudence ’ — African and English — but ... English law and many African systems” (Berry 1993: 41 quoting Sutton).

Notwithstanding the evidence that land tenure regimes contained complexes of mixed variables, which are a response to different political, agro-ecological and economic conditions, the tendency among colonial officials, bureaucrats and elites has been to depict land tenure in terms of a stark binary between western and African customary forms of tenure, each associated with certain ‘typical’ attributes. These attributes are

persistently stereotyped into polar opposites or typologies of tenure that, on closer circumspection reveal more complex sets of relationships, which continue to defy any neat division between collectivism and individualism, or customary tenure (or ‘communal tenure’) and ‘individual’ tenure, the latter associated with title. For those colonial constituents whose interests were advanced by the subordination of African land tenure, the legal association of title with ‘ownership’ implied that all tenures without title meant non-ownership or, “not freehold” (Pierce 2013: 156), which had political repercussions for both the interpretation and translation of indigenous concepts, as well as the distribution of power in society.

The concepts I discuss in this chapter relate to the multiple fields of law, custom and social norms, which interact in complex ways when legal interventions are introduced. Some norms are reflected in state law and others in locally observed ‘rules’ and practices. The complex manner in which different normative orders intertwine presents a challenge for analysis, particularly considering the varied historiographical contexts in which ‘customary’ law and tenure have been framed to reflect different interpretations and revisions of its meaning (Berry 1993: 37; Cousins 2008: 110; Peters 2006: 85-6; Pierce 2013: 142-3; 155-7; Chanock 1991: 61-77).

The cross-cutting social norms, customs and law result in considerable legal ambiguity, regardless of the typology into which tenure is conventionally cast. The ambiguity may provide room for manoeuvre by some to act in ways that increase security and productive use, while in other cases it may be a cloak for increased concentration and power in the hands of some at the expense of others (Peters 2002a: 45; 54-56; 2006: 90-91). There is no neat division between tenure form and concentration of wealth or accumulation of capital via land, despite the tendency in ideological statements to associate title with concentration and social differentiation. Title may nevertheless, paradoxically, provide the grounds for increased investment in *social relations*, that reproduces privilege but not necessarily productive use of land (Berry 1989b: 49-52. 1993; cf Peters 2002a: 56).

This chapter considers the approaches of various scholars who have grappled with the problem of law and custom in the colonial context, with particular reference to the conceptual challenges thrown up by the phenomenon of ‘African freehold’ discussed in this thesis. I have selected from a vast literature those aspects that seek to conceptualise land tenure beyond the conventional binary that is perceived to divide ‘western’ and ‘African’ land tenure in the context of legal pluralism. Forging conceptual paths through what frequently appears to be an irreversible jungle of contradictory or contested ideas, norms, social institutions, social constructs and social practices reveals that it is possible to see trends and patterns in new categories and structures of land tenure relationships. Benda-Beckmann et al show how much analytic confusion is generated by failing to distinguish between ‘concretised social relations’ and legal or institutional categories (whether formalised in law or not). The latter are abstract and symbolic concepts, distinct from messy jumble

of everyday life, which is the site of social interaction and relationships that impact on property concepts (Benda-Beckmann et al 2006b:14-20).

I open the conceptual discussion with a brief look at broad property concepts. I examine aspects of a theory of African property relations, which broke away from the academic mode of identifying 'rules' governing land rights, the salience of which has survived major changes in the political economy. I discuss the importance of disaggregating social and spatial units when considering questions of land tenure, and seeing these in relation to temporal features. I look at new approaches to the methodology and conceptual development of the study of African social relations, which broke out of the old anthropological mould of viewing African society through the lenses of ethnicity, traditionalism and closed social systems. I show the significance of these concepts for land tenure.

2.2 Property concepts

Freehold ownership is unequivocally associated with the common law in South Africa. When the handful of Cape Africans acquired title, the colonial common law was itself evolving in response to local conditions, merging with the existing Roman-Dutch law, which the new British rulers adopted in the Cape Colony. English property concepts were adapted to continental versions of land registration developed by the former Dutch rulers at the Cape. Freehold can be traced to its source in the common law in Britain, where freehold title developed in the context of changing property relations over many centuries, and dates all the way back to the thirteenth century (Macfarlane 1998: 108-112). The English land enclosures of the eighteenth century resulted in new and narrower versions of property in the context of capitalist markets (Hann 1998: 13; Peters 2006: 96,1998), processes to which freehold tenure adapted in various ways.

African freeholders, on the other hand, made the switch in an instant, and in a context where many of the conditions of state and market were external to their conditions of tenure in day-to-day life. The African freeholders continued, for the most part, to hold their land as extended family groups without reference to the state procedures or the market, drawing from pre-colonial custom to validate locally adapted modes of holding and transmitting the land. This led in turn to the emergence of complicated legal contradictions that mirrored the differences in the political structures, social composition, social organisation of production and thus property concepts of European and Africans respectively, the results of which form the main subject of this thesis.

Property does not lend itself to easy definition, as captured in the dictum of English jurist, Sir Henry Maine (1822-1888), that property 'defies exact circumspection'. Pierce similarly analyses 'property' in terms of its 'diffuseness', a difficulty that is enhanced when translating meaning across different political and cultural landscapes (Pierce 2013: 156-7). Peters has shown how the language of property in the English context is a

historiographical question: “As the struggle for ascendancy between the rights of owners of private property and the rights to the commons mounted through the eighteenth century, it involved legislative and administrative changes by the Whig elite and shifts in (quoting E.P. Thompson) “definitions at law and in local custom” (Peters 1998: 352; cf Thompson 1976:337). ‘Property’ is thus a chameleon-like concept, taking on the colours of the social and political environment, and in colonial contexts, the idea of property in land (at law called ‘immovable property’) was invariably appropriated by the dominant ruling class, while the land tenure relations of the colonised populations were interpreted as pre-property or non-property.

Hann shows that the dominant liberal interpretation of property, following the industrial revolution, centred on the primacy of ‘possessive individualism’ associated with ‘private property’⁴ acquired through the market. Hann calls for a renewal of “anthropological approaches to property relations” and bemoans the simplistic notions of property associated with the western liberal tradition of private property, where it is assumed that by separating the political, economic and legal spheres of state governance, the virtues of exclusive private ownership can be unleashed; and also from rival Marxist claims that state ownership provides a viable alternative. He resurrects the idea of “the embeddedness of property” from older historiographical traditions, claiming that the separation of powers is fictitious, “a thin disguise for unequal power relations”. He attempts a definition that escapes the narrow Eurocentric ‘hegemonic liberal paradigm’ to embrace a concept of property that may be applied cross-culturally. He suggests this is possible if investigated in terms of “*the distribution of social entitlements*” (original emphasis) which can be “investigated anywhere in time and space”(1998: 7; 45). He comes up with a broad definition of property as:

... the vast field of cultural as well as social relations, ... the symbolic as well as material contexts within which things are recognised and personal as well as collective identities made (1998: 5).

Hann hints at one *specific* problem in cross-cultural analysis, which is that of ‘separability’. He suggests that a new anthropology of property must expose “the deepest problems posed by forms of social organisation rooted in misleading ideas about separability” (1998: 9). In this thesis the concepts of social and spatial separability are critical markers of differential modes of land tenure.

The commodification of land under capitalism, as suggested, led to a misleading correspondence between ‘private property’ and ‘property’ which became fused in the western imagination as meaning the same thing. The change in meaning reflected western evolutionary thought that saw in the development of private property a progressive advance of civilisation, private property being postulated by Locke and other enlightenment thinkers as a bastion of liberal and civilised values. As mentioned above, Peters has shown how in the case of England the semantic changes corresponded with the ‘narrowing’ of rights of access to the commons during the process of land enclosures in the eighteenth century, which in turn corresponded with

⁴ Macfarlane argues convincingly that ‘private property’ was present in land ownership in England from the twelfth/thirteenth centuries (Macfarlane 1998 111, 123). This suggests that the critical change was not in the notion of private property as much as the primacy of the market.

the narrowing in *legal* rights reflected in the switch in English common law from more inclusive to more exclusive legal concepts of property (Peters 1998; 2006: 96; 2013: 539-540).

Thus is revealed the central problematic: with the narrowing of common property rights comes a widening in inequitable access to land. In the African debates the global problem of inequality induced by private ownership, in the light of massive poverty, intersects with dilemmas about land titling, which is thought to be the key trigger to privatisation, social differentiation and potential dispossession. Indeed the development of a landed and landless class is the stated aim of privatisation and concentration of productive resources in the hands of the few. These debates necessarily engage with the complex problems of legal pluralism and its relationship to African systems of customary law, which the literature suggests tends to work in the opposite direction — towards redistribution of property. The question that many scholars are asking now is whether the ‘inclusivity’ observed in African property concepts has not been part of (a) a *reaction* to dispossession, rather than inherently built in African property concepts; and (b) a disguise for social and inchoate class differentiation that is emerging in ‘customary’ societies (Peters 2002a: 49; 2006: 86, 90; Chanock 1991: 67).

Berry provides a more nuanced picture of ‘inclusion’. She argues that new political and economic opportunities have led to diversification and social differentiation, which though manifested in variable ways across Africa, have tended to multiply the channels of access to resources. The nature of investment in social relations has reinforced people’s social networks as a channel of access, and this tendency has constrained the emergence of clear class differences and liquid asset formation. There is unequal distribution of wealth and power, and clear signs of social stratification and commercialisation, but these processes rest on partial but not full exclusionary mechanisms. Inclusive strategies are not necessarily equalising, and in fact hinge on subordination of relationships within the social group, based on a range of socially constructed variables such as gender and seniority as well as affiliation (Berry 1989b: 50-52, 1993: 148-149).

Subordinate members of rural household, kin groups, or communities are not excluded from access to land or capital goods which the group controls, but their rights are open to negotiation and their ability to influence the outcomes of such negotiations may be compromised by their subordinate status (1993: 148).

As example she maintains that labour mobilisation through hired labour, although variable, is generally rudimentary and continues to be reliant on social networks, which are however, declining as all members of society engage in socially mobile access a range of resources outside of the family networks. The use of ‘network labour’ within descent groups, kin groups or communities in turn relies on subordinate relationships, e.g. client’s, women’s or children’s labour. The inclusive strategies can put a strain on the resources, rather than induce higher productivity (1993: 142-8). Inclusivity is therefore a social-relational issue itself, and not a simple matter of members being ‘in’ or ‘out’.

The collapsing of ‘private property’ with ‘property’ has therefore muddied the conceptual terrain, and obscured the ideas, language and practices of property in cross-cultural perspective. It is clear that African land tenure has not escaped concentration and accumulation in the hands of the more powerful. The increasing commercialisation of land in Africa has seen, on the one hand, increasing buying and selling of land by Africans (with or without formal title), which suggests that competition and contestation over land is increasing, despite ideological denial of alienability (Peters 2004, 2006: 89; 2013; Chanock 1991: 67-71, Cousins 2006: 116; Colin & Woodhouse 2010). A wave of ‘land grabs’ by outside investors in Africa suggests that African property rights are legally ambiguous and vulnerable to appropriation by the powerful (Peters 2013).

The question of alienability or inalienability of land under title is central concern with titling. Titling as a policy leads to the nerve centre of what constitutes legal recognition. The transformation of rights to ‘proprietary rights’ contains the potential seeds of dispossession from below (Li 2010; Chanock 1991: 67). The perceived protective mechanisms in customary tenure that shield African land from market forces have always been central to debates about titling. Li traces the present dilemma of market versus what she calls the “communal fix” to early colonial discourses, where “...colonial officials—like their contemporary counterparts—held different views on whether capitalism was the goal to be achieved or the nightmare to be avoided” (Li 2010: 386; cf Peters 2002a: 45; 2006: 88, 2008, 2013: 540, 544; Chanock 1985).

Titling complicates the conceptual dualism that permeates the debates and scholarship about African land tenure, where titling is represented as the crucial divide between non-market and market forces. Berry (1989b; 1993), Haugerud (1989) and Mackenzie (1993) show that in reality the interface between African title and western concepts of immovable property creates a new terrain of contestation over both the physical resources and their transmission, and the debates about the meaning of law, custom and title (see Chapter 3.3 below). The empirical reality is that freehold title held by Africans, though recognised as ‘immovable *property*’, did not historically conform to the model of individual title conventionally associated with the private property model. Property relationships continued to reflect the interest among African owners in investing in the reproduction of family descent groups, where rights of access to, and control over property depend on one’s social position in the family or lineage. This disjuncture throws up profound legal dilemmas in view of Africans’ tendency to view the holding of title as conferring entitlement in a sense that differed from the western legal and social conventions associated with title.

This adaptation of custom to title differed also from official customary law, which colonial authorities and interests among African society had invoked to manage matters of interpersonal relationships, including the inheritance of property. In the Anglophone colonies, customary law was incongruously matched to the English concept of individual inheritance of impartible property.

'African freehold' provides a model that combines individual and collective, market and non-market elements in a way that not only explodes the binary, but calls into question the very existence of the model itself. The combining of some of these elements can be seen in particular in the straddling of concepts of inheritance and succession under African title in ways that contradict a sharp divide between individual and collective attributes associated with western versus customary tenure. The apparent anomaly calls for a re-examination of the conventional associations and attributes that oppose western and African concepts of land tenure and property. What is needed instead is a closer look at the way that *common* variables are differently counterbalanced and amplified in different tenure relationships.

2.3 Is property a useful bridging concept in land tenure scholarship?

Among many other scholars, Pauline Peters (2013) has recently put the question of 'property' firmly back on the agenda in the questions she poses in her critique, and later defence of property concepts in customary tenurial relationships. "... [W]e have seen "property" in land to have been an emergent set of ideas and practices in social process, I want to pose the question: should we centre "property relations" in our analyses?" She emphasises the importance of looking beyond the tendency to formulate relations over land as being "socially embedded" in a general kind of way, which she claims has become pervasive in the literature, to ask more "precise questions about the type of social and political relations in which land is situated, particularly with reference to relations of inequality – of class, ethnicity, gender and age" (1998: 356; 2002: 48; 2004; 2006: 89-92, 99).



Discourses about pre-colonial land tenure have been framed by an overriding concern with social and economic inequality and poverty that followed in the wake of colonial conquest of African society, in which land dispossession and subordinated forms of tenure featured centrally. The issues of concern in scholarship tended to be broadly focused on policy issues such as land restitution, redistribution and democratisation of local power to counter the devastating results of discrimination, unjustifiably skewed land distribution and prejudice towards customary land tenure and common property regimes. The current debates remain sharply divided between which models to follow, still tending to divide along the lines of preference for titling or some of form of registration, on the one hand, or customary tenure on the other. The interpretations of 'customary tenure' differ widely. The contested ideological terrain has been fuelled by the widespread adoption by post-colonial African states of measures that entrench the institutional dualism inherited from the colonial era in the form of traditional structures of governance over land allocation. These measures are, however, clothed in new ideologies of African decolonisation, sometimes veering towards cultural essentialism.

Land tenure features centrally in all these debates, and remains powerfully symbolic of the indignities of colonial sovereignty over land, as well as materially representative of vastly unequal access to land. The

South African post-apartheid state, after an initial period that sought to open up and/or liberalise land ownership policies, has recently moved rapidly to entrench the traditional authority structures over 'communal' land, which critics claim closes off independent sources of access to land (exacerbated in the case of African women), and stunts options for local democratic transformation (Ntsebeza 2005: 78; Claassens 2009, 2013). Within these debates, the future role of 'customary' law and land tenure remains contentious, with one lobby arguing for the legal, statutory, recognition of customary tenures, defined not by official customary law, but adaptive and flexible principles that reflect modern values, such as those enshrined in the country's Constitution (Bennett 2008: 138-153; Cousins 2008:109-137; Claassens 2009). These policy dilemmas involve probing the trajectory of customary law and tenure in modern Africa. How do these concepts stand up to the ideals of modern state institutions, including their founding constitutions and legal systems? (cf Okoth-Ogendo 2008: 102).

Individual title has lost its pre-eminence in these debates with regard to rural land. Even international financial institutions that remain avowedly committed to market regulation of land have been persuaded of the ineffectiveness of titling in inducing higher productivity or security of tenure; warned also of the potentially negative effects of titling, including the possibility of further dispossessions through the market (Rakodi & Leduka 2004; Peters 2006: 87; Durand-Lasserve et al 2007; Cousins 2008: 15; Li 2010). Individual titling briefly reared its head as an international strategy following the publication of Hernando de Soto's controversial book, *The Mystery of Capital* (2000) in which he popularised the importance of extending western property concepts to the mass of poor people, making the claim that private property rights accorded to poor people's few assets will convert 'dead' capital into active wealth by providing the collateral to access credit (de Soto 2000: 66; Peters 2013: 543). His metaphor, that the poor live 'outside of the bell jar'⁵ had wide appeal among western governments, arguing that the poor are marginalised because they are unable to benefit from their possessions, whereas the assets of elites grow under cover of the formal economy (2000: 66). His ideas met with a crescendo of criticism in which scholars from around the world pointed out flaws and fallacies in his argument, mainly resting on his failure to acknowledge social and political-economic realities. (Cousins 2008: 15; Cousins et al 2005; von Benda-Beckman 2003; Musembi 2007; Woodruff 2001). Titling remains uncomfortably poised between these various schools of thoughts, although it remains a powerful policy choice among national and local government institutions for urban Africans.

Does the concept of property help to bridge the highly bifurcated realm of land tenure, which still tend to be associated with political, social and legal asymmetries? How has property as a concept been applied to

⁵ De Soto was referring to Fernand Braudel's bell jar analogy in the latter's publication *The Wheels of Commerce*: "The key problem is to find out why that sector of society of the past, which I would not hesitate to call capitalist, should have lived as if in a bell jar, cut off from the rest; why was it not able to expand and conquer the whole of society? ... [Why was it that] a significant rate of capital formation was possible only in certain sectors and not in the whole market economy of the time?" (De Soto, *supra* note 2, at 1, 66-67)

customary tenure? The concept of property in customary tenure contexts has largely been restricted to ideas about 'common property'. A large body of literature arose in defence of the African 'commons' as a reaction against sweeping ideological claims that all common property is 'nobody's property', an argument central to Hardin's proposition of doom being inevitable in communally held resources in his publication *The Tragedy of the Commons*, which became the emblematic reference for this contentious issue (Peters 1998: 351). Modern scholars of natural resource management in Africa sought to counter Hardin's thesis, and institutional economists sought to develop a theory of 'property rights' based on positive assessments of common property regimes (Cousins 2008: 122-123). The result is a general acceptance of the term 'property' to describe 'common property' in Africa. Peters questions the uncritical use of the concept of 'property' to what she prefers to call 'common pool resources' (1998: 351). Her argument is that 'communal' tenure, the term attributed to African tenure in a derogatory sense by Native administrators, was a product of its opposite, private property; and that the term 'common property' is similarly an expression of this *opposition*, or mirror image, rather than an accurate description of rights in common pool resources. In a more recent article (2013: 537-556) she suggests that the application of 'property' concepts in the context of the international 'land grabs' may well be justified, and urges more research on the subject. According to her argument, the denial of property in the "many forms of customary tenure under which millions of resource users in Africa hold land" exacerbates vulnerability. Property is thus "one basis for preventing further misappropriation by more powerful agents, domestic and foreign" (ibid: 556).

The focus on common property resources has not been matched by scholarship on property relations at the intra-household level, i.e. between members of landholding social units. The stress on larger units obscures the relationships *between* members of the land holding units *over time*, in short, familial property relations, which is the source of evidence for much of the material in this thesis. I wish to demonstrate in my treatment of 'African freehold' a constant interplay between western-law and customary-law concepts of property, which simultaneously underlines the potential to make more visible the 'property relations' in both customary and western land ownership, and thus the possibility of the concept of 'property' as a useful concept in reformist discourses about land tenure more generally. This would, however, require, more detailed research at the level of familial tenure relationships than has been the case to date.

Lund stresses the importance of weaving in to the conceptualisation of property the institutions of authority that are involved in defining property: "Struggles over property are as much about the scope and constitution of authority as about access to resources [...] the two are mutually constitutive: the capacity to define property is authority [...]; [p]roperty to a large extent depends on the configurations of institutions of public authority", suggesting that public institutions are themselves constituted in relation to questions of property (2002: 11, 32-33). He also weaves into the authority-property nexus other critical variables such 'social time' and 'space', distinguishing between territory as jurisdictional space and property as owned space. These nuances are critically important in sharpening concepts of property in a range of social and political

relationships, in which land tenure is just one strand. In this ‘strand’ however, we need to examine the specifics of social and familial relationships.

2.4 Social and spatial units in property

Significance of social units

One of the keys to unlocking varying tenure relationships lies in examining the interplay between social units and spatial units. This approach does not oppose ‘individuals’ with the ‘collective’ but seeks to find the relationships between individuals and the social units to which they belong, in turn associated with various concepts of space.

Land, while being a crucial factor in production and property relationships, was not transmitted among the south-eastern Africans in the past, simply because it did not need to be retained by the family, the investment not being in land but in cattle and labour. The main form of transmissible property was cattle, which were heritable by individuals. Land was neither retained nor divided in the same way as moveable property such as cattle. The hoe was the simple form of technology used by women for small-scale cropping, which meant that the scope for surplus was minimal, and indeed surpluses were not encouraged or needed in the pastoral economy. Among commoners there was minimal social differentiation. As Peires points out, the social differentiation was between chiefs and commoners, which he depicts as an ‘interplay’ and tension between principles of homestead authority and redistribution, and the homologous concept of authority and redistribution at the level of the chief, the “struggle” between the two taking the form of a “struggle for cattle”. The tension combined economic and political elements in transactions between chiefs and commoners: “cattle comprised wealth and influence” (Peires 1981: 32).

In short, in the context of my argument, there was less emphasis on retaining land within a nuclear group, and more emphasis on reproducing the lineage group itself, for which cattle were needed. The latter was achieved through a process of territorial expansion or mobility.

The purchase of land in title, the introduction of the plough, surplus production and the sale of crops were thus potentially revolutionary forces with the potential to transform the nature of intra and inter-household relationships by encouraging individualisation of relationships, social differentiation, and accumulation. Interestingly, this process did not materialise as the theory may have predicted. Extended family descent groups survived these changes and put a break on internal divisibility of the family and the land, a phenomenon I discuss in detail in the following chapter. While title created a situation where transmission in land became a necessity, in many other respects the socio-spatial relationships did not change as radically as

one might assume. Sansom suggests that historically the pastoralists of the south-eastern region of Africa exploited land in the immediate vicinity of homesteads, that is, in compact units (Sansom 1937: 139-141). In this respect, title did not radically rearrange the spatial unit of exploitation, particularly taking into account that title accommodated a common grazing area for all the title holders. The conundrum is that the legal connotations of title were precisely to create individual, proprietary rights, and heritable portions.

How are we to explain this tenacity of kinship relationships in tenurial relationships? First we can look at some of the concepts that are the means by which people distinguish between their social and spatial units, even if they do not consciously define their relationships in these ways. People tend to take the ingredients of their land maps as the 'natural' pattern of social life, and seldom conceptualise their relationships to each other and the physical world in abstract terms, as do scholars, such as those discussed below. It is nevertheless important to make these abstractions in order to dissect and examine these concepts of land tenure more closely. By doing so, one has to separate the concepts from their reified and culturally-laden contexts, which have a tendency to rigidify into hardened ideologies.

Folk land tenure maps

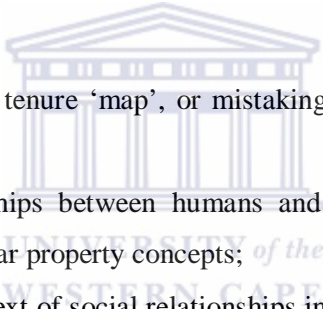
Paul Bohannon was influenced by a new school of thought, to which he contributed, in the mid-twentieth century that introduced the concept of 'socially embedded' property relations, publicised most widely in the writings of Karl Polanyi, his contemporary. The term, which has proved enduring, features in Polanyi's mid-twentieth century study of the transformation of property relations in England as a result of the industrial revolution and the rise of market capitalism (1944). The study was influential in refocusing the source of property relations in human relationships, rather than objectifying property in a 'thing' or property object. Polanyi's grand theory has been challenged, but his ideas inspired a tradition of scholarship that conceptualised property as embedded in social relations, and remain relevant today⁶ (Hann 1998: 9-10). Bohannon⁷ was among the first Africanist scholars to encourage a cross-cultural set of concepts, which, by building on the importance of social relations in land tenure, could straddle both western and non-industrial economies. Part of the argument was ideological, a desire to provide a counterpoint to ideologies that elevated the cultural and economic benefits of market economies, a process Polanyi saw as potentially socially destructive, and which he named as the 'disembedding' of property from his socio-cultural relations.

⁶ The idea of social embeddedness in Karl Polanyi's analysis of economic transformation in England is conceptualised by the notion of 'socially embedded property', i.e., the integration of social and economic forces in societies where market capitalism had not permanently replaced social orders with the "blind action of soulless institutions [of market] utopia". He distinguished between situation where "[l]abour is capable of effective work because it is integrated into an organized effort by social forces" and market capitalism which, on account of the separation of the economic from the social institutions of society, had resulted in a "cataclysm" in civilisation, which he likened to a "social catastrophe". In the case of land, he argued labour had been separated from land, or man from nature, by commoditising both land and labour (Polanyi 1944: 4, 178; 216-219; 235; 272). He showed how historically "economic systems ... are embedded in social relations; distribution of material good is ensured by noneconomic motives" (272). Polanyi's ideas inspired anthropological studies of societies under colonialism on account of his conceptual shift from what Hann calls the "embedded moral community" to "disembedded industrial economies" that had escaped from the moral political and social constraints of pre-industrial societies in which property relations were embedded in social relations (Hann 1998: 9-10; 13).

⁷ Bohannon worked in Nigeria and is best known for his theories of 'spheres of exchange'.

Bohannan (1963) suggested a concept of 'folk law' to replace western legal concepts, largely to escape from the innate assumptions in western concepts of property that land tenure relationships are necessarily expressed in a one-to-one relationship between land and people. He argued that pre-capitalist economies were embedded in particular social and political contexts, which required a different set of methodological tools than western land tenure or property concepts, for example, analysis of reciprocity and redistribution in African economies. He took exception to the anthropologist Max Gluckman's use of what he called Eurocentric jural terms⁸ and thereby raised many of the problems of 'language' and 'translation' that are highly pertinent to land tenure scholarship today (Moore 1978 2000 139).

Bohannan was concerned with reformulating conceptual assumptions about land tenure to increase their application cross-culturally and to diminish the distortions resulting from the imposition of western concepts of land tenure on African society. Bohannan noticed the limitations of conventional analyses of African land tenure that he felt were, firstly, too ethnocentric to be generalisable; and secondly, introduced unconscious distortions as a result of Westerners' search for "'rules of tenure' based on three *a priori* judgments" which he identified as:

- 
- preference for the western land tenure 'map', or mistaking the western 'map' for other social and spatial 'maps';
 - the expression of all relationships between humans and land (which he calls the 'man-thing' relationship) in terms of particular property concepts;
 - the reflection of the spatial context of social relationships in terms of contract and law of succession (1963:103)

Bohannan argued that these three assumptions should be replaced "with some others more generalized and less ethnocentric". He identified three analytic assumptions that, from an ethnographic perspective, cover most "folk" assumptions of land (including western assumptions). These are:

- people have a concept of land, e.g. people have a representational 'map' of the country in which they live;
- people have a mode of correlating man with his physical universe, e.g. a set of concepts for speaking about and dealing with the relationship between themselves and things ("man-thing" relationships);
- people have a social system with a spatial dimension, e.g. the spatial aspect of their social organisation ("man-man" relationship) has some sort of overt expression in word and deed (1963:104).

⁸ Bohannan's ideas about 'folk' assumptions sparked a long debate and disagreement with Gluckman, see Moore 1978:139-46

These three together constitute the folk land tenure 'maps' of any society. The relative emphasis on, and the interplay between, each of the three factors differ from society to society (1960: 101-111).

He examined three examples from Africa to show how the variables of each category shift relationally according to people's different ecological, social, economic and political circumstances (1960: 104-110). By isolating people's social organisation, their spatial relatedness to the land and their ideological concepts to explain their relationships to each other and to the natural universe, he found a method of distinguishing between African and western concepts. The way in which people associate these three aspects in relation to each other reveals their 'land tenure', which he described as the folk view of geography, the folk view of the relationship between humans and things, and the folk view of their social systems.

Western systems correlate the representational map and the human-thing relationship closely (the first and second assumptions), while African systems correlate the map and the social organisation closely (the first and the third). The remaining assumption in each case is more open to question. For westerners, social organisation (the third assumption) in relation to land is less emphasised, for Africans the person-land relationship (the second assumption) is more fluid.

He compared the concepts employed by western and three African societies (in their pre-colonial manifestations) in terms of his framework (the Tiv, the Plateau Tonga and the Kikuyu) and showed how each varied according to the quality of attachment to principles of territoriality, land fixity and social organisation. He describes the western pattern as an "astrally based grid map in terms of which people are, by a legal mechanism, assigned rights to specific pieces of earth-pieces which maintain their integrity even when the owners change". In contrast, the Tiv had a 'genealogical map' made up of agnatic lineages, which were not closely correlated with specific pieces of ground — in keeping with shifting cultivation. The Plateau Tonga had two kinds of geographic references, one of which was territorial, marked by shrine points; the other villages residence patterns. The two spatial markers did not necessarily coincide and both sets shifted and changed. The Kikuyu had a strong notion of terrestrial boundaries, but had two 'maps': "estates of individuals" belonging to localised unilineal groups, and political units called 'ridges', the two not coinciding. In all three non-western scenarios the social relationships corresponded in different degrees with spatial contexts, but not necessarily coinciding with principles of territoriality. The "man-thing" unit was de-emphasised but most strongly present among the Kikuyu. Bohannan argued the latter approached the western 'ownership' concept.

Westerners divide the earth's surface by use of an imaginary grid, itself subject to manipulations and redefinitions. [They] then plot the grid on paper or on a sphere and the problem becomes one of correlating this grid to the physical features of land and sea. [Westerners] have perfected instruments for locating [themselves] on the earth's surface in relation to the position of the stars. There are precise rules for symbolizing the information from the instruments with which we do so and for

transferring it to the gridded map. [They] have ... perfected a system of measurement which allows [them] to repeat precisely operations that have been carried out in the past; thus [they] have been able to locate and measure pieces of the earth's surface to record ... computations on maps. These measured pieces become ... identifiable 'things' (1963: 102).

He concluded, however, that the "western 'map'" is slowly replacing the indigenous 'maps' (104-9). In short, man-man relationships in space, with concomitant rights to exploit the environments are being replaced by legally enforceable man-thing units of the property type, the man becoming a legal entity and the thing a surveyed parcel of land. Rights of people are being made congruent with rights in specific pieces of land so as to accord with surveys and legal procedure. Property and contract are becoming the basis of social life in places that were once governed by considerations of status (1963: 110).

Like so many social scientists of his era, Bohannan was referring to the notion developed by Sir Henry Maine in the mid-nineteenth century that all societies evolve from "status to contract" (Maine 1861). Maine's use of the term 'status' was a reference to social organisation, and was seen as less ethnocentrically charged version of social evolutionary theory than many current theories. Bohannan noted that African systems of land tenure were moving towards 'contractual' concepts of man-thing relationships, as "social groups which in the past merely had spatial dimension are now being turned into territorial groups, because they are assumed by European-dominated legal systems to be 'juridical persons'" (ibid).

Extending Bohannan's western map, one could say that the person ('man') has become a severable legal entity and the 'thing' is being cut up into measurable surveyed parcels of land. The law places a premium on registered surveys and title, each land parcel corresponding with an owner, which together represent the constellation of rights and obligations implied by 'title'. The records are held in centralised state repositories symbolising the removal of these rights from their 'socially embedded' contexts to a separable and separate level of political organisation. This nationally uniform system of legal recognition places responsibility on theoretically neutral and objective officials of the bureaucracy, as well as private professionals who are detached from the particular social contexts, to ensure 'good title'. Title is the equivalence of 'property'.

Among African freeholders these one-to-one and owner-state relationships did not materialise as expected (Berry 1989b, 1993; Haugerud 1989; Mackenzie 1989, 1993; Cheater 1987). Title did not radically alter pre-colonial social relationships, although authority and control of the land underwent profound changes. The contradictions that I discuss in relation to 'African freehold' in this thesis centre on these subtle distinctions between social units and land units, and their relationship to each other. While Bohannan's prediction of change in a unilinear direction has not so far materialised, his stress on the three dimensions of land tenure helps illuminate some of the themes that came to the fore in my thesis. The paradigm shift contributed to a shift from thinking of property as a 'thing owned' to more abstract concepts which Africanist scholars have embraced as highly pertinent to the multiplex social arrangements of African tenure. Far from being

anachronistic, similar abstractions may be applied to other global post-industrial conditions such as the extension of property concepts to intellectual property, genes, embryos and space (Hann 1998: 5; Strathern 1998: 214-232; Verdery & Humphrey 2004). One of the influential Africanist scholars who applied these ideas to a theory of African tenure was Okoth-Ogendo, to whom I now turn.

2.5 A theory of African property relations

Okoth-Ogendo (2008: 101) argues that it is “misleading in the extreme to try to analyse tenure of land resources in terms of the conceptual categories of Anglo-European property law” and calls for a more rigorous understanding of African property relations based on the organisation of African social orders in their own right. He argued forcefully that it is a “juridical fallacy that indigenous law conferred no property in land” and built a theory of African land tenure as embodying ‘property relations’ (2008: 96). He argued for the importance of replacing a search for ‘ownership’ — in the sense used in modern western thought — with the concept of the ‘allocation of power’ over land. This idea involves a switch from conceptualising property in terms of the relationship between an owner and a property object, to the relationship between a person *in respect of* property, such as implied by other theories of socially embedded property. Okoth-Ogendo built on Bohannan’s ‘man-man’ and ‘man-land’ concepts in his theory of African property relations.

Okoth-Ogendo redefines African tenure in terms of “access rights” that correspond with “control” (governance) at all levels of social organisation, and which may shift in time and space and according to specific social relations. He challenges the idea that authority over land is ordained only from higher authorities (e.g. chiefs) or that property relations involve exclusive property. He argues that access is based on recognised social affiliation to a social unit, and authority is “segmented ... vertically and horizontally so as to supervise specific functions at different levels of social organisation” (2008: 101). “Control is exercised through the permanent members of the particular unit of production involved [and ...] is far from being simply a product of political superordination” (Okoth-Ogendo 1989: 11)”. “In these tenure regimes there is no coincidence of access and control, and property does not involve the vesting of the full complement of power over land that is possible (that is private property)” (Cousins 2008: 129).

The ‘powers’ Okoth-Ogendo identifies as central to property relations are rooted in the “social process through which society deals with how that power should be vested in particular members thereof and the mechanisms through which that process is controlled”.

The existence of a power, *per se*, implies some form of property and that it is not essential to or even prudent in all human relationships that a coincidence of power and exclusivity of control in any individual or group of individuals in respect of all contexts, things or objects should exist (Okoth-Ogendo 1989: 8)

He developed a formula that distinguishes between “access” to the power over land, and its correlate, the “control” of that power. In African land tenure, the twin axes of access and control embody changeable dimensions of power that vary according to the particular production units and relations of production involved. Two important attributes he identifies are the absence of coincidence between access and control; and “variations in and graduation of power which is inherent in its origin in social adhesion rather than in market operations” (ibid: 10). The gradation in power denotes different dimensions of social relationships (“man-man” relationships), rather than a coincidence of power and control in a proprietor or individual. The theory counters the westernised idea of property as implying a one-to-one relationship between individuals and a spatially defined property object associated with “particular categories of rights or quantum of power”.

For tenure encompasses a full range of juridical relations that lie on a continuum along which rights of varying qualities and amplitude may be found [... and along which] the tenure rights of any person could oscillate up and down ... depending on the combination of access/control questions. (ibid: 12)

Okoth-Ogendo concludes that in African property relations, some of the core dimensions of these powers are extremely durable and resistant to change. In particular, the normative framework of access may not necessarily undergo visible change even in the face of market penetration and new agrarian relations that may manifest in more “compact, usually family-based, units”. He uses the example of the transition from nomadic pastoralism to various forms of agriculture to show that though the control structures change fairly fundamentally, the powers of access remain relatively undisturbed. He concludes that “certain categories of access power are extremely resilient to change” (ibid: 14).

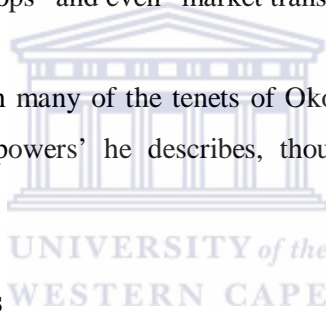
Social adhesion of one kind or another usually determines access, which links particular categories of membership in a production unit to “value equivalents of status differentia” which remain relatively fluid. “Property law then refers to the body of rules and principles which define, regulate and enforce those equivalents in the plane of time, space and association” (ibid: 11,14).

Okoth-Ogendo (ibid: 8) likens western law to Roman law, which holds a particularly materialist concept of property as a ‘thing’, a concept that is indeed embodied in South African Roman-Dutch common law. He leaves out of his argument, as do many other scholars of African land tenure, the nuances in western law, for example, that English law accommodated more flexible property relations in the past, as evidenced in British nineteenth century jurist, Sir Henry Main’s conceptualisation of rights as ‘powers’ in his famed and much-quoted aphorism of land tenure as a ‘bundle of powers’. Okoth-Ogendo concedes in the notion of ‘bundle of rights’ a more differentiated approach to property, that is, as a range of powers between people in respect of land, rather than implying exclusive control. He nevertheless sees the ‘bundle’ concept as tied up with

western concepts of property in that a set of rights are specified as belonging to “an individual or group in the physical *solum* ... which leads us back to the ownership trap” (1989: 11).

He concludes that “the outright disposal of land to persons external to a given unit of production is therefore alien to African land law”. He bases the entire conceptual framework on the idea that “power over land in Africa is not defined by the emergence of a rule of exclusion in the juridical calendar of a people [...] but by the manner in which production functions are assigned to individual members of society at different points in the social cycle” (1989: 10-11). He does not engage directly with the evidence that Africans have in fact been buying and selling land in a variety of contexts, and increasingly so (Peters 2004, 2006: 89; 2013; Chanock 1991: 67-71, Cousins 2006: 116; Colin & Woodhouse 2010; Li 2010). There is evidence that access is in many African contexts yielding to powers of exclusion, even if the ideology and ‘law’ have not changed in that respect. Okoth-Ogendo nevertheless rejects the notion that technological change, land scarcity and response to the market threaten his paradigm. On the contrary, these features show the ‘resilience of African tenure regimes which have shown “remarkable flexibility in adapting to all manner of changes ... including permanent cash crops” and even “market transactions” (1989: 12,14).

African freehold appears to accord with many of the tenets of Okoth-Ogendo’s theory, and indeed reveals the ‘remarkable resilience of access powers’ he describes, though he may have over-emphasised the resistance to exclusionary processes.



2.6 Proliferation of social networks

Berry provides a rich tapestry of evidence in Africa of the development of new patterns of access to, and control over resources, and the continued reliance on social relations to channel these processes. She argues that land was one of many resources that underwent changes with regard to access and control under indirect colonial rule, the contestation over which leads to uncertainty or tension within and across local social units such as kin or descent groups, which in turn affects the strategies of resource use. She weaves the interrelated processes of access to land, labour and capital into her theories of changing land tenure relationships, showing that land is not always the constraint on production. Her broader focus on changing resource allocation underlines the importance of Okoth-Ogendo’s definition of land tenure systems involving the *allocation of power in society*, and its exercise, e.g. with respect to land use, rather than simply being about “sets of rules concerning rights in land” (1989a: 2).

Berry’s scholarship has extended Okoth-Ogendo’s concepts of ‘access’ and ‘control’ to all the relevant resources over which Africans struggled and continue to struggle, showing the influence on production patterns of the inter-related struggles over material and financial resources (land, labour and capital). She emphasises the continued incidence and significance in these processes of investment in non-material

resources in the form of social relations, social institutions and knowledge that may be employed in processes of production. Ongoing investment in proliferating and fluid social institutions may generate contradictory economic returns by constraining the development of productive capacity, but may at the same time mask processes of privatisation and concentration, as well as social differentiation within as well as across kin groups (1989b: 51; 1993: 132-3, 155-8). She shows the differential statuses of individual members of landholding groups, and how their relationships are mediated by cultural concepts of affiliation and socially and culturally constructed identities, such as gender or generational status. These relationships also involve the means of exploitation of labour within family groups.

Her argument (1989a: 2) supports the main lines of Okoth-Ogendo's theory, that in addition to its material value in production, land is:

- a focus for the definition and exercise of rights of access which extend to other productive resources;
- a social asset as a means by which people maintain their local social kinship affiliations and social identities.

She stresses that identities may be both 'ascribed' or 'achieved', and do not evolve unaltered from their 'traditional' forms which tend to stress birth status only. People become members of multiple social groups, which also signals changes in human-land relationships (1993: 133, 160, 162, 165). Moreover, "land, labour and capital are combined differently in different processes of production and exchange" (1993: 166). Land nevertheless seems to remain a fulcrum between social units and groups, knitting together various aspects of social affiliation, culturally constructed identities and group membership, which in turn become resources in themselves (1993: 160). Social relationships, however, tend to act as a brake on individual accumulation, the development of productive resources and the investment in the longer-term economic strategies of enlarging productive capacity (1989b 51; 1993: 133, 180). These trends mean that even in circumstances of accumulation, group structures seldom develop into closed corporate structures of control and management, but their boundaries remain fluid and contested, militating against the growth of a landed class (1993: 180, 200). She observes that individualisation of labour has been far more pronounced a trend than individualisation of land relations.

2.7 'Social time', space and property

Lund (2013) has taken these concepts further, showing that the complexity extends beyond the social spheres often characterised as 'nesting' relationships, into matters of authority and jurisdiction which are themselves multiplex. "[R]ather than a neatly nested system of jurisdictions, we are sometimes dealing with a structure that is partly hierarchical, and partly divided into separate functional jurisdictions. Land politics may involve simultaneous efforts to settle a land matter, settle the question of the appropriate 'level' or scale of authority

to invoke and implicate, and decide which jurisdictional realm is at issue”. The implications are that legal pluralism cannot be understood as representing a neat parallel, since different levels of jurisdictional authority may vary and affect interpretations of claims on property.

Lund emphasises the importance of interdigitating different *levels* of jurisdiction, i.e. territorial jurisdiction, functional jurisdiction (which may be further dissected both horizontally and vertically) and jurisdiction over persons. Historical ‘events’ and particular constitutions of ‘authority’ lead to different interpretations of space and property, for which purposes he employs distinctions between concepts of ‘social time’, which may differ according to different interpretations of the past, territory, property and authority.

Many errors occur by confusing territorial power with powers over property and authority more broadly. Territorialisation for Lund, following Sacks’ definition, is “the attempt by an individual or group to affect, influence or control people, phenomena and relationships by delimiting and asserting control over a geographic area”, i.e. jurisdictional space (Lund & Boone, 2013: 1-3; Lund 2013: 3). “Contestation over land and resources often involves struggles not only over land per se, but also over the legitimate authority to define and settle land issues”. (Lund & Boone 2013: 2)

Lund defines property in terms of social relationships concerning ‘things’ of value: in its broadest sense, the rights that particular actors have to use and transact access and value from land, and can be owned in various ways, comprising more or less tangible signs of public recognition, of which deeds are only one form of legitimation. He emphasises enforceability, which is broader than law.

Property is about relationships among social actors with regard to objects of value. Property is essentially distinguished from mere momentary possession or longer-term access by virtue of being recognised by others through enforcement by society or government, and by custom, convention or law. [...] Property relations involve different kinds of social actors, including individuals and collectivities, and take the form of enforceable claims sanctioned by some form of public authority. Property relations therefore exist at the level of laws and regulations, cultural norms and social values, social relationships, and property practices. (2011: 72).

He sees spatial control as one of the key elements of how social power is expressed, along with social time. As territory, space is governed or managed, but not owned by its governing agency, and is usually associated with political territory. (2013: 3-4).

His distinctions between various levels of jurisdictional power, and power over property are important in the South African context, where governance and management authority by traditional authorities and other community structures, and local levels of central government, are easily blended into, and confused with access and use rights.

2.8 Collective as defensive?

While the authors above stress the importance of variable social units and concepts of space for understanding property relations, the association of 'collective' units with 'indigenous' concepts of land tenure is proving to be tenacious. Chanock has persistently critiqued the tendency in legal and social scholarship to shy away from the obvious evidence of growing individualism among Africans in their responses to changing political economy, putting forward the idea that the persistence of the 'communal ethic' had a lot more to do with colonial imposition of law and administrative units of authority, than any inherent tendency in African customary law: (Chanock 1991: 67; 1994: 307: 298)

The context of African family life was distorted by the necessity for would-be wage earners to leave the impoverished rural reserves and work in the towns, while state law forbade urbanization of their families. Family relationships, including the control of children and the allocation of labour and resources took place within a context of spatial disruption and dislocation (1994: 318).

In a recent paper Li (2010) sees capitalism as the key variable in modern constructs of land tenure. Drawing mainly on Asian examples, she associates the contemporary stress on 'indigeneity' and 'collectivism' with a defensive strategy. She counters the essentialism of arguments that associate indigeneity (which is the Asian equivalent of 'customary law' in Africa) and collective tenure with primordial pre-capitalist cultural constructs. Li herself was motivated by her "counterintuitive" idea of a reversal of the more dominant sequence in the literature which tends to associate "collective inalienable landholding" as being "the 'normal' state" before agrarian capitalism. Instead she argues it is likely a formation that emerges in response to it. This view suggests that "communities mapped onto territories" (as the common perception portrays it) may be a *response* and not an imposition from above preceding market penetration. (2010: 408-9)

I rehearse the argument in some detail because it raises, in a contemporary discourse, the key concepts that arise in this thesis that are central to arguments that centre on dichotomy, such as individualism vs. communalism or collectivism; alienability vs. inalienability and market vs. non-market forces.

Li's central concern is with processes of social differentiation from below. She feels that micro-processes have been under-emphasised and invisible compared with the focus on larger-scale processes of change, particularly responses to the penetration of international capital (e.g. seen in widely publicised 'land grabs'). She centres capitalism as a key variable in colonial policies, which can be seen in the dilemmas among colonial officials as to how or whether to control market forces in land tenure. The choice of controls by officialdom can be seen in the colonial propensity for fixing communities to the land. Li's argument is about the shape and form of the *responses* to the penetration of capital. She sees individual and collective constructs of tenure as opposing concepts, which emerge either in response to, or in opposition to the market.

In her view, 'collective' tenure is a defensive strategy to protect tenure against market forces. She is concerned that this emphasis disguises processes of accumulation and actual or potential dispossession 'from below'. These processes tend to be invisible, or else they are subsumed by discourses that stress responses to 'imposition from above'.

In her argument, the construct of 'individualism' is implicitly associated with the concept 'title'. A point of contention about titling, in her view, is the process of conversion of land into a liquid asset, where 'liquidity' means turning land, which is fixed in place and solid, into a "fully fledged commodity that flows without boundaries" (2010: 408). Title is a key agency for converting land into a liquid asset, capable of inducing both dispossession and loss of land, on the one hand, or capital accumulation. The latter may be expressed in investment of returns in education for children, entrepreneurial and commercial activities and other modern conveniences, which may be many people's preferences. In the hands of the poor, however, critics argue that dispossession is more likely to prevail. The emergence of social differentiation (e.g. from land title) runs the risk of dispossession of land through debt and distress sales. Turning land into a liquid asset is seen as the irreversible point of no return, a bridge crossing a gaping chasm, turning solid into liquid, in Li's words, "a giant step".

Li argues that 'collective' (or in African discourses, 'communal') tenure could be a key defensive strategy to block the forces of capitalism and agrarian class formation, and is frequently invoked by experts sympathetic to the actual or potential 'victims' of colonialism and capitalism, but who, in making visible the 'collective' aspects of tenure, may be blind to the micro-processes happening from below. The importance of this debate lies in the shift from simplistic notions of the role of 'custom' or 'indigeneity' in being *essentially* associated with collectivity. Li's proposition that "provisions for active land management, especially collective provisions intended to restrict accumulation and protect a subsistence floor, do not precede exposure to market risk but follow from it" (2010: 408). This represents an important shift in the literature from the more conventional depiction of collective tenure as *preceding* individual tenure, to the suggestion that it may be a response that *follows* from the threats or perceived threats of the market.

The lines of the argument implies the need for a closer examination of what is at stake in the social and economic interactions at the micro-household level, as well as these in relation to the broader layers, examining what particular relationships and strategies are invoked at different moments of change or continuity. Many of Li's suppositions are supported by Berry, who shows through detailed attention to processes of change how African social networks have strengthened in response to changes, threats and opportunities, as discussed above. Berry, however, sees these processes as having been constrained by the nature of investment by Africans in social relations and social networks, which she argues has limited the conversion of land and other resources into 'liquid' assets (Berry 1993: 135-180).

Among African freeholders there is evidence to support the idea of defensive strategies that magnify the significance of *collective* responses, paradoxically under the guise of title, but it may be taking matters too far that the changes ‘create’ them. Nevertheless, Li’s argument does provide a different inflection to the contemporary stress on collective title, which could be seen as a reverse-evolutionary discourse. By this I mean that collectivism (validated by the ‘customary’ ethos) is recalibrating to be the ‘new normal’, while individualism is portrayed as a dangerous throw-back to colonial ideas of social evolution or a dangerous gateway to inequality and dispossession from below. These ‘either-or’ arguments obscure the multi-variant and relative features of land tenure, whether idealised in terms of individualism *or* communalism, by depicting property relations in customary or western law in overly monolithic terms. In these debates, as well as older literature, and in law, individual ‘title’ is depicted as a distinctive and modern response to property and citizenship, which is assumed to carry either benefits or dangers associated with the market. African freehold shows that these assumed associations may not necessarily adhere in the ways predicted or stereotyped.

Referring to the relationship between indigeneity and capitalism, which are her twin prisms for analysing Asian land tenure, Li concludes:

Rather than seeing “global capitalism” as a singular force with a unitary will and intention, I treat it as an assemblage that pulls together elements of diverse provenance [...]. Thus, indigeneity was not conjured unilaterally by “global capitalism” with its functional requirements any more than it was conjured from the top down by technologies for indirect rule. It has been woven from diverse threads that emerge from above and below in entanglements with capitalism.

A similar argument may be applied to concepts of tenure, which go hand-in-hand with large-scale changes in the distribution of property. Titling should be viewed, not as a monolithic concept, but as ‘an assemblage of parts’. Deconstructing title helps to discharge some of the extreme dichotomies between different cultural concepts of land tenure.

2.9 Law, Custom and Legal Pluralism

The semi-autonomous social field: ‘law as process’

Sally Falke Moore, in breaking from the anthropological emphasis on evolutionary typologies, static social models, cultural difference and closed ‘tribal’ systems, focused on the actual articulations between the past and processes of small change, in order to illuminate larger changes. For her the concept of change was not a shift from the ‘traditional’ to the ‘modern’, but a tension between countervailing processes of change and continuity, which are present in all societies. She distinguishes two kinds of processes to sharpen the analyses of continuity and change:

- processes of regularization;
- processes of situational adjustment.

Processes of regularisation are those which produce rules, organisations, customs and symbols, rituals and categories to make them durable or to fix them, and introduce an element of predictability. Situational adjustment, on the other hand, is a response to immediate situations, exploiting the ‘indeterminacies’ of situations, and providing the opportunity for reinventing and reinterpreting the rules or relationships. These countervailing processes therefore involve regularities, which perpetuate social conditions on the one hand, and change on the other. Changes may be seen in explicit rule-changing, more subtle matters of open or multiple options, or indicative of indeterminacy (Moore 1978: 39, 47-48, 50).

Her attempt to overcome culturally closed paradigms and to develop an integrative cross-cultural approach to law, custom and social change has valuable methodological tools for examining land tenure, which is fraught with cultural baggage. In particular, she did not see customs of non-western societies as “somehow inherent in them; that they somehow arose from the opinions and practices of the people ‘like mists from a marsh’” (Chanock 2000a: xix).

A key (arguably *the* key) methodological approach Moore developed to examine the reproduction of regularities, as well as the more subtle situational adjustments and indeterminacies of change, is the concept of ‘the semi-autonomous social field’. The semi-autonomous social field is a frame to explore the intertwined nature of law, socially observed norms and social relationships. These dimensions are present in various layers of society, of which law is only one of many fields “by which societies built durable social and symbolic orders” (Chanock 2000a: xviii). The key contribution of the semi-autonomous social field is that it “broke down the model of a single legal field into numerous self-regulating and enforcing arenas in varying relationships with a central law” (Chanock 2000a: xi). Moore’s theoretical model was based on her research in rural Tanzania, where the political conditions were very different from those in South Africa; interestingly the reverse, in that the law in Tanzania at the time of her field work had outlawed private ownership. The Wachagga of Mount Kilimanjaro, on which her research is based, did not have title to their land, but she observed processes of accumulation and social differentiation based on more individualised processes that were occurring hand-in-hand with customary social relationships that stressed social interconnectedness. She noticed how in many important respects the law had a minimal impact on the tenure relationships among the subjects of her research. She shows how neither colonial nor socialist principles extinguished the local customary norms that continued to evolve within the transformed social, economic and political contexts (Moore, 1978: 65-78).

Moore’s concept of a semi-autonomous social field is a way of identifying a *research problem* to assist in analysing a field of social research. As a methodological tool it is compelling precisely because a social field

is not a bounded space, organisation or body of law, yet the 'semi-autonomy' allows for examination of the interrelationships between all these fields and the more messy jumble of every-day social relationships in which social order is being constantly regulated, reproduced and transformed.

The concept of the semi-autonomous social field is a way of defining a research problem. It draws attention to the connection between the internal workings of an observable social field and its points of articulation with a larger setting [...]. The law ... is only one of a number of factors that affect the decisions people make, the actions they take and the relationships they have. Consequently important aspects of the connection between law and social change emerge only if law is inspected in the context of ordinary social life (Moore 1978: 78).

The boundaries of Moore's social field are neither geographic nor organisational:

The semi-autonomous social field is defined and its boundaries identified not by its organisation (it may be a corporate group, it may not) but by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them. [...] Many such fields may articulate with others in such a way as to form complex chains, rather the way the social networks of individuals, when attached to each other, may be considered as unending chains. The interdependent articulation of many different social fields constitutes one of the basic characteristics of complex societies. [...]. (Moore 1978: 57-58)

The idea of *semi*-autonomy emphasises, not only the inter-relational nature of various social fields, but suggests the capacity for rule-making below the radar of state law:

The concept of a semi-autonomous social field puts emphasis on ... the absence of autonomy and isolation, as well as focusing on the capacity to generate rules and induce or coerce conformity. (Moore 1978: 58)

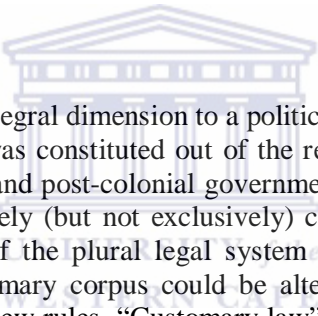
For Moore, 'rules' themselves are not the prime lens for studying ideas and behaviour, but the processes by which "people used, abandoned, bent, reinterpreted, sidestepped or replaced" rules, and only as such become a locus of studying processual change. Rules are nevertheless important: "[t]hey are a part of the way people think and talk about social life in general", even if their way of dealing with rules in concrete instances may diverge from them (1978: 147). One of the central themes in Moore's work is that "[t]he making of rules and social and symbolic order is a human industry matched only by manipulation, circumvention, remaking, replacing, and unmaking rules and symbols in which people are equally engaged" (1978: 1). Her semi-autonomous social field was precisely a way of observing how social processes that operated outside the ambit of formal rules. At the same time rules are acknowledged as important referents for social action. For Moore, 'culture' is the 'patterned aspects', which may well be resilient to change, i.e. is more 'determinate'. However, underneath the layer of culture and organised social life:

... the patterned aspects may be temporary, incomplete, and contain elements of inconsistency, ambiguity, discontinuity, contradiction, paradox and conflict. [...] While rules and customs are socially and culturally generated, indeterminacy may be produced by the manipulation of existing internal contradictions, inconsistencies, and ambiguities within the universe of relatively determinate elements” (1978: 49).

Moore (1986: 317) identified three dimensions of transformation of indigenous law in a semi-autonomous social field, which reflects the position of the freeholders in my study.

- (a) The transposition of its place in a political/legal system
- (b) The transformation of its economic/social context
- (c) The translation of its meaning.

Moore understood that law is connected to political power, and emphasised that the investigation of modern law and custom must be seen in relation to the broader transformation of the political economy. In the context of the modern democratic state organisation, law and custom relate to each other in processes of cultural bricolage.



[Customary] law once was an integral dimension to a political totality, the precolonial chiefdom. The entity called “customary law” was constituted out of the residue left after colonial modification of the ... polity [...] The colonial and post-colonial governments reduced “customary law” ... to a set of local ethnic conventions largely (but not exclusively) confined to relations of kinship. [...] As such it was a small segment of the plural legal system of the state [...] There was no simple mechanism by which the customary corpus could be altered as such. In the colonial period the Native Authorities could make new rules. “Customary law” could be added to, bits of it replaced. It could be reinterpreted. Parts of it could remain unused. But as labeled, it was an entity which was conceived as static (Moore 1986: 317).

Despite the relegation and subordination of customary law to the domain of family relationships, she observed that it “remained a critical element in the lives of rural people ... because it determined access to land, and because it framed the structure of the family and lineage on which the whole system of social support was founded” (Moore 1986: 317).

A key methodological implication of the investigation of a semi-autonomous social field is that it allows the researcher to see the interplay between norms and laws, and the degree to which internal rules conform or diverge from state rules. The degree of conformity or non-conformity with state law is intrinsic to the nature of the social field itself:

An inspection of semi-autonomous social fields strongly suggests that the various processes that make internally generated rules effective are often also the immediate forces that dictate the mode of compliance or non-compliance to state-made rules. (Moore 1979: 57-58)

Moore maintains there are analogies between the centralised, formal processes of law formation and localised or 'semi-autonomous' rule-making based on local norms, since 'norms' are also legislated by government. State-legislated norms may clash with local norms.

One of the most usual ways in which centralized governments invade the social fields within their boundaries is by means of legislation. But innovative legislation or other attempts to direct change often fail to achieve their intended purposes' and even when they succeed wholly or partially, they frequently carry with them unplanned and unexpected consequences. This is partly because new laws are thrust upon ongoing social arrangements in which there are complexes of binding obligations already in existence. Legislation is often passed with the intention of altering the ongoing social arrangements in specified ways. The social arrangements are often effectively stronger than the new laws. (Moore 1978: 58)

Processes of rule-making ("law-like" processes) are thus present in all social domains, rural or urban, factories or on farms, families, sports clubs, business corporations, etc "or just about any social arena with social regulation" (Tamanaha 2007: 393). Whether these are formalised into law, or appear as patterned local regulatory 'habits' or practices, or customs, each may be examined in terms of their 'ideas' or symbols on the one hand, and their content, such as rules and repetitive or changing practices on the other. The ideational and practical levels each affects the other, and both layers are amenable to change and accommodation, and can be seen as being mutually constituted.

A key conceptual backdrop to Moore's anthropology was that she saw state laws (centralised legal systems) as "piecemeal aggregates", rather than a "consistent body of rules", contrary to the way the legal profession portrays it. The 'systemic' nature of law is for Moore an "after-the-fact work of professional specialists" or the "before-the-fact work of political ideologues" (1978: 9-11). In this respect, she sees local rule-making and state rule-making as analogous, and both are only ever able to attain "partial order and partial control [...] legal systems can never become a fully coherent, consistent whole which successfully regulate all of social life (1978: 3).

Moore's approach raises many questions which have been debated over a long period of time by scholars of 'legal pluralism' in the past few decades (much of it since her initial research) regarding:

- what is law?;
- what are the distinctions between 'law' and 'custom'
- what is the reach of law?

I cannot do justice to the wide and complex scope of these discourses, which raise profound questions, and in some respects irresolvable problems of definition (Tamanaha 2007). I turn again to Moore's semi-autonomous social field as a reminder that these questions cannot be resolved by definitions and closed sets

of meaning; or in a-historical constructs of bounded societies. The semantic meanings and practical outcomes are themselves the site of ongoing ideological struggle, reflecting continuous social and economic transformation in any society, in which particular historical events play a crucial role. The intertwined nature, and analogous characteristics of law, customs and social norms defy attempts to distinguish between them theoretically or conceptually. I discuss this problem below, since it proved relevant to my attempts to feather out the distinctive elements of law, norms and customs in 'African freehold'.

Legal Pluralism

In a wide-ranging historiographical overview of the 'troubled concept of legal pluralism', Tamanaha (2008: 396) ultimately avoids the definitional problem of identifying law by

... accepting as 'legal' whatever was identified as legal by the social actors. [...] Legal pluralism exists whenever social actors identify more than one source of 'law' within a social arena. [...] Law is a 'folk concept', that is, law is what people within social groups have come to see and label as 'law' (Tamanaha 2008: 396).

Moore adopts a somewhat pragmatic approach to distinguish between law and custom. She suggests a way of distinguishing between "local customary law and the law of the supravening polity [as] a difference between the kind and level of political unit within which the rule [is] legitimate". She concedes that this approach is a practical distinction in order to avoid interpretive confusion, since a search for an essential distinction would prove elusive (1978: 15). She maintains that there is an advantage to preserving the conventional distinction between rules potentially enforceable by the government (i.e. law), and rules enforceable by other organisations or agents (1978: 17). In the past laws were "the rules of the dominant and geographically widest regime, 'custom' ... the binding practices of localized subordinate peoples" (1978: 15), but as the state attempts to monopolise law, these distinctions become more rigidly differentiated. Yet the state never monopolises law. The state is interdigitated (internally and externally) with non-governmental, semi-autonomous social fields which generate their own (non-legal) obligatory norms "to which they can induce or coerce compliance" (Moore 1973: 720). For Moore, it was not about side-lining the importance of law (as is sometimes read into her scholarship), it is about balancing the visibility of each (cf Peters 2002a: 55).

Moore's theoretical approach emphasises the myriad "non-governmental sites of rule-making and /or rule enforcing" where juridical "law-like" processes can be observed in many layers of society (meaning all societies), in which she implies the processes are similar. To avoid confusion, however, " 'law' can ... be reserved for the government-enforceable" (1978: 18). Woodman adds to 'enforcement' the notion of 'observance' (given the limited reach of enforcement in some societies). Woodman maintains it is not possible to determine the finer distinctions between state law, customary law and non-state law on grounds

of enforcement alone, and that the 'choice of law' is an outcome of power relations and struggles between different authorities (Woodman 12, 17-18; Tamanaha 2008: 385: 392).

The literature suggests that the distinction between 'law' and 'custom' (and different sources of law), is, as Peters suggests for the term 'property', an "historiographical" matter, which cannot be solved by scientific definition (Peters 1996: 6). Peters' example for this premise is pre-capitalist England, where customs were once 'part of law', but which, in the wake of the land enclosures following the advance of capitalism, led to the law increasingly excluding customs, which was in turn reflected in changes in the language itself. Peters shows how time honoured rights of use became devalued as "mere uses", bordering on "illegal", and ultimately owners gained power "over users", displacing coincident rights that were in the past regulated by custom (Peters 1998: 354). In Europe, prior to the codification of civil law, a varied range of medieval, religious and family customs applied in different regions of the continent, which were observed as an aspect of law (Moore 1978: 15; Goody, Thirsk & Thompson 1976).

If legal pluralism is accepted as empirical reality in most societies, as Tamanaha suggests, the condition of legal pluralism can be normalised and observed in various social fields and analysed in terms of what is legally or socially required in a given field.

Legal pluralism, it turns out, is a common historical condition. The long dominant view that law is a unified and uniform system administered by the state has erased our consciousness of the extended history of legal pluralism [...for example] the hodgepodge of coexisting legal institutions and norms operating side by side, with various points of overlap, conflict and mutual influence [in medieval Europe]. (Tamanaha 2007: 377-382)

The messy reality of legal pluralism in European society counters the tendencies to associate the concept with more recent colonial societies alone. In post-colonial discourses, moreover, an ideology of legal pluralism has emerged that has refigured the concept to extol the virtues of ethnic diversity and cultural distinctiveness. Recognising rights of certain groups or categories is seen to allow a degree of partial autonomy and pulling away from the centre.

South Africa is marked by an extreme variant of legal pluralism on account of role the law played in securing racial and political segregation. A strong burden fell on law to keep the geo-political boundaries in place. The walls between different sources of law and custom were far less porous than those of Moore's world. So disfigured by race and inequality was South Africa's plural legal landscape that Chanock characterised the particular moment of codification of customary law in the late 1920s in South Africa as a legal 'pathology' that is still significant today (1994: 295, 2010: 353).

Scholars of legal pluralism categorise two levels of legal pluralism: state recognised legal pluralism and ‘deep’ legal pluralism. The former recognises customary law by way of legal and constitutional imperative. The latter reflects the presence of other sub-state levels of social norms and customs. ‘Deep’ legal pluralism is substantially the world that Moore was analysing, and it is an ongoing reality in South Africa, operating side-by-side with state recognition of customary law in the Constitution, a problematic I discuss in Chapter 9.2 of the thesis⁹. The outcome, as Tamanaha postulates, is not a matter of preference or ideology, but the result of the balance of power between the state and the subjects or citizens, and a site of ongoing struggle between individuals, groups and organised political life:

In many locations during and after colonisation, state legal institutions were relatively weak by comparison to other normative systems. [...] Since the bulk of state legal norms were transplanted from elsewhere, they almost inevitably did not match the norms that prevailed in social life... Thus, while the transplanted law held the upper hand on its own turf within the context of the legal system, matters were reversed in social life, where the state legal system frequently was unable to dictate its terms [...] From the standpoint of a legal authority trying to consolidate its rule, legal pluralism is a flaw to be rectified. From the standpoint of individuals or groups subject to legal pluralism, it can be a source of uncertainty, but it also creates the possibility of resort to alternative legal regimes (2008: 385)

Change and Continuity

The question ‘what is the reach of law?’ is the more vexing and the most interesting. Why do certain habits of ideas and practice remain relatively more stable over time, conspicuously resistant to change, while others change perceptibly? While the big answer undoubtedly lies in political economy, there are certain areas of social organisation, that, as Okoth-Ogendo commented and Berry has shown, are remarkably obdurate, even in the face of large-scale economic changes (Okoth-Ogendo, Berry 1989 a & b, 1993). Many scholars acknowledge there is an association between regular, repetitive responses (i.e. conformity) and fear of coercive and retributive force at the local level. Moore speculated on a deeper possibility of why some normative elements are relatively stable vis-à-vis others that change:

One possible reason ... may be that in pre-industrial circumstances the maintenance of relationships of social exchange between social units depends heavily on the existence of replicated units with like normative orders. This may act as a brake on significant normative changes within individual subunits since innovations might cut off important relationships. The commitment to *maintaining connections among units* might account for some of the putative stability of ‘customary law’ (Moore 1978: 13) (emphasis added).

Moore argues, however, that repetitive patterned responses are a part of processual movement through time, including those triggered by globalising capitalism (Moore 1986, 1978: 42). She concludes that form and structure are not opposed to process, but part of processes of dialectical change. Structure should not be equated with static and process with change; conversely, change is not the opposite of regularity. Processes

⁹ The Constitution of South Africa, Act No. 108 of 1996, see articles 9, 10, 15, 30, 31, 39(2), 211 (3).

produce continuities and repetitions, as well as innovation. She draws attention to elements in situations that are neither regular nor changing, but subject to indeterminacies. She concludes:

An adequate processual study of change is inextricably bound up with processual study of continuity and indeterminacy. An adequate study of what is negotiable in situations cannot be made without attention to what is not negotiable in the same situation.” (1979: 48).

These observations foreshadowed a spate of scholarship that expanded on her concept of ‘indeterminacy’ observable in sub-state fields of norms and customs. Berry in particular emphasised the negotiability and ‘elasticity’ of relationships that are embedded in African customary law and tenure. By extending the same argument, this literature refutes a Eurocentric conceptualisation of African society as closed and impervious to change (Peters 2006). The stress on negotiability and fluidity tends to obscure both Moore’s and Berry’s emphasis on regularity, continuity and repetitive, patterned responses that occur simultaneously with adaptability and flexibility in customary law and society.

Peters argues that the stress on indeterminacy and ambiguity disguises situations where state systems are determinative, as well as local situations where innovation, rules or claims do ‘stick’. She provides evidence of increasing concentration, inequality and competition from below, processes that develop under the cloak of customary tenure, which she sees as incipient class formation (Peters 2002a, 2004, 2006, 2013). One of her examples is the tendency towards privatisation among the pastoralists of Botswana (1992). In discussing matriliney and property relations among family members in Malawi (1997) she argues that repetitive or cyclic events can be seen as a ‘structuration’ of relationships, where change and innovation do not necessarily eclipse the familial structures that reproduce social relationships, authority and property. She suggests that there has been an over-emphasis on indeterminacy, negotiability and flexibility (2002a: 54; 2006: 45-47; 2013; 542).

Bringing together the concepts of familial relationships, property, process and structure, Peters points out how gender studies have returned to a focus on familial and kinship relationships. Peters has shown that political economy and kinship are not mutually exclusive concerns of research, and indeed the building blocks of familial relationships are an essential ingredient of political economy, and key signifiers of gendered power relations (Peters 1997).

The rekindling of kinship terminology and descent ideology (discussed in Chapter 3 below) tends to be associated with feminist literature, where relations of power within households is a key concern in linking local levels to higher levels of power. Household units are in turn deeply structured by gendered relationships, and hence the importance of linking social structures with social processes, rather than seeing them as opposed. The switch to macro-scalar issues in the political economy and large-scale ‘community’ units of tenure may skip over these micro-scalar social and tenurial relationships.

A note on terminology

In keeping with the conceptual framework suggested in the work of Moore, Peters and Tamanaha discussed above, I have used the terms ‘law’, ‘custom’ and ‘customary’ in this thesis as mutually constructed concepts that cannot easily be isolated by means of closed definitions, but as sites of ongoing struggle and realignment in any country legal system. I have retained the use of the term ‘customary’ to refer to both official ‘customary law’, meaning the codified variant, and ‘customary’ as an adjective to refer to entrenched local norms that reflect living values and practices, sometimes distinguished as the ‘living law’ (Claassens & Mnisi 2009: 491-516) which are common to all societies, not only African or so-called ‘traditional’ societies. ‘Tradition’ and ‘traditional’ are used to frame the invariant characteristics of social practices that purport to reflect ‘timeless tradition’, even when these may be ‘invented’, as suggested by Eric Hobsbawm (Hobsbawm & Ranger 1983).

Hobsbawm’s Introduction in *The Invention of Tradition* (Hobsbawm & Ranger 1983: 2-3) provides a useful schematic for distinguishing between custom and tradition:

The object and characteristic of ‘traditions’, including invented ones, is ‘invariance’. The past, real or invented, to which they refer imposes fixed (normally formalized) practices, such as repetition. ‘Custom’ in ‘traditional’ societies has the double function of motor and fly-wheel. It does not preclude innovation and change up to a point, though evidently the requirement that it must appear compatible or even identical with precedent imposes substantial limitations on it. What it does is to give any desired change (or resistance to innovation) the sanction of precedent, social continuity and natural law as expressed in history ... ‘Custom’ cannot afford to be invariant because even in ‘traditional societies’ life is not so ... ‘Custom’ is what judges do; ‘tradition’ ... is the wig, robe and other formal paraphernalia and ritualized practices surrounding their substantial action.

2.10 Drawing the strands together

The dialectical relationship between ‘structure’ and ‘process’ suggest that the reaction against overly deterministic functions of traditional systems and the implied closed structures of pre-colonial social organisation should be offset against the importance of structuration in ‘continuity’. By bringing these two concepts together, it is possible to comprehend phenomena that appear at first sight to be anomalous or even contradictory, for example aspects of ‘African freehold’ which combine elements of custom and exclusive property, collectivity and a degree of individuation.

These concepts are useful for analysis of African freehold, which the thesis elaborates in Part Two, which exemplify many of the trends discussed in this chapter:

- the obduracy and persistence of powers of access to land based on social relations, as suggested by Okoth-Ogendo, and shown by Berry;
- the reproduction of ideologies of descent in the context of land title discussed by Berry, Haugerud and Mackenzie;
- the “remarkable adaptability” of Cousins’ ‘nested’ customary social relationships, which also have saliency in apparently non-customary phenomena, such ‘ownership’ of land;
- the permeability between law and custom conceptualised by Moore and Tamanaha;
- Moore’s small-scale repetitive *and* manipulative actions that reproduce as well as alter or transform relationships simultaneously;
- social norms that flourish beneath the radar of state law;
- Peters’ suggestion of concentration and narrowing of definitions of rights of belonging, resulting in increasing competition between units within families (or wider groups), such those based on kinship, age, gender and status, where the most powerful are paradoxically the most equipped to exploit the ‘customary’ ambiguity in land tenure;
- Bohannan’s folk maps which reflect different conceptions that people have of their relationships between themselves, as well as to the physical world depicted in terms of various symbols of space
- Lund’s concept of ‘social time’ and the utmost importance of temporal features, such as significant historical events or issues of property transmission; as well as different *interpretations* of time, such as people’s invocation of either ‘timeless tradition’ or ‘particular events’ to validate claims and authority.

‘African freehold’ adds another neglected dimension, by showing that western and African concepts may inter-relate and ‘interdigitate’ in ways less starkly opposed than suggested by much of the Africanist literature (cf Berry 1989 a & b). In the next chapter I narrow my focus to aspects of the microscalar issues that I consider important in examining the intersection, articulation and divergence between law and custom, by looking at issues such as concepts of the family unit and concepts of the divisibility of space and concepts of the devolution of land, and how these concepts have been used in the scholarship on African freehold.

CHAPTER 3 CONCEPTS OF FAMILY AND THE PASSAGE OF LAND

3.1 Introduction

As Bohannan observed, African concepts of tenure, and indeed across the global scale, differ according to specific agro-ecological, socio-economic and political-historical circumstances. There are nevertheless common elements. The diffusion of capitalism, multiple, non-agrarian sources of livelihood and increasing concentration of land resources combined with increasing constraints on land access have led to degrees of social differentiation and a tendency towards more nucleated family homestead units. Nevertheless, a range of scholarship shows that homogenising effects have been constrained and moderated by counter-tendencies. These countervailing features are partly, as Li suggests, a defensive reaction towards collective identities to ward off dispossession (Li 2010); and the filtering effects of patterned, 'customary' social familial forms, ideas and practices that find expression in ongoing investment in social relations. Aspects of these traditional social organisational features are resilient to transformation (Berry 1993). Berry takes the argument further, suggesting that concentration and commercialisation occurs without dispossession as a result of reliance on social networks for labour and access to resources (including state resources), which also constrains the expansion of productive capacity (Berry 1993: 135-158).

In spite of these countervailing tendencies, western and African systems of law, political administration and agrarian production have mixed and mutated over time, albeit retaining distinctive features (Berry 1989a: 3-4). One of the questions I attempt to address through the prism of title (or legally recognised private land 'ownership'), is why, as so much evidence suggests, analogies and possibilities for diffusion between western and African customary land tenure systems resist integration at their points of greatest intersection, i.e. through land title? And what does this say about African land tenure more generally?

Peters and Berry, among other scholars, show that concentration of land and other resources is evident in processes of private accumulation and (re)production of inequality (i.e. of commoditisation or commercialisation), and that these processes occur within customary systems (Peters 2002a: 56; Berry 1993); and in some cases predated colonialism (Pierce 2013) and title (Berry 1993; Haugerud 1989: 61). Title is not the necessary common denominator to concentration and accumulation, though the presence of title restructures the legal and social qualities of access to and control over land. Title can be operational within families organised along traditional lines, while privatisation also occurs under customary tenure, the most frequently cited examples being Kenya, Ghana and Nigeria where cash cropping was significant (cf Peters 2002a: 50, citing Francis; Berry 1993; Pierce 2013). Whether or not this is a sign of the class formation is debateable in the scholarship, with Peters seeing signs of incipient class formation, and Berry arguing that concentration is based on the prevalence of investment in multiple (and multiplying) social networks rather than expansion of productive capacity and class formation, that is, "exploitation without

dispossession'. Berry's view is that exclusionary tendencies are only partially effective, so that exclusive control over access to land by closed corporations or individuals seldom develops (Berry 1993: 135-158, cf Okoth-Ogendo 1989: 11). The relative degree of exclusivity and inclusivity is important in defining the parameters of the land holding group under title.

This chapter explores changing concepts of 'family' and the ongoing importance of affiliation, affinity and other socially constructed identities, such as gender and seniority in the links between social identity and land holding. These concepts have been crucially affected by external changes that have resulted in new rules or channels of access to land and its transmission, but the concepts and ideologies themselves have also affected the way in which these changes have impacted familial life and property. The legal implications for property distribution flow from people's conceptions of the basic social unit that holds and transmits property, and which in turn relates to the spatial unit in question. As Berry noted, extending Sir Henry Maine's dictum of property as a 'bundle of powers' (more widely adapted to the expression 'bundle of rights'), in Africa we are also concerned with "bundles of rights holders" (Berry 1993: 41). Bringing together bundles of rights with bundles of rights holders is another way of representing the dynamic relation between graduating social and spatial units, as well as differential jural and social powers over land so powerfully theorised by Okoth-Ogendo, discussed in Chapter 2 above.

In this chapter I am concerned with conceptualising the 'bundle of rights holders' in order to sharpen a view of the social unit that holds property. Where there are differing *legal* conceptions of the basic property-holding and transmitting family unit, the consequences can be great. It is the social field where formal laws can intrude strongly, and where common law, statutory law and customary law principles show the greatest areas of tension, both within and between them.

The constituency of familial social units is a relative and cultural concept. Moore puts 'descent ideology', which forms the basis for cultural modes of tracing relationships and classifying kin (referring to any society, including western society) in the comparative law framework of constitutional theory, stressing the importance of distinguishing between the jural and ideological aspects (Moore 1978: 149-180).

There seems to be a two-way interaction between social structure and ideas about social structure.[...]. Descent ideologies and their elaborations are in part symbolic or metaphorical representations of social connections, in part categorical definers that affect social relationships. (Moore 1978: 180)

In the following chapter I narrow my focus to culturally constructed ideas about family and property, drawing from evidence from African freeholders, where ideologies of descent continue to be counted as important principles of social organisation for property purposes, if not exclusively so.

The issues discussed are arranged as follows:

- Research sites conceptualised in terms of a semi-autonomous social field.
- A brief review of comparative literature on African freehold.
- The importance of descent groups as social units holding freehold land.
- Land is means by which people maintain local and descent group affiliation, and is thus a symbol *and* consequence of membership of a descent group (Haugerud 1989: 61-62).
- Affiliations that revolve around land buttress new economic opportunities and risks associated with the spread of commercialisation (Haugerud 1989: 61-62).
- The social relational nature of property as evidenced in the continuing significance of kinship and descent, and how these concepts generate rules of transmission.
- Property concepts are deeply embedded in, and built on the foundations of, gender relations. Descent groups based on social affiliation are defined and concretised in terms of gendered norms and relationships. Socially constructed identities such as gender and seniority intersect with social categories upon which family affiliation is defined. Gendered relationships are thus inextricably entwined with property relations.
- I isolate transmission processes, or the way land devolves, as the key variable in making visible the relational and conditional nature of property in relation to social affiliation and social identity.
- The mode of transmission and devolution in turn calls for a clearer analytic and practical distinction between succession and inheritance than is generally found in the literature.

3.2 Tenure research sites as a semi-autonomous social field

Moore's concept of a semi-autonomous social field, discussed in Chapter 2, provides an integrating analytic space to observe land tenure relationships in the complex environment of legal pluralism in Africa. In South Africa, massive state investment in racial and spatial separation regarding landholding and residence, but not economic life, resulted in extreme manifestations of legal pluralism in matters such as access to land, transmission of property, family law, service allocation, etc. As observed in Chapter 2, legal dualism does not operate along parallel lines. Different sources of law, including local norms, intersect and intertwine in ways that defy legal categorisation. The methodological utility of defining a research field in terms of a social field that is partially autonomous and not defined by race, law or geography, lies in the greater freedom accorded the researcher to explore the concrete social processes that animate 'life in the round'. Moreover, the prism on actually-existing local social processes minimises the confusion between legal or jurisdictional units of analysis (or official 'categories') and concretised social processes. Since, according to mounting evidence, access to, and control over land and natural resources continues to be channelled through *both* legal and social networks, the resulting entanglement renders attempts to either fully align or separate them futile. As Berry observes, people work "through as well as around the system" (1993: 64), including land administration.

In the case of land that is titled, there is an added advantage in a methodology that allows for the observation of processes set in motion by legal interventions that seek to radically restructure local social relations.

There is a consistency in norms and social sanction among freeholders to conceive of the research sites in this thesis as a semi-autonomous social field. Moore's methodology of a social field, rather than an organisational, geographic or legal field provides a methodological lens to examine an urban and a rural site in a single social framework, despite the different dynamics of space, geography and land use; and the fact that many members of a land holding group do not permanently reside there. A social field may include a spatially dispersed population, since the boundaries are not jurisdictional or physical.

By defining property relations by a social, rather than a legal field, it is possible to observe processes that channel access to and control over land, without being restricted by whether or not these conform with the law. As discussed in chapter 2, property relationships involve continuous processes of production and reproduction, and outcomes are frequently the result of power struggles within families or social units. This means that, just as there is evidence of non-compliance to colonial law, it is futile search of an 'authentic' customary law that may be 'determining' of social patterns of behaviour. The struggles over access to and control over land play out in the context of new sources of wealth, power and status, and though filtered through social identities based on customary patterns of affiliation and ascribed positions, these are not fixed but respond to the challenges of the present, and new positions or resources may be by means of 'achieved' status, rather than ascribed status, and resources may be exchanged or purchased (Berry 1989b: 43-44).

When the social and spatial elements are feathered out, following Bohannan's methodology, it is possible to see multiple variants at play, for example tensions and differentiation between individuals within social units. Much of the regulation takes place at sub-state levels, where local social norms are more important than state procedures and formal law. Here the concept of 'semi-autonomy' is apt since these levels of control are not completely independent of, or insulated from, other levels of regulation. There are important points of articulation as well as divergence. This approach challenges the conventional dichotomies between individual and collective interests, and ultimately, between typologies of tenure as inassimilable opposites based on closed sets of rules, emphasising the interplay between individual family membership and the family grouping, and degrees of inclusivity and exclusivity.

3.3 African Freehold – building on the Literature

The incidence of freehold in Africa was rare historically, and the literature on this subject is slim by comparison with customary or 'communal' tenure systems. The literature is mainly confined to the controversial titling programme in Kenya in the mid-twentieth century. For the purposes of comparative value, I have found it useful to briefly review key studies on the effects of titling in Zimbabwe and Kenya, as

well as one close to home in South Africa (Berry 1993; Cheater 1987; Haugerud 1989; Mackenzie 1993; Mills & Wilson 1952). The latter is the fourth in a four-volume inter-disciplinary study of the Keiskammahoek district, entitled the Keiskammahoek Rural Survey, where some villages have freehold title, hereinafter referred to as 'KRS v 4'. One of the cases described in the volume on land tenure is Rabula (Mills & Wilson 1952: 45-68).

Freehold tenure was introduced in the eastern Cape colonial territories a century prior to its introduction in Zimbabwe and Kenya. In spite of this time lapse, there are striking similarities between the results in all three countries. In Zimbabwe and Kenya, freehold was introduced on the recommendation of land commissions that had been specially appointed to look into freehold as a solution to perceived problems, in line with ideas about 'modernising' African agriculture, for which purposes individualisation of holdings and title was perceived as the means of creating a class of African commercial farmers (Peters 2002a: 45). This thinking was in line with emerging ideas about 'development' and the increasingly technical orientation in the language that justified these interventions (Peters 2006).

In Zimbabwe, freehold tenure was introduced in 66 areas in terms of the Land Apportionment Act of 1930. The area was subsequently substantially reduced in 1960, when nearly half the land originally set aside as freehold was re-categorised as reserve land under 'communal tenure' (Cheater 1987: 176, 189). In Kenya the Swynnerton Plan of the mid-1950's introduced freehold in the Central Province and later expanded to the east (Berry 1993: 125-128; Haugerud 1989: 63-64; Mackenzie 1993: 211). The plan was geared to expanding native Kenyan's cash-crop production through improved markets and infrastructure, the distribution of appropriate inputs, and the gradual consolidation and enclosure of land holdings. The project was commonly recognised as a "counterinsurgency" mechanism to combat armed rural rebellion among the Kikuyu.

The Kenyan intervention coincided with the Tomlinson Commission of 1954-5 in South Africa, which similarly recommended the division of the rural society into improving peasants, with individually owned family smallholdings, and workers whose future lay in rural villages, selling their labour. The Verwoerd-led nationalist government, however, rejected the Tomlinson recommendations.

The studies of freehold contexts in Zimbabwe and Kenya show that the legal changes did not extinguish customary social relationships among freeholders, though it did alter and restructure them. The authors of the South African Keiskammahoek studies also observe the persistence of customary norms and practices, but do not make this central to their analysis as the other authors do, and which I do in this thesis. In common with the methodology of this thesis, the authors of the other African studies identify a particular legal problematic in processes of transmission of land; and moreover, stress the legal dualism between official customary law and statutory law, and the tension that results from the interface between them. This is

understandable given the stress in law on control over rules of inheritance, a link made explicit when land is recognised as ‘immovable property’ by virtue of title, and registered in the name of an identified owner. The authors look at processes of articulation between these systems of law, as well as conjuncture, stressing the inter-penetration or ‘interconnection between indigenous and imported law’ as an arena of struggle. They identify processes of acquisition and transmission as a locus that reveals relationships of power concerning property, and both stress the consequent diminution of women’s access to, and control over land in the processes of competition and contestation between these two legal spheres.

There are nevertheless important differences between their approaches. Whereas Cheater privileges law, or legal regimes, as competing arenas within which these contestations take place (Cheater 1987: 172), Mackenzie examines ongoing transformation in terms of changing relations of power at intra-household level. Mackenzie also stresses the entanglement of customary and statutory law, but sees law as one among many ‘resources’ that people draw on in the context of competing class and gender struggles to legitimise acquisition and control over land (Mackenzie 1993: 195). The two approaches have significant methodological implications for understanding property in Africa, and provide a microcosm of two different approaches to the study of African land tenure more generally.

Berry and Haugerud on the other hand, lay less stress on law, and more stress on ongoing socio-economic processes and agrarian change (Berry 1989 a & b, 1993; Haugerud 1989). Berry’s scholarship is overarching. In her major study, she compares agrarian relationships in four African countries, examining land as only one factor of production in agrarian economic and property relationships. She incorporates exploitation of labour and the relationship between land tenure and agrarian production processes, in which socially constructed relationships based on age and gender are important. Investment in social networks features as a key thread in her analysis (Berry 1993). Her scholarship reveals the dynamic quality of African agrarian relationships, whilst simultaneously emphasising the continued importance of social networks for access to resources, including land and labour, wages and state resources, and the manner in which this constrains the expansion of productive capacity. She concludes, as do other scholars of land reform in Kenya, that “social relations continued to play a significant role in determining actual patterns of access to land ..., even after registration” (Berry 1993: 127).

Haugerud’s analysis (Haugerud 1989: 61-85) deals with evidence that refutes the causal connection between privatisation of rights and title. She does not focus on social relationships as much as provide evidence that land privatisation, increasing purchases, litigation and erosion of customary use rights were present in Kenya some decades before the official privatisation through titling occurred. She concludes that “tenure reform ... has not successfully institutionalised exclusive private control of land, nor has entitlement been a necessary prerequisite for expansion of commercial agriculture” (Haugerud 1989: 83).

Cheater's material, which she calls the "legal dirt" on which her paper is constructed, is a set of land disputes that entered the legal arena in one of the 66 freehold areas, viz. Msengezi in the district of Chegutu (formerly Hartley) in Zimbabwe (1987: 175). This by its very nature situates the problem 'in law', since it may be assumed that cases referred to authorities for arbitration or adjudication are 'trouble cases' that the respective contestants desire to be legally resolved. The author situates the cases in the asymmetries and contestation between sources of law. The cases are thus not set in the context of the ongoing social processes of transformation in everyday life. Cheater's narrower focus on legal disputes leads both from, and to, her view that "[l]aw, particularly the law of property, may indeed be an instrument of the ruling class for the reproduction of any given social and economic formation", an idea she references to Chanock's conclusions in his studies of customary law in Zambia and Malawi (1987: 173).

Her particular concern is the paradoxical "pattern whereby a 'customary' outcome was manipulated by the use of statutory law". She concludes that the

... adjudication of conflict between statutory and customary legal systems by colonial administrators frequently meant that, where customary law was supposed to apply, legitimate heirs were disinherited; and where attempts were made by landowners to dispose of their property by will, attempts which were not approved by the statutory system, the wishes of deceased landowners were not met (1987: 174).

She thus examines the cases in terms of the legal requirements in each case between statutory and customary law, and concluded that customary law had been subordinated both in its operation, and conceptually, to the dominant statutory system. She postulates that there was "deliberate *legal* hindrance to significant change in the relations of production involving blacks" (1987: 189 emphasis added). Her case material explains, in her view, why those 'individual blacks who wished to transfer themselves and their property relations to the domain of statute law were under no circumstances permitted to do so. Precedents for change were not tolerated by the colonial system" (1987: 189). She is interested in the 'gap' between statutory and customary law with respect to ownership and transmission, convinced however that those Africans whose disputes she followed would have abandoned customary law and followed the common law had the legal structure allowed it. It was through the control of marriage and inheritance laws, which channelled disputes or choices in one or other direction, that these tensions are expressed.

She sees "indigenous and imported law as competing legal systems that are rarely harmonised ... precisely because their asymmetrical coexistence is necessitated by the historical fact of change under colonial domination" (1987: 173). She observes that anthropologists have *not* pursued this line of thought in spite of their observation of the interconnectivity between legal systems, and implies that anthropologists were unwittingly complicit in the very asymmetry she refers to. Cheater thus follows Chanock's stress on the legal mode as a "weapon" of the ruling classes, in collusion with elements among African society seeking to

legitimise power based on reinvented custom (Chanock 1985: 67). Chanock regards the law as a locus where social relationships could be defined, changed and defended. The law thus played a critical role in the construction of new modes of authority, though he is aware, quoting Moore, of its “highly circumscribed ability to control behaviour” (Chanock 2000a xxix, 1991 70-76, 2001: 22).

Mackenzie’s analytical framework is different from Cheater’s. She does not view law itself as the critical mechanism of change. “[B]oth customary law and statutory law are conceived as arenas of struggle to which both men and women have access”. She contends that this approach is “heuristically [useful] in untangling gender-differentiated rights of access to and control over land”. (1993: 195-6). Mackenzie approves of Moore’s methodology, which she claims captures the “iterative nature of the relationship between local struggle and large-scale process” (1993: 203). Mackenzie and Moore both use trouble cases and legal disputes to illustrate their respective studies, but locate the disputes in wider processes of change.

Mackenzie is interested in the nature of contemporary struggle vis-à-vis the land at the intra-household level. She is concerned with making visible the processes of both class and gender differentiation, which she believes can be seen in the micro-level of familial property relations. Importantly for this thesis, she emphasises the significance of identifying “antecedents to the present struggle in order to place the instances of contemporary discourse over land in historical context”. She thus links pre-title social organisation with post-title property relations, concluding that customary rights to land are not extinguished with the introduction of freehold tenure and registration of individual title. She centres the continued importance of norms associated with the patrilineally defined subclan (*mbari*), which was the pre-colonial basis of territorial control and inheritance. Under the freehold system, she argues that descent as an “ideology” is drawn on in the struggle by men to access and control land. Although *mbari*, or territorial patrilineal descent groups, have lost their *institutional* power (the colonial administration having empowered chiefs at the cost of other locally significant political organisations), their significance as an expression of familial social and political organisation has *increased* (Mackenzie 1993: 195-6).

Women’s rights are under threat from two sources. The first is customary inheritance, which prevents women from exercising authority over land. Customarily, women cannot gain independent access to land through her husband, which is strongly controlled by patrilineally defined *mbari*. The latter is an agnatic descent group that transmits property to the brother/s of her husband if the couple has no sons (1993: 196-200). She concludes that women hold positions of ‘structural significance’ as heads of houses, the ‘matricentric unit’, and as such are the “medium through which ... rights passed to her sons”. Male control was reinforced with the individualisation and registration of rights, and women’s usufruct rights decreased, since, regarding property, women held ‘structurally subordinate’ positions as producers and ‘non owners’ (1989: 96-106). Women resort to innovative practices (manipulating both custom and statute) to prevent title passing to their husbands’ brothers if they produce no male heirs (an example of the latter is women-to-

women marriages). The alternative is to have independent title of their own, whereby women can gain authority over property and pass the land to their daughters (1993: 196-200).

The second threat is through land sales, which were legitimated by title and statutory law, and which Mackenzie claims escalated between 1963 and 1982. The results, that saw women and their children destitute, led to administrative interventions to curtail these sales (1993: 196-200).

She concludes that 'women and men engage in a struggle over rights to land in two distinct legal spheres, the one pertaining to customary law, the other to statutory law (1993: 200). Her definition of legal spheres, following Merry, however, includes both custom and accepted dispute processes as well as "laws enacted by a political authority" (1993: 217). Although she focuses mainly on customary 'law', she takes issue with approaches that see customary 'rights' as either part of a customary "self-contained particularity" or as purely an "imperial construct" to serve colonialism and capitalism, fixed and frozen. The intersection of the two represents a confluence of colonial and African interests at a particular time. She sees the customary sphere as a "continuing domain of discourse or an arena of struggle" (1993: 201). Mackenzie's examination of the patrilineal descent group as a source of customary validation of property rights has an important bearing on similar ideologies and practices among the freeholders in this thesis.

KRS v 4 distinguishes between four different 'forms of tenure' that were introduced when the district was newly settled by black, and a few white, settlers historically (Mills & Wilson, 1952: 45-68). The study describes both the practices and the law by way of comparison between the four different forms of tenure. The volume provides insights into the social order among freeholders, and discusses the divergences and conjuncture with the other tenure forms that are the subject of comparison. Despite important differences in interpretation between the study findings and the findings in this thesis (see below and Part Two) the study supports the contention of this thesis that African freehold involved the diffusion of both customary and 'western' norms, ideas and family forms. However, while the study notes that the ownership unit among the freeholders was the 'agnatic lineage group', based on the norm of patrilineal descent, the implications for property relations, gendered access to and control over land, and titling as a policy paradigm are not critically examined. The study accepts somewhat uncritically the social and political reality of legal dualism, with all its intersections and interpenetration; and which, in an appendix on the "legal position", is shown to have remarkable twists and turns resulting from the institutionalisation of racial segregation of land in South Africa.

At times the description of the 'freehold' village of Rabula in the study is mired in confusion between customary law, common law and local ideas and practices. For example, the study shows patterns of property transmission by tabulating research data on 'inheritance'. By not adequately distinguishing between the meaning of inheritance in the formal law (which is premised on individuals in nuclear families), and the

actual applied meaning among the freeholders of heritable *use rights* by family members, the authors come to the conclusion that there are numbers of “matrilineal descendants” who have inherited land individually (Mills & Wilson 1952: 53). In the context of lineage-held land, the Xhosa term for ‘inheritance’ does not readily translate to the English common law concept of inheritance when it comes to land. In reality there is no such category as matrilineal descendants in Rabula, or elsewhere in the region. The misconception came from the mistranslation of local norms to legal norms. It is consequently not possible to interpret the information in the tables of data. The authors, following the same logic, do not distinguish between local social processes of sub-division of land, and formal (i.e. surveyed) sub-division. The result is a misconception that there are heritable portions or subdivisions of land, which are consequently ‘inherited’ by particular individuals who are categorised according to generational and gender criteria. Reported family disputes are similarly interpreted in terms of conflicts over individual inheritance.

Though the authors clearly perceive a divergence between local customary practices and the legal conditions, the research methodology when it came to transmission of land followed surveys of a sample of families that based their questions on the assumption of individual transmission of heritable rights. Thus a respondent might report that she had ‘inherited’ a ‘plot’ from her mother, when in reality she was allocated the use rights of a portion of land that had formerly been her mother’s. The methodology did not allow for the possibility of land devolving as a whole among multi-generational families, but who are allocated lifetime use-rights that revert to the family estate when they marry and leave, or die. Murray had a similar problem with interpreting the data. He saw the problem to lie in the methodological tradition in southern African studies to take the nuclear family for granted as a unit of analysis in household studies, which his own research reveals is a ‘fallacy’.

The tradition ... is exemplified in the report on the Keiskammahoek Rural Survey, Volume III, in which the assumption of the analytical priority of the nuclear family renders it difficult to interpret the table on Kinship Composition of the Homesteads (1981: 102 referring to Mills & Wilson 1952: 52-3, 56)

In summary, the different methodologies that have been employed to study African freehold have resulted in different emphases and conclusions, but all the studies grapple with observed anomalies that emerge with titling. What all these studies show, as does mine, is that ‘customary’ norms and rights to land are not extinguished with the introduction of western property forms such as freehold tenure and registration of individual title. Instead, titling adds another layer to the legal and normative spheres that control access to land, in which ‘custom’ is an important resource that can be manipulated and in the process, transformed.

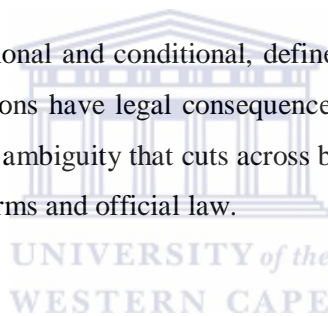
All the studies isolate four key themes that have significance with regard registration of titling:

1. Titles did not displace descent systems. Well understood local social processes based on kinship relationships define the rules about access to, and control over, property (Berry 1989a: 4, 1989b: 43, 45; 1993: 101-134; Haugerud 1989: 61-2, 66; Mackenzie 1989: 91). These norms can be, and are, manipulated — frequently by men attempting to reassert control over property.
2. There was a convergence of interest among colonial administrators and clan elders in solidifying and even strengthening male control over property and inheritance (Berry 1993: 127, 138, 163; Haugerud 1989: 75; Mackenzie 198: 94 ; cf Chanock 1985).
3. With registration, transfers tended to pass unrecorded, and subdivision of land, such as it was, occurred informally (Berry 1993: 128; 1989b 4; Mackenzie 1989: 92-3; Haugerud 1989: 61-70).
4. Agnatic descent is a normatively recognised principle of social organisation associated in the past with the linkages between productive systems and kinship institutions (Goody 1976c: 25). This social construct of the family is in tension with the legal definitions of family as the basis for inheritance rules; and also in tension with women's quest for independent access and tenure security. The contradictions between women as wives and sisters under the agnatic system, and women's rights in terms of human rights discourse emerges as an important theme in the discourse (cf Berry 1993: 157-8; Mackenzie 1989: 94). Individual versus descent group control is related, and there is evidence that individual men also come into conflict with the collective interests of the group (Berry 1989b: 48; Haugerud 1989: 83).
5. Processes of transmission of land provide an analytic key to understanding the social basis of property relations. All the studies show that there are multiple layers of access and control, which evoke local norms and also, at time, different sources of law. Rights of access and control by the descent group (i.e. living members of family collective) do not mean that rights and authority within the group were, or are, egalitarian. On the contrary, within the families, rights depend on status informed by norms of affiliation and socially constructed identities such as gender, age and place of origin, etc. Women, younger people, 'adopted' people have subordinate statuses which dictate the terms of access and use, and their labour can be exploited. Women's position under title may become potentially very vulnerable, as it is shown to be the case in Kenya (Berry 1989b: 46; Haugerud 1989: 83; Mackenzie 1989: 92-101). Mackenzie's study in particular draws attention in its entirety to the differential access to, and control over property by women, and the contestation that occurs as a result (1989: 91-109). Individual men who wish to invest in the property also have to manoeuvre around constraints inherent in collective control by individuals.
6. All the studies discussed above refer to direct transmission of land via 'inheritance' without discussing the ambiguity of the term 'inheritance' under title. Inheritance implies entity-to-entity transfers (usually one-to-one) rather than succession of the entire group to rights of access. In Kenya there may be a higher incidence

of direct transmission, since many authors imply that there was a high degree of *de facto* privatisation and commercialisation of land in the central region pre-titling. Nevertheless, there is reason to believe that these processes, along with their linguistic expression, require more thorough interrogation.

In summary, the studies reveal that there are not clear lines of separation between different sources and choices of law; instead, there is competition and tension between legal and normative spheres, which sometimes manifest in relationships between family members. Some family members may take advantage of the legal ambiguity by attempting to profit from their land rights by taking individual action, but these actions are strongly circumscribed by social sanctions against individuals striking out in overtly independent directions. The key device by which social membership and individual actions are controlled is the reproduction of the family group, which at the same time constrains individual inheritance of land. Conflicts frequently reflect gendered struggles for control over and access to land. The legal importance of these nuances is particularly significant in South Africa today, as new rules of property transmission are being carved out of constitutional principles of gender equity, a subject to which I return in subsequent chapters.

The rights of family members are relational and conditional, defined by the individual status in, and social adhesion to the lineage. These distinctions have legal consequences, but the meanings and implications of these distinctions are easily lost in legal ambiguity that cuts across both the common law and customary law, and because of misfits between local norms and official law.



3.4 Historical rationale of descent groups among the Nguni-speaking societies

The evidence discussed above suggests that ‘descent groups’ are key social units at the landholding level where freehold title is involved. Mackenzie uses the indigenous term *mbari*, which is a sub-clan level of organisation (Mackenzie 1989; cf Berry 1989b, 1993; Haugerud 1989). *KRS v 4* uses the term lineages to define family forms in Keiskammahoek district (Mills & Wilson 1952). Descent ideology, discussed above as critical in defining access to and control of land, intersects with family law and is the basis upon which rules about marriage and gender constructs hinge (Berry 1993; Mackenzie 1989).

I turn to a brief review of the context and possible rationale of unilineal descent groups historically, followed by a discussion of the significance of descent groups in the present, particularly in the context of freehold title.

Among pre-colonial south-east African Nguni-speaking societies (among others) unilineal descent groups were central to the production and reproduction of the society. The descent groups, comprising clans and lineages, consist of descendants traced through the male line i.e. the groups are patrilineal. Kinship groups

interlocked with wider social clusters to form the widest political group, e.g. a chiefship, and were the important property-carrying local social units. Preston-Whyte emphasises that lineages did not have political, geographic or corporate integrity, but were expressions of identity traced in terms of recognition of the genealogically senior male (Preston-Whyte 1937: 196).

The mechanism through which membership (kinship affiliation) is controlled is the calculation of each individual's identity through links to the male line of descent, hence the term 'lineage' from 'line'. All recognised members of descent groups and clans are related by agnatic relationships, meaning descent traced through males only. The living kin of agnatic clusters are the descendants of a common grandfather or great-grandfather, who thus trace their genealogical relationship to each other. Each lineage is in turn integrated into a clan, which is strictly exogamous: wives cannot be recruited from the same clan as the husband, and this is very strictly socially enforced. Clans therefore have paramount importance in defining interpersonal relationships and marriage rules, and their significance is clearly underlined and named. In isiXhosa clans are known as *isiduko*; in Zulu and Swazi as *isibongo*. Clans are eponymous, named after the founding father of the clan, which helps to clearly differentiate them from each other. Ordinary clan members are not expected to recall the precise order and names of their genealogies, the emphasis being on the founding father and their nearer kin (Preston-Whyte 1937 (1974): 178; 201).

According to Preston-Whyte, the lineage complex stands out in importance among Nguni-speaking societies of south-eastern Africa. Unlike many other African societies, the lineage among Nguni-speakers was a clearly differentiated unit, separate from other residential, age or territorial social markers or groupings that among other African societies had a bearing on rights, rules and social identities¹⁰. The social boundedness of the localised descent groups is said to have underlined the distinction between the agnatically related descendants of the patrilineage, and the maternal and affinal kin who were associated by marriage; a distinction which Preston-Whyte points out was far less pronounced among Sotho and Tswana societies of southern Africa, though clans remain important. Among the Sotho Tswana, the group of agnates may not be so clearly differentiated from other relatives, and their family groups included agnatic, matrilineal and affinal kin (Preston-Whyte 1937: 187; 200). Sansom has speculated that the dramatic variation in agro-ecological conditions between the dry western regions of southern Africa, and the wetter east, resulted in variation in modes of production, which in turn affected the social organisation of the pre-colonial African societies (Sansom 1937: 135-176).

The nature of south-east African descent groups, or 'lineages', has been much debated among anthropologists. While the social significance of the unilineal descent group among Nguni-speakers has been generally accepted among anthropologists, their institutional significance is disputed (Preston-Whyte 1937:

¹⁰ Compare this with the historical patterns of the Lango of Uganda (shifting cultivators and pastoralists), whom Moore describes, in addition to descent group affiliation, had other identities with legal consequences: shifting villages with non-prescribed residence, military age-sets, etc (Moore 1978 [2000]: 158-174).

178-201; Hammond-Tooke 1984). Preston-Whyte emphasises the importance of lineages as representations of agnatically-related members of descent groups, which acts as a mechanism of group reproduction. The historical rationale of a unilineal descent structure was that it extended in time and space beyond the life of an individual and provided a mechanism to hold the whole social structure together. Unilineal descent groups were thus a source of social integration from the lineage through clans to the chiefship. In pre-colonial society the lineages tended to cluster in neighbourhoods creating multiplex ties between neighbours (Preston-Whyte 1937: 187; 197), but lineages do not depend for their existence on lineage members living together.

Hammond-Tooke argues that lineages were poorly developed among the Nguni-speaking people of southern Africa (Hammond-Tooke 1984). He based his arguments mainly on a 'functional' approach to lineages, showing how they generally played a minimal role in institutional and religious matters, and lineages were not corporatised. In pre-colonial times in southern Africa, homestead units (which were not necessarily lineage clusters, but could be) formed interlocking network chains with larger integrating social units, such as clanships and political units such as headmanships, chiefships or kingdoms, while local lineages were not significant in local political life.

Whether or not the Cape Nguni have 'lineages' is a definitional matter. Only in a very weak sense can what have been termed 'lineages' in the literature be considered groups. What one finds rather are sets of people, the relationships between whom are structured on genealogy, which can thus be used to solve certain questions such as agnatic cluster solidarity, relationships between these groups, the accommodation of new arrivals and the determining of the elder to preside over ritual matters (Hammond-Tooke 1984: 77).

Access to land depended on fealty to the more centralised political authority. Hammond-Tooke's conclusions about lineages are a cautionary against seeing lineages as corporate groups. The evidence that lineages could easily fragment or split off according to different circumstances, and the absence of a Xhosa name for lineage, are convincing arguments that lineages were not expressed in terms of an institutional entity. Clans were clearly more important institutional mechanisms, particularly in the key role they played, and continue to play, regarding rules of exogamy and for ritual purposes.

Lineages as symbols and constructs of localised descent were nevertheless important for defining the differential status and roles of individuals based on either agnation or affinity. Hammond-Tooke's disregard for the significance of lineages is based on his definition of a 'group' as a corporate structure with political and religious roles (Hammond-Tooke 1984), rather than a form of social organisation, or 'way' of reckoning kinship, which in turn has important implications for the gendered division of labour and rights to property. Preston-Whyte, however, maintains that descent through males was also important for jural purposes (Preston-Whyte 1937: 178; 184-5; 201), meaning that important rights and obligations were attached to one's identification with the descent group. What it means is that neither individuals nor family groups were

considered entirely economically independent, but were integrated in interlocking layers of social relationships. The importance lies in the distinctiveness of this group for property and its transmission.

Unilineal descent groups are thought to have emerged historically in the absence of strong political or state structures, and more usually among pastoralists. Evidence suggests that, among pre-colonial societies, patrilineal social organisation was associated with pastoral societies dependent on male-dominated division of labour and mobility, and matrilineal where specialised adaptations to ecological conditions favoured large sedentary communities favouring division of labour where crucial agricultural tasks were, and are, in the hands of women. Patrilineal descent groups are the most dominant of the unilineal types, and globally represent the majority of all family forms (Keesing 1975: 25; Goody 1976c: 4).

3.5 The present significance of ‘descent group’ ideology

We have seen that agnation provided the basis for defining familial identity and ‘belonging’ in the south-eastern region of Africa, and was a mechanism for the perpetuation of the descent group. It is thus important for both social identity and for the reproduction of social relationships. There is no evidence to suggest that in the past lineages were either land *owning* or land allocating units, the most important transmissible property being cattle. As discussed in the section above, Preston-Whyte raises the possibility that there were jural qualities associated with the holding and transmission of moveable property, and that members’ rights and obligations were associated with affiliation. The groups were nevertheless not structured into closed corporate groups, which is, in fact, a contradiction in terms: the concept of unilineal succession is precisely structured to combat the emergence of this possibility.

The acquisition of land in title created a new set of imperatives regarding the transmission of land, and it is this aspect that gives the matter significance in the case of the African freeholders, suggesting that lineages have gained in significance regarding access to, and control of property and its transmission. What is interesting in the present is that the social organisational basis of unilineal descent groups seemed to have survived pre-colonial political centralisation, colonial administration and post-colonial governance (Berry 1989b: 43). The concept of ‘lineage’, though clearly qualified, continued to be a means by which people identified, and identify, membership calculated on the basis of genealogy through the male line (or through the female line in matrilineal societies), which remains highly relevant to the social organisation of people today. I therefore use the term ‘lineage’ in this thesis as a relevant abstraction, but qualified in the sense that Moore defines a descent group as ‘a way of thinking about the procession of the generations’, rather than as a first principle (Moore 1978: 157; see 3.6 below). Lineages can be seen as significant social ‘organising devices’ and means by which inheritance of property was controlled.

We have seen that the anthropological scholarship suggests that unilineal descent groups should be thought of as socially constructed groups and not corporate entities (even when the word ‘corporate’ is sometimes, misleadingly, used). The crucial consequence of a unilineal descent group is that it creates continuity beyond the lives of its living members, conceptualised as consisting of all the sequences of the generations traced to the founding forefather, thus integrating and uniting the dead, the living and the unborn. The implications of unilineal descent groups for social organisation and property distribution are highly relevant to law reform, since there are significant impacts on the conceptualisation of inheritance and succession. The relevance of these distinctions will become clearer in subsequent chapters, but suffice here to contrast patterns of unilineal descent with patterns of bilateral descent, since the latter forms the backbone of western concepts of property and inheritance.

Bilateral descent is the construct of the family that informs the identification of familial channels along which freehold-held property is legally transmitted from one generation to the next. We will see how these different modes of tracing family relationships result in particular modes of social control over land by descent groups, and how these influence processes and concepts of property distribution and inheritance which diverge significantly between western and African systems. Common law concepts were built on the western bilateral family form, which inform the legal rules of succession and inheritance applicable to freehold title. The failure to distinguish between variable family organisational patterns has contributed significantly to the incompatibilities described above.

The generic model of the ‘nuclear family’ is based on bilateral descent, where kinship relationships are traced through relationships to both parents, and which, as argued by Goody, is a system that encouraged the concentration of property in the conjugal couple and controlled by inheritance to the nearest kin, the children (Goody 1976c: 9-22). Among the latter, the group concept is attenuated over time, since there is no mechanism to prevent the dissipation of the family as a living and differentiated organism. Here the social emphasis falls on the immediacy, in the present, of the nuclear family and their offspring. For the purposes of property, the circle of family is drawn narrowly, and only the closest forebears are relevant. The corollary is that there is no inherent necessity in stressing the continuity of a name of a forebear¹¹. In contrast, groups identified on the basis of unilineal descent are strongly socially bounded, reach far into the past and future, and resist infiltration by people that are not defined as kin (Keesing 1975: 92). The agnatic core is thus always clearly distinguished from other close social relationships, including biological relationships traced through the mother. The genetic link with biological mothers is socially and emotionally important and recognised, but for purposes of social production and reproduction, and for religious and ritualistic practices, the *social* links in the chain were, and still are, reckoned through males only (Preston-Whyte 1937: 204).

¹¹ An exception is seen in some western transmission practices based on male primogeniture, which encouraged continuity among landholding aristocracies.

In short, as a continuous group, the membership of a unilineal descent group does not dissipate or disperse through marriage, such as occurs with 'western' nuclear families that trace descent bilaterally through both the mother and father. There are built-in mechanisms that give the group a 'life of its own', beyond the identity of the living members, reaching to the dead and the unborn. Through its definition based on agnation there are natural boundaries against assimilation by 'outsiders', including marriage partners.

The studies in Kenya, Zimbabwe and South Africa discussed above indicate that unilineal descent groups are constituted around highly gendered rules that distinguish between the roles and social identity of wives on the one hand, and those of the male and female family descendants calculated through the male line of descent on the other. Wives enter the group from their own agnatically related family as a result of marriage. Residence is strongly patrilocal, which means that agnation is a basis of individual units of residence. Wives have relatively secure use rights to the 'family home', but it is not her family home, but her 'place of marriage'. Berry reports that in all her research sites, women maintain links to their agnatic kin after marriage (1993: 157) and Mackenzie notes the rights of sisters in their own agnatic residence (Mackenzie 1989: 97).

In the past, agnatically related clusters lived in neighbourhoods called *imzi* pl. *imizi*. With the breaking up of agnatically related clusters and *imizi*, and the spatial dispersal of family members, other concepts became important, such as *umzi* (homestead). There is not an expectation among lineage members to live together (Mills & Wilson 1952: 47). Genealogical links to a lineage are maintained under conditions where families, and individual members of families, are dispersed, and even widely dispersed, such as they are in the present.

Clearly the role and relative importance of lineages or descent groups differed across different agro-ecological regions in Africa. The studies on Kenya cited above indicate the importance of clans or *mbari* in territorial expansion and as land controlling units which survived indirect rule and registration of title, but in altered form (Berry 1989b: 43, 1993: 115-116). With colonial rule, the traditional balance of power between men and women, *mbari* and individuals was thrown out of balance. *Mbari* authority decreased with colonial administration, but began to exert a powerful influence over the distribution of land under the registration process (Berry 1993, 1989a: 4; 117 Haugerud 1989: 81; Mackenzie 1989: 97), which suggests that titling gave them renewed impetus.

The importance attached to lineages or descent groups in the literature on freehold title suggests that titling increased the importance of lineages in land holding, which makes sense in light of the fact that the traditional political units and authorities no longer played a role in access to, and control over land. Instead, lineage organisation, previously an insignificant construct regarding land tenure, became the important controlling authority when land ownership became more fixed. These formerly amorphous genealogically

related sets of kin (who may or may not be geographically dispersed) developed into more significant economic units for the purposes of property and land exploitation. In the context in which unilineal descent groups are significant among the family relationships discussed in this thesis, the term 'lineage' best captures this relationship. In the absence of a Xhosa word, families refer to lineage members as *abantu bakowethu* (our people) or *abantu bakulotata* (father's people) (Wilson et al 46-47¹²). Families also use terms like 'family tree' or 'forebears' to refer to their genealogies, and to family members who are significant in relationships involving property, and for ceremonial and religious purposes.

In summary, the literature supports the evidence that came to light in the research sites that unilineal descent groups as representations of kinship relationships are significant among African freeholders in the following senses, which become the subject of more detailed engagement in Part Two of the thesis:

- Unilineal descent provided/s a mechanism for perpetuating a descent group through sequencing across generations in a manner that isolates the group itself, the identity of which is not dependent on individual identities or membership.
- The corollary is that unilineal descent groups are means by which members identify themselves in relation to the family, which in this case is through 'blood' links traced through male forefathers.
- Unilineal descent groups have continued social significance for ceremonial events, ancestral rituals and property transmission.
- Unilineal descent groups are structured in a highly gendered way in order to create the conditions of perpetuation.
- There are significant consequences for property and social relations of the gendered relationships that shape descent groups, which I discuss below.

3.6 The gendered nature of rights in land

As alluded to above, there are in-built mechanisms in the process of reproducing land-owning descent groups that resist assimilation by 'outsiders'. This includes marriage partners (see Preston-Whyte 1937: 204). Wives are clearly excluded from the descent group in terms of social status and property distribution. This does not mean that there are not strongly emotional attachments by wives to their biological family, or vice versa, children to their mothers. It means that their rights to transmit property are strongly curtailed. In similar, though inverse, vein, female siblings of the agnatic group could not transmit property through affinal ties to their marriage partners or their children (Berry 1993: 156-7). They retained rights to the property only if they retained their original names or remained unmarried, in this way passing on the name of their agnatic forebear to their children, rather than that of a marriage partner. In other words, sisters have rights to

¹² Zulu terms are *umndeni* or *umzalo* according to Preston-Whyte, 1974: 185.

property as long as the rights of access and control are associated with her agnatic status, which can be claimed as an unmarried, divorced or widowed woman (Mackenzie 1989: 97).

The inference that can be drawn is that the rule that transmissible property did not pass through women was precisely the mechanism for maintaining the social integrity of generational succession through lineage and clan identities.

Thus, in Xhosa society, for a married woman, her residence in the patrilocal homestead is regarded as her 'place of marriage', *umzini*, derived from *umzi* (house). In contrast to *ikhaya* (home), where one's umbilical cords are buried, the marriage residence is not the place she identifies as her home, *ikhaya*. Since it is the *ikhaya* of the family group into which she has married, she has no right to transmit or claim any kind of ownership beyond her use rights in the family property. Evidence from all the case studies on freehold ownership suggest that there are strict social taboos preventing married women introducing her own agnatic kinship ties into the property relationships, though she is secured in the use of the land. She is strictly prevented from inheriting the land in her own right, for there is the risk that widows may remarry, for example. The implications are that though she can enjoy the use of the family property, and has authority as a wife, property cannot pass to or 'through' her as an individual. Transmission occurs through the agnatic family group, identified by the name of a senior elder associated with the lineage chain who acquired the land. This also has implications for female siblings of the agnatic group, whose rights to the property are dependent on their retaining their agnatic status. Their male marriage partners cannot access rights to the property through their connections to their spouses (Mackenzie 1989: 94-100).

The research findings in Zimbabwe and Kenya reveal that the resilience of control over titled property and its transmission by means of patrilineal descent may accentuate the traditional bias towards male authority (Berry 1993: 115-117, Haugerud 1989: 69; Mackenzie 1989: 97, 1993: 205-212). Social office was in the past strictly confined to men. These gendered norms do not disappear with titling, and in fact may increase the tensions between men and women regarding secure tenure, because male-to-male succession potentially transfers proprietary rights that were previously absent. With titling, the 'structurally' subordinate status of women comes into sharp relief, and there is evidence that their security of usufruct is not necessarily guaranteed as it was in the past (Berry 1993: 156; Mackenzie 1989: 99). In pre-colonial society, relationships of authority were shaped by different imperatives, e.g. office was dependent, not on bureaucratic recognition but on following, and bounded land was not a means of identification of authority. The links between land and authority places more emphasis on spatial control by figures of authority.

In summary, the exclusiveness of the respective agnatic groups of the bride and groom is emphasised in many social practices and taboos that draw attention to the separate identity of the groups involved. Although socially the bride was/is an 'outsider', this does not detract from the importance and warmth of the

conjugal family (Preston-Whyte 1937: 204), but stresses the separation of property. Women face many contradictions as a result of these distinctions, as the fortunes of wives become bound up with the descent groups with whom they live and raise children, but to whom they do not 'belong'. The clear distinction between consanguines and affines result in highly socially structured organisational norms, not in the sense of institutionalised corporate and rule-bound organisations, but in norms governing marriage and property considered necessary for maintaining such distinctions. Overall, title accommodates women in terms of both access rights and rights of control providing they adhere to the rules of the maintenance of the group name. There are complex legal consequences of these distinctions, which I examine in Parts two and three of the thesis.

In the next section I discuss some of the theoretical underpinnings of kinship and the ideology of descent, and the influence of marriage on property in contemporary law. I consider two other critical elements that impact on freehold ownership, viz, the ideology of inalienability and the importance of the relationship between social units and spatial units. I then consider the implications of these social concepts of family property for transmission of land.


3.7 Kinship, descent and marriage: relevance for contemporary property relations

Kinship relationships were so interwoven into all areas of social life, such as family, politics, religion, property, production and distribution of resources that the specifics tend to blend into norms that are taken as given, and the very 'normality' renders the concepts themselves invisible, which lends credence to the conceptualisation of descent as an 'ideology'. In the past, unilineal local descent and clanship groups formed interlocking relationships which ultimately meshed the whole society into an operational 'whole', reinforcing some of the older anthropological views of closed societies. When male authority and control over property are disembedded from the rationale that perpetuated unilineal descent groups, the unequal power relationships between men and women becomes much starker, and may accentuate patriarchal relationships that were in the past part of the overall structuration of society.

Recent scholarship has reacted to earlier anthropological literature that tended to conceptualise African tenure in terms of static 'closed systems' integrally linked to kinship and ethnic categories, the information of which was consumed by colonial land administrators to inform a colonial version of 'customary law', which boosted the authority of the colonial native administration and traditional authorities. There has been a shift from the earlier anthropological emphasis on functional purposes and structural features of kinship and descent among social groups, and the related tendency to identify Africans in terms of corporate 'groups', with an overlay of ethnicity. More recent research attempts to integrate a wider range of socio-dynamic variables into studies of African rural and urban society, where state formation, class relationships and integrating economic variables supersede the emphasis on 'family' and kinship.

Feminist theory has led to a revival of interest in kinship concepts in explaining and illuminating persistent economic, social and cultural patterns of residence and descent that cohere around particular sets of social relations in which kinship relationships feature. Anthropologists and historians interested in exploring gendered relationships in relation to land and authority are re-integrating kinship into analyses of dynamic, modern-day social relations in post-colonial contexts. Interest in matrilineal societies in central and southern Africa has further stimulated scholarship on family structures, the persistence of matrilineality having been seen to defy the expectations of most economists and administrators (Peters 1997). Peters emphasises the importance of disaggregating the variables of kinship, inheritance and succession, residence and descent, which may shift and not move together as a totality, but are nevertheless a clustered set of characteristics (1997: 7, 12).

Peters suggests that kinship and residence as modes of organization continue to be highly influential factors in socio-cultural, political and economic transformations of the still predominantly agrarian societies of Africa, if no longer exclusively so. “The specifics of these, including whether or not they are matrilineal, patrilineal, or cognatic types, mediate and inflect socio-economic transformations” (Peters 1997: 126). In a group of papers on the relationship between matrilineal kinship and gender, Peters and three other authors show how these variables continue to mediate social relationships. In the introduction to the papers, Peters opens with the provocation:



Matrilineity is as dead as a dodo [...] [p]artly ... due to the demise of kinship theory [...] which] has been chopped into parts — family, household, relations of production and property, child socialization, group formation, gender relations, sexuality — cannibalized by the changing fashions of ethnographic and theoretical rethinking (Peters 1997: 125).

The link between the kinship nexus and socio-economic transformation signals that there has been a shift from the former emphasis on the functions and structures of kinship and descent groups, which tended to depict social groups as corporatised and socially cohesive ‘systems’, with variables such as marriage, descent, gendered division of labour and relations of production as incidents of the totalising structure itself. Peters suggests that it is more useful to consider these features as “a set of characteristics rather than a totality or ‘system’” (1997: 135). By switching the focus to the social and economic interactions and transactions, the variables are revealed as more flexible and separable, combining in different ways according to specific historical circumstances.

Today, social theorists are more inclined to see kinship or descent or marriage as sets of discursive and action strategies, less determinants of social life as frameworks for it, less causes of behaviour as arenas for interpretation, negotiation and contestation (Peters, 1997: 129).

Peters' work brings out two key features of descent that tend to lead to misrepresentations of familial social relationships. The one is that by privileging descent, the emphasis falls too heavily on group corporateness (e.g. lineages), and makes invisible the gender and kinship relationships that cross-cut descent. The second is the assumption that centres the elementary nuclear family based on the conjugal bond as the most important cohesive social relational grouping in production and property relations (Peters 1997: 128-9). As we shall see, there are other competing identities based on kinship which influence the way in which people identify their nearest kin, which is not necessarily congruent with the nuclear family.

Similar broad principles hold for the kinds of structures and residence arrangements exemplified by the African freeholders of Fingo Village and Rabula. There is a great deal of nuance regarding marriage, descent and residence that is lost when the variables are interpreted as part of a locked system of social reproduction that depends on the unchanging articulation of the various parts. Social research reveals how the associated characteristics of kinship (such as marriage, descent, residence, production, division of labour, devolution practices, etc) are influenced by multiple variables. Instead of these being seen as a fused "monad" (Peters 1997: 138), a more accurate portrayal would be to see the structural components more holistically, as interacting sets of ideas, representations and norms that articulate with the wider polity.

The various different turns in subsequent decades towards analyses privileging action and strategies, symbolic representations, political economy, history, and mixes of these, have led to seeing kinship as more flexible, more open to multiple variants even within a society, than was seen in the typological approaches of the 1940s and '50s. While the notion of structural principles "determining" social organization and action is now discredited, such principles (ideas, representations, norms) are not without effect. (Peters, 1997: 128)

Peters draws attention to people's intentionality and agency in the context of historically situated socio-cultural, political and economic relations.

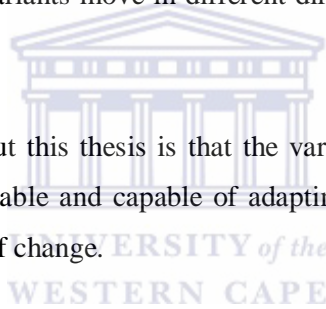
People create their own histories but do so through discursive and practical strategies that embody the "received categories" of their cultures ... and the political economic conditions of their existence. (Peters 1997: 128)

Another set of concerns raised by discourses that employ kinship and descent is that of causal relationships and what Goody calls 'vectorial' dimensions, or the 'direction' of change (Goody 1976c: 25). The ideological biases that infused the colonial view of land tenure in the Cape (as elsewhere in the world) followed a 'social evolutionary' logic as a 'natural' direction of change. Colonial views of indigenous modes of production equated pastoralism with primitive social structures, agriculture being associated with 'civilisation' and progress. Marriage, polygyny, *lobola* (bridewealth), male authority and female labour were intractably associated with primitive 'systems'. The assumptions of the early administrators was that these latter systems would in time 'evolve' from the first to the second in an evolutionary sequence. Among the variants that would evolve would be the construct of the 'family' to mimic the form considered to be the

'natural family' in the west, that is the married monogamous couple, who form a conjugal fund which passes bilaterally, that is through both parents, to the direct descendants (their biological children). The social structure linked to polygamy, bridewealth and unilineal descent systems was linked to the broader system of male authority via chiefs and primitive modes of production.

Research shows radical shifts in kinship features do not necessarily follow an 'evolutionary' path. Even in the face of Christianity, which sanctified marriage as the fulcrum of 'civilised' social relationships, and capitalism, which accelerates individual property relations, identities traced through social relationships based on historic patterns of social descent have maintained their significance in the day-to-day lives of non-western societies. The movement towards more monetised relationships in the context of capitalist relations of production were expected to shift the entire apparatus or 'structure' towards the western typology of monogamy, cognatic descent, bilateral inheritance, individual title to land, etc, all elements of which are assumed to cohere. Research has shown that elements from the western model based on industrial economies have indeed become more widespread as contracts replace other relationships of kinship and status, but as Peters posits above, the variants move in different directions, in different combinations and at different paces.

The premise of the argument throughout this thesis is that the various features of kinship and descent are associated, but some features are malleable and capable of adapting to new circumstances. Other features show remarkable resilience in the face of change.



The persistence of agnatic descent groups or lineages, to which all members of the family 'belong', did not preclude the emergence of smaller nuclear family units within the overall framework. The freehold owners typify the descendants of Christianising elite of the nineteenth century Cape colony, and who, for the most part practiced monogamy. The monogamous families, which stressed the importance of marriage relationships (spouse and children), did not dissolve the importance of social identities of agnatic descent, and unilineal descent groups remain strongly socially bounded and resist infiltration by people that are not defined as kin.

3.8 'Sideways' or 'downwards' – a way of conceptualising devolution

The anthropologist Jack Goody coined the metaphors 'sideways' or 'downwards' transmission of property to help conceptualise the historic development of different cultural ideas about devolution. He hypothesised a broad distinction between societies where intensive agriculture developed and societies where intensive agriculture did not develop. Surpluses supported specialisation, accumulation of storable wealth and eventually stratification based on estates (feudal), caste or class. From this economic base, he has correlated different modes of devolution. He concludes that stratified societies tended towards monogamy, bilateral

descent systems and what he calls 'diverging devolution'. The latter means that property passes through both males and females, though there were many variations in the form and gender emphasis that this could take, even within political regions. Bilateral descent and diverging devolution do not imply necessary equality of treatment between men and women. Societies that were less stratified, on account of less emphasis on agricultural surplus, tended towards polygyny and unilineal descent systems and what he calls 'lateral devolution'.

He noticed in his data an additional factor in Africa: a tendency for property (and succession) to pass through one gender only, either males or females. He speculated that economies based on pastoralism (and also advanced agriculture) tended towards patrilineality and economies based on horticulture tend towards matrilineality.

Goody proposes the distinction between 'downwards' or 'sideways' devolution to conceptualise these differences, 'sideways' meaning that property and office, in the absence of sons, passed 'sideways' through the male collaterals, and ignored female children. Collateral transmission is a 'sideways' movement since property passed to male siblings of the same generation, or sons, failing which to the next nearest male collaterals, ignoring female children, who were, of course, expected to get married and leave their homes to take up 'patrilocal' residence at the seat of the home of the patrilineage. With diverging devolution in cognatic descent systems, on the other hand, property passes 'downwards' through sons and daughters in various legally defined ways according to the country's laws of succession where people die intestate. This approach is conducive to retention of property by a small band of kin.

Goody attaches great significance to the tendency in Africa to 'segregate' property and office by gender. There are many shades of grey between these two stark differences: some features change when the economic circumstances change, while others persist. Thus one should conceptualise these distinctions in terms of a continuum rather than sharp binary that implies uni-directional change from one 'system' towards another 'system'. (Goody 1969; Goody 1970; Goody 1971; Goody 1976a; Goody 1976c)

Evidence from the study of 'African freehold' supports the notion of 'shades of grey', where women in the patrilineage could, did and do claim rights to the lineage land, as long as they do so in their capacity as daughters or siblings and not wives. The rights of wives were subject to tight controls to prevent lineage ownership entering the name of the wife's agnatic descent group, or the name of a married member of the family descent group who has taken her husbands' name and passed it on to her children. African 'owners' were legally entitled to follow the common law route if they followed certain specific contractual requirements, in which case they could leave the property to a nominated heir/s; or if they died intestate, the property passed to the wife and children. In practice, African freeholders have tended to shun both legal modes of inheritance. The general trend of transmission is an automatic process generated through ongoing

access to the property by the members of the descent group, without nomination of individuals. There are thus no pre-determined rules of inheritance, the evidence of which I present in Part Two of the thesis.

3.9 Implications of boundedness of spatial unit vs boundedness of social unit for devolution of land

The disjuncture between variable formal and extra-legal norms of transmission may be seen in the broader principles of ownership in the common law. The common law recognises heritable property in land by separable owning units based on the organisational principles of the western nuclear family, which conferred a one-on-one relationship between a legal entity and a legally surveyed parcel of land. The colonial authorities followed a dual legal approach. Official customary law similarly conferred a one-on-one relationship between a legal entity and a parcel, but in this construct of law, the owner would be a male traced through collateral lines of the descent group.

The local normative controls diverge from both, giving access to the entire kinship unit (the descent group), the members of which are traced, as previously stated, by virtue of their affiliation to the patrilineage. In Okoth-Ogendo's terminology, the principle is one of 'social adhesion'. Conforming to Okoth-Ogendo's formula, the freeholders follow norms which ensure continuity of the group, and access rights to all members of the group, with no individuals having a 'coincidence' of power of both access and control that may result in proprietary rights.

The contradictory principles of transmission are felt most strongly in relation to gendered relationships regarding property.

The widespread avoidance of registration procedures has been widely commented on by scholars who have critiqued titling in Africa (Berry 1989a: 4, 1993: 128; Durand-Lasserve & Selod 2007; Haugerud 1989: 62-70; Mackenzie 1989: 92-3; Payne & Durand-Lasserve 2013; Rakodi & Leduka 2004). Registration has the effect of forcing nomination of individuals as heirs, rather than successors to rights in property. The argument followed in this thesis suggests that there is a rationale for this avoidance, which tends to be overlooked in the literature, as well as official assessments. The active avoidance of registration removes the threat posed by registration of vesting proprietorial powers in particular individuals. My arguments suggest that avoidance of registration is a *strategic* method of countering the transfer of rights of proprietorship. This strategy is not represented as a conscious act of resistance, but a reflexive manoeuvre to avoid the legal consequences. There are important ramifications of this distinction in motivation, since the failure to register transfers was, and continues to be misinterpreted as a sign of backwardness or lack of education by officials and land professionals. In South Africa, this diagnosis by colonial administrators can be seen in the official solution to what they saw as a cultural 'problem'. Legislation gave powers to specially appointed commissioners to identify the present, living owner by adjudicating the title in terms of either common law

or customary law rules of inheritance, depending on the marriage. When they ‘found’ the name of the ‘owner’, duly validated by the genealogies and relevant legal principles, the person was registered as the owner. These procedures, and the consequences, are discussed in Parts Two and Three of the thesis. Cheater’s evidence shows that similar tendencies occurred through judicial processes in Zimbabwe (1990).

In Anglophone colonies, customary law was incongruously matched to the English concept of individual inheritance of impartible property through male primogeniture. The African concept of male primogeniture was historically *not* a power over individual inheritance of land, but succession to status, position and authority, which had a bearing on authority over the control and distribution of moveable property. Moreover, African primogeniture is associated with male-to-male transmission of status and authority as well as male-to-male, or female-to-female transmission of property (i.e. invariably through one sex only), whereas in England property passed through or between both sexes. Thus two very different social contexts were jumbled together when officials applied inheritance rules to land in customary law. Moreover, while the common law rules of inheritance continued to change and adapt over time, primarily towards increasing gender parity, the ‘invented’ African tradition of male primogeniture over impartible land was frozen into colonial and apartheid ‘native law’.

These anomalies, supported by the evidence in Kenya and Zimbabwe, are revealed in ‘African freehold’ in stark relief, since in reality, concepts of inheritance and succession straddle new ideas as well as older traditions, and in ways that contradict a sharp divide between the conventional binaries, such as individual and collective rights. The disjuncture calls for a re-examination of the conventional associations and attributes that oppose western and African concepts of land tenure and property. What is needed instead is a closer look at how *common* variables are counterbalanced, amplified and structured according to the social relationships involved.

3.10 Contradictions and conflicts as central to the dynamics of change

A central problematic identified in influential contemporary anthropological accounts by feminist critiques, exemplified in the work of Griffiths (1997) and Peters (1997: 130), is that earlier anthropological ethnographies were conducted through the prism of male-centredness, and their accounts tended to oppose the social and domestic spheres on the one hand, and the public sphere on the other. Women tend to be associated with the former and men the latter. Griffiths has delved deeply into the effects of this binary, and how it spills over into a binary between ‘law’ and ‘social life’, locating law in a separate realm. Using the example of the baKwena in Botswana she develops a paradigm that re-integrates these binaries by focusing on marriage as a central variant in her analysis. Griffiths singles out ‘legal centralism’ as a key problematic that arises in the jural level from the biased social distinctions at the level of social relationships.

In contrast to the structuralist approach that tended to depict a given observed order as the natural order, with the accompanying “crude stereotyping” by policy makers and scholars of features of African cultural and social life (such as landholding) (Lund 2002: ix), recent literature on land tenure and authority in Africa shows that the variables that make up local social life reflect dynamic, contemporary relationships (Juul and Lund 2002: 2-3; Lund 2002: 11). The shifts in ‘customary’ social phenomena are not inevitable and uni-directional, even where local relations of production are responding to global integration of markets, with more African families becoming more permanently urbanised and more ‘nuclear’.

In chapter 2 above I discussed the trend in recent social studies that recast the importance of property relationships, both in anthropology (Hann 1998: 27-29), and in the context of the renewed interest in land tenure and authority in Africa (Juul & Lund 2002). As mentioned, a common theme running through this scholarship is the definition of property within the realm of ‘social relationships’, which Hann, building on Polanyi, identifies by the term ‘the embeddedness of property’ (Hann 1998: 33). The emphasis on social embeddedness re-introduced the earlier nineteenth century preoccupation with property, not as ‘thing’, according to the modern turn in western law, but as a social relation. “Property is not about things, but about relationships between and amongst people with regard to things” (Lund 2002: 12 quoting Moore 1988: 33).

The focus on property relationships, rather than on the groups and structures themselves, reveals multiple layers of social and political interaction that lie behind ‘land tenure’. By examining the layers, and at the same time distinguishing between categorical dimensions, such as legal prescripts or customs, and concretised social relationships (von Benda-Beckmann 2006b: 14-22), the observer is able to disaggregate various elements that in the past tended to be seen as fused together in a single construct. Land tenure and gender relationships, for example, tend to be frozen, along with other variables, within typologies and presented as preconceived constructs, each dependent on the other. Two variables often seen as inextricably linked are ‘inheritance’ and ‘descent’, but research has shown in a number of different contexts that changes in one may not necessarily lead to a change in the other, in the sense of a causal linkage. Nevertheless, as Goody’s exhaustive correlations on devolution and other social variables show, (1976c et passim and tables 121-134), “a change in one does have effects for the other” (Peters 1997: 138).

Despite the flexibility and adaptability, contestation and negotiation emphasised by the new influential literature on Africa exemplified by Berry (1993) and Lund (2002: 1-10), Peters shows in her detailed ethnographic work that the linkages are not randomly flung together, that there is “a certain systematicity in social practices and ideology” (Peters 1997: 138; 2002a: 45-47). In her introduction to a series of papers on matrilineal societies in Africa, Peters cautions against over-correction towards ‘negotiability’, with its sometimes unintended over-emphasis on contingency, indeterminacy and flexibility which suggest that social relations in modern Africa society are marked by open-endedness.

Multiple dimensions add up to something typifiable; negotiability and contestation take place in culturally particular modes. One does not need to posit a closed or total system but neither does one have a totally open-ended one. People experience and channel change through pre-existing ideas, ways and practices. The sets of ideas and practices constituting and enacting matrilineal organization, therefore, present a particular definition of reality for people ... While not immune to modification and change, that particular definition constitutes a different kind of reality from non-matrilineally organized groups. (Peters 1997: 138)

Moore's processual approach, replacing 'structure' with 'process', encompasses 'events' that signal the multiple layers of social relationships that may sometimes be contradictory and lacking a single "episteme" through which people understand their world.

Nor is there any single mode of knowing that informs the anthropologist. The circumstance is the justification for arguing that certain kinds of events are particularly important forms of diagnostic data. Within their content they display multiple meanings *in combination*. Immense social effort goes into attaching orderly "official" meanings in action and communication. But as played out in events those official meanings can often be seen to have ambiguous and contradictory counterparts attached to them. The juxtaposition in events of competing and contrary ideas, and of actions which have contradictory consequences, is the circumstance that requires inspection and analysis. It is through that contiguity of contraries that ongoing struggles to control persons, things, and meanings often can be detected. Those struggles to construct orders and action that undo them may be the principal subject matter of ethnography as current history. (Moore 1987: 735)

Moore calls certain kinds of incidents that expose "ongoing contests and conflicts and competitions and efforts to prevent, suppress, or repress these" as 'diagnostic events' that reveal situations where the pattern of local repetition is being broken, signalling change (Moore 1987: 730).

3.10 Synthesis

The older anthropological literature tended to represent African societies in terms of 'closed traditional' societies where the variables of study cohered and moved together as a 'whole'. A processual approach suggests that during processes of change, these variables may move in various directions. For analytic purposes the variables should be feathered out. Processes of change and repetitive patterned responses are both at work. Recent scholarship has attempted to find integrating models for cross-cultural analysis by introducing property concepts and/or political economy. The universalising effects of capitalism has led to cultural diffusion of western familial and property concepts due to the homogenising effects of market relations, among other phenomena. This may, however, mask a range of micro-processes, which the reviewed scholarship brings to the fore, for example:

- unilineal descent groups survive political and economic change, not as closed structures, but as social mechanisms that mediate the past and the present;

- title does not dissolve customary social networks and relationships — families continue to invest in social relationships and social networks, rather than in formal legal procedures and channels, to access and control land under title;
- the significance of local descent groups may paradoxically be magnified under conditions of land constraint and title.
- social and spatial correlates vary according to different ‘folk land maps’;
- systems of devolution vary according to production systems and their correlate social organisational forms, without implying unilinear causal relationships;
- powers of access to, and control over land ‘graduate’ and oscillate along a sliding scale according to a range of agrarian and socio-spatial relationships in contrast to one-to-one property relationships;
- local normative patterns are under stress as a result of market principles, increased competition for land and new property relations that emphasise women’s rights and the nuclear family group, and the reaction against male control of property.

Okoth-Ogendo’s concept of African property relations resonates with the social organisational features and the conditional nature of rights to land in South Africa, features which also mediate land tenure relationships where land is held by title. His idea of (a) a range of juridical rights, which (b) do not fall under the control of a single proprietor, but which are spread out in time, space and according to affiliation and association capture the conditional and relative nature of the social relationships. Okoth-Ogendo defines title as a “bond, or title, which tied individuals or a combination thereof to some delineated portions of the physical *solum* in a way that conferred both jurisdiction and exclusive control”, (1989: 7) a condition which he emphatically denies is present in African land law. The review above indeed indicates that under freehold title the axes of power and control tend to modify but not replace the former principles with western proprietary concepts. The circumstances of title by its very nature altered pre-colonial social forms and customs, including ideas about transmission of land, but at the same time provided a space where the relationships that defined access (through family membership) survived and indeed perpetuated a particular mode of holding and transmitting land. The outcomes conform to much of Okoth-Ogendo’s formula.

Okoth-Ogendo’s contention that some categories of access powers are remarkably resilient to change is well demonstrated among freeholders described in the literature in 3.3 above. The scholarship shows that adhesion or association based on norms of descent define the parameters of access and block the emergence of one-to-one relationships between people and the land. Property is related to the nexus of social relationships embedded in the structure of kinship relations, which bind together the overall regulatory features of ‘African freehold’.

Under freehold, however, the control function described by Okoth-Ogendo is partly shared with the state, which introduces the dimension of state law. The articulation between state law and local norms among African freeholders, however, result in contradictions which do not follow a neat or singular pattern, and these are found most particularly in differing principles of inheritance, which in turn relates to differing concepts of social and spatial 'separability'. Powers of access vest in recognised members of the 'family', which is not the nuclear family, but an extended and continuous group of members linked by common descent. The family is conceived in terms of a culturally defined, and bounded, set of social relationships, somewhat conforming to Okoth-Ogenda's representation of a "graduating" set of power relationships. Property is always relational, or conditional on particular social relationships at particular points in time and space.

Peters stresses the incipient onset of social differentiation in much of her work, resulting, if not in clearly defined classes of landed and landless, but in creeping concentration of wealth and property. These processes are not necessarily located in 'titling' or formal land ownership, but may be concealed behind customary relationships. The ambiguity within these relationships may be exploited by accumulating individuals, sometimes also linked to patron-client relationships filtered through older customary relationships, which in the context of state formation link national elites to local levels of power, and so facilitating control over resources by a smaller elite (Peters 2006: 89).

Peters also centralises the continuing importance of kinship relationships and ideas about descent by characterising their 'patterned' nature, rather than conceptualising these aspects as parts of 'totalising' and unchanging social structures. These concepts may serve as useful bridging concepts between western and African systems, rather than conceptually divisive or dualistic.

Moore's processual approach represented a decisive break from the scholarship that tended to portray customary relationships in terms of 'a self-contained particularity'. She stresses the inter-relationship, rather than functional difference, between 'law' and 'custom' and also the dynamic interplay between 'process' and 'structure'. These features are imbricated, inter-active and mutually reinforcing in the small-scale changes that are enmeshed in large-scale transformations. She argues that descent ideologies and elaborations thereof, are "in part symbolic/metaphorical representations of social connections, in part categorical definers that affects social relations (Moore 1978: 180).

Lund has contributed a number of additional variables in his dynamic conceptualisation of 'space', distinguishing between space as 'territory' and space as property, and emphasising the mutual construction of property and authority, the one reinforcing the other. He underlines the importance of temporal aspects and hence his metaphor 'social time' and different interpretations of the past, which may seek to validate the

present in terms of particular historical events on the one hand, or ‘timeless tradition’ on the other (Lund 2013: 14-35).

The question of whether or not customary social norms may be a ‘break’ on more productive property relations, or a mask for processes of accumulation and social differentiation are unresolved questions in the literature. Li’s provocative question (discussed in chapter 2.8 above), regarding the possibly ‘defensive’ nature of collective responses to land tenure is an issue that is implicated in Berry’s scholarship (discussed in chapters 2.6 and 3.2 above), and in the evidence I present in Part Two of the thesis, and suggests further attention should be applied to this hypothesis in future. First, I turn to the historical context of the two study sites, since my argument supports the notion that legal outcomes are matters of historiographical detail, followed by the presentation of the empirical evidence in Part Two.



CHAPTER 4 THE GREY AREAS OF THE GREY ERA: FIXING AFRICANS TO MEASURED MAPS

4.1 The colonisation of space

Three strands identified by Lund in the making of territory and property: time, space and sovereignty, came together at a particular historical moment in the eastern Cape in the nineteenth century to sow the seeds of the emergence of hard spatial distinctions between private property and African reservations.

Lund reminds us of the ubiquity of the past in Africa. Arguments over land and property are voiced in the present with reference to the “naturalness” of a particular past for the purposes of justifying a certain future under circumstances of increasing competition over history, space and institutions of public authority (Lund 2013: 14-15). Lund identifies two ways of representing the past in relation to vindicating land claims: either as timeless *tradition* or as *historical events*, both of which connect to different conceptions of space and property in his analysis. “The contemporary construction of the past, as either tradition or history, and the competing projections of land control as either property or political territory, interdigitate in complex ways”. Vindications can be based on *tradition* in the sense of

timeless ... antiquity laying out ‘how things have always been done’ ... [with] no beginning or end but stretches seamlessly over time from days of yore till this very one. On the other hand, there is a past made up of significant *historical events* ... [consisting] of junctures of actions and transaction punctuating time ... events that ‘changed how things had been done’ (2013: 15-16).

Lund’s layering of different invocations of the past and space, which configure in different ways to construct identity and property — and at the same time legitimate the sources of authority that are involved in the *recognition* of citizenship and property in their various manifestations — is helpful in synthesising the extraordinarily complex historical events in the eastern Cape that dramatically ‘changed how things had been done’ through conquest, ideology, law and new structures of governance and spatial control. Looking back at these historical events through the lenses of the present, however, challenges the viewer to see how different perceptions of the past, different validations of claims to resources and authority and hence different interpretations of property by custom, convention or law impact on contemporary struggles over land.

Governance of territory and ownership of property were two key exercises of colonial power that involved new forms of spatial control in the Cape in the nineteenth century. Lund alludes to a third preceding form of spatial control expressed as ‘sovereignty’. “The conquest of a space above or beyond law where the conqueror is not accountable — at least not initially — constitutes a sovereign moment”. The British colonization of African space¹³ “constitutes a classical moment where new powers are established and a new

¹³ Lund (2013) illustrates his argument using the example of Ghana.

structure of hegemony and law is imposed through which new social contracts can emerge”. [T]hese “modern categories ... [of] governed territory and owned property were ... established as ideas to structure arguments for different forms of control *under the rule* of a government” (Lund 2013: 29).

The “boundedness of territory and property by a state or other controlling agency presupposes their control” (ibid: 13). Unlike many colonial contexts where colonial and even first independent governments were “rather cavalier” about these distinctions between territory and property, and where control was “sometimes precarious” (ibid: 13), the Cape colonial governments, followed by the Union government, exercised a heavy hand in delineating and controlling boundaries of control in order to ensure that spatial boundaries, private property and control of people in space (i.e. citizenship) would stick. The technological sophistication of instruments for surveying, as well as social and political conditions conducive to private property combined to reinforce a clear distinction between ‘owned’ spaces and ‘governed’ spaces, African tenure associated with the latter.

In the westerly regions of the eastern Cape Colony, these distinctions were not initially based solely on race. In the colonial territory west of the Kei River, the ‘hard’ spatial boundaries that later came to define distinct racialised zones of land tenure (if not actual residence) were not so clearly defined by race or form of tenure, but rather by mechanisms of citizenship and property. There was a period where race and territory intermeshed in mixed patterns of settlement and evolving and experimental models of tenure with somewhat porous legal margins between them, which was unusual among the colonial territories in Africa.

These more variable patterns of demographic settlement and land tenure regimes cleaved along legal distinctions between categories of the population, who were classified, not according to race *per se*, but according to people’s status and standing in relation to colonial law. The important categories were: citizenship of the Cape Colony, which included some groups of blacks; various categories of indigenous labour servitude; and a large category of Africans outside of colonial law, who maintained sustained resistance to the extension of colonial sovereignty over indigenous territory. The latter comprised the mainly Xhosa inhabitants of the region, who were pushed eastwards following successive annexations of land in consequence of a series of armed conflicts known as the Cape ‘frontier wars’ (Peires 1981, 1989; Mostert 1992). The important land tenure distinction was between individual title which implied private property (of which there were various modalities) in the colonial precinct, and African tenure, which was referred to as ‘tribal’ or ‘customary’ tenure preceding its incorporation into the colonial administrative apparatus.

Private property was itself an evolving concept as Anglophone legal concepts were gradually blended into the official Roman-Dutch law of the colony. Although there were versions of outright ownership (*eigendom*) in and around Cape Town, the rural Dutch *boer* farmers owned their land by way of official licences to roughly defined, and frequently shifting, extents of loan farms tolerated by the Dutch authorities. The

English administration began to tighten up land tenure from the early nineteenth century, increasingly circumscribed by more precisely regulated quitrent tenure adapted from the local Dutch version already in place at the Cape, but which did not require land survey. It was only from the mid-nineteenth century, when more precise and sophisticated instruments of land surveying entered the Cape Colony, that the English concept of freehold tenure was gradually introduced as the preferred tenure for colonial citizens, along with the alternative of leasing. The introduction of clearly defined, surveyed, private property parcels found their spatial counterpart in the notion of African reservations. In the patchwork mix of the old Cape Colony, incorporated Africans were administered in blocks of land referred to as 'locations', which could be internally surveyed, or not. These concepts are discussed in Part Three of the thesis.

The emergence of settlements like Fingo Village and Rabula, the two field sites for this study, are exemplars of this transitional period in Cape colonial history, where the spatial and tenure margins between local settler and indigenous ethnic groups within the older colonial precincts were not so strongly delineated as the later colonial period. Their emergence as titled villages occurred at a junction of profound shifts in settlement patterns and land policies, along with continuities from the previous era. Interestingly and significantly, the hard binaries that associated race or ethnicity with particular forms of tenure had not yet taken root in the colonial imagination. While the differences between 'western' and 'African' or 'tribal' land rights were a source of continual amplification and exaggeration, the sureness of the eventual triumph of the former over the latter was never doubted. Belief in social evolution as a principle of human social development was seen as natural and inevitable. It was therefore not inconceivable that colonial settlers and administrators could think of applying concepts of 'individual' or western tenure to those groups of people who had been incorporated in the colony as legal subjects of colonial law, duly modified one must add, to underline the Crown's interest in the taxable qualities of individually defined parcels of land.

4.2 New maps in the Cape colonial precepts

The majority of residents of both Fingo Village and Rabula are culturally aligned with the 'amaMfengu'. The anglicised rendering of Mfengu was 'Fingo', the name given to a category of indigenous people whose fate became bound up with the colonial project in the Cape. Their arrival in the Cape coincided with, and contributed to, the new social and spatial mapping of the Cape Colony, and influenced the trajectory of the incorporation of the amaXhosa. By the turn of the nineteenth century, all the sub-regions of the colony had been annexed to the Cape, known by the colonists as the Transkei, Border, the Ciskei and the old Colony (in isiXhosa *Koloni*). These names capture how, when the borders were constantly shifting, the regions were identified in relation to each other, the Kei River figuring prominently as the real and imagined point of articulation or 'crossing'.

Prior to the mineral discoveries and the formal annexation of the Transkeian Territories, the territory west of the Kei River was characterised by cultural, spatial and tenurial diversity, which were frequently cross-cutting. The hard distinctions on the grounds of racial identity were still to come. The various regions that made up the colonial territory were colonised piece-meal, with black and white settlements interspersed. The patchwork pattern of settlements contrasted sharply with the more clearly defined, territorially consolidated Transkei reserve of the future, where there was more social homogeneity.

It was during the political and cultural milieu spanning the three decades prior to the annexation of the Transkeian Territories that Fingo Village and Rabula came into existence. At that time, the colonial territory was divided into two parts, the Cape Colony proper and the Crown Colony of British Kaffraria, the distinctions between which I make clearer below. Fingo Village was in the former, Rabula in the latter. Fingo Village and Rabula, were both referred to in English as ‘native locations’ in the idiom of the time. Fingo Village was officially known as ‘Fingo Location’ before it was renamed, thus distinguishing it from the mushrooming ‘Fingo Locations’ all over the Cape Colony.

Two senior Cape officials could be singled out as having transformed the socio-spatial and political map of both the Cape Colony and British Kaffraria. These were Reverend Henry Calderwood, Civil Commissioner of the amaMfengu and Sir George Grey, Governor from 1854-1861. Grey in particular could be considered arch-representative of an ‘assimilationist thrust’ in contemporary colonial discourses. He embodied the standards and doctrines of western civilisation with excessive zeal, the corollary of which was his profound intolerance of other cultural values, which, for the amaXhosa, meant that their laws and customs would not be recognised. Under Grey, emerging ideas about titling the plots of land granted to the amaMfengu, already favoured by Calderwood, were concretised, and it was during his governorship that both Fingo Village and Rabula were internally surveyed.

Grey established western institutions of learning, religion, public works and health facilities to convert blacks in both the old Colony and British Kaffraria to a new social orientation, as graphically illuminated in his notorious speech in the new Cape Parliament in 1855.

We should try to make them a part of ourselves, useful servants, consumers of our goods, contributors to our revenue; in short a source of strength and welfare for this Colony, such as Providence designed them to be (du Toit 1954: 88).

This potentially unifying ethic ensured that the heterogeneous population inside the Cape colony — amaMfengu, recent European immigrants and *boer*¹⁴ farmers — were regarded as ‘colonial subjects’. Theoretically, amaMfengu were equal before the law to any other colonial subjects, e.g. they had the same

¹⁴ Farmers of Dutch extraction who later merged as an important category into the Afrikaans-speaking sub-group in South Africa

right to land on the same terms as white settlers. In practice, very few had the resources to buy land, and the overwhelming majority were dependent on allocations by the state. Many whites were also awarded land as grants, but it is significant that the theoretical equality of all colonial subjects before the law regardless of colour was simultaneously undermined by discrimination in respect of the allocation of land, e.g. amaMfengu were settled on smaller plots in more militarily exposed areas.

Assimilation was a thread in earlier 'humanitarian' imperial philosophical discourses, exemplified in the anti-slavery movement, and the moral elevation of the idea of 'free labour'. These processes merged into new ideas about capitalism and the market economy. The *quid pro quo* of belief in the universality of social values and principles of equality was that all people in the body politic adopt the same civilised habits. For the amaMfengu this frequently meant 'some are more equal than others'.

4.3 The cultural identity of the amaMfengu

Before we proceed to the history of land settlement in the two sites, we need to examine the nature of this cultural identity. The amaMfengu identity is relatively new in South Africa — relative, that is, to the older pre-colonial ethnic identities. The word is an umbrella term for people who became collectively associated with a new identity, but who still retain their previous ethnic identities (which are closely related). The people who came to be labelled amaMfengu had dispersed from present-day KwaZulu-Natal, and thus became physically and socially dislodged from their prior ethnic groups. They were identified collectively by others to describe their new situation. The name, from the verb *ukumfenguza*, means 'wandering around homelessly looking for work' (Peires 2011: 55). Peires emphasises that the term was not the chosen identity of the people so named, but imposed on them as a result of their status as refugees among the amaXhosa in latter-day Transkei.

Prior to their displacement from north of Mzimkhulu River, the refugees had been affiliated to various south-east African ethnic groups, the most significant numbers for our purposes having been linked to the amaHlubi, the amaBhele and the amaZizi, labelled as 'clan clusters' by anthropologists (Wilson et al 1952: 49). A preferred nomenclature, according to Peires, might have been abaMbo (people of the East), or even their distinct ethnic affiliations, which are clearly remembered and distinguished; but for various reasons, the label 'amaMfengu', anglicised as 'Fingo', stuck. Since the Mfengu spoke languages closely related to isiXhosa, and arrived in various areas of Xhosa territory, they are considered a sub-group of the amaXhosa, who are in turn labelled as 'Nguni' from the point of view of linguistic and cultural affinities.

The amaXhosa in the south and the amaZulu in the north may be taken as representing opposite ends of a common cultural continuum which we are forced by convention to call 'Nguni'. Within this cultural continuum, we find significant local differences, even among near neighbours (Peires 2011: 57).

The refugees moved south in consequence of the unsettled conditions north of the Mzimkhulu River in the eighteenth and early nineteenth century — not as a single group, but in successive steps and stages. The narrative of their origins as ‘refugees’ is contested by some ‘revisionist’ historians (discussed below; see also Keegan 1996: 330). For present purposes the traditional account is accepted as the most plausible explanation of their early history, a view, generally-speaking, confirmed by the results of my research¹⁵. The refugees, according to Peires (2011: 55) were “destitute of land and cattle, and [were] seeking to rebuild their lives through working for others”. One significant group settled among the amaGcaleka Xhosa of King Hintsa in latter-day Transkei (c. 1785-1835). The particular historical experiences of that group were subsequently stamped on the entire amaMfengu thereafter, in spite of evidence that they were widely spread in the region north and east of the Kei River (Peires 2011: 55; Beinart & Bundy, 1987: 8). Significant numbers of the group associated with Hintsa had been drawn to the Wesleyan mission station at Butterworth, close to Hintsa’s Great Place (Keegan 1996: 146). According to Peires, Missionary John Ayliff encouraged amaMfengu to

defy Hintsa, and when the British invaded Hintsa’s territory during the Sixth Frontier War (1834-35), many amaMfengu were escorted across the Kei River into the Cape Colony, where they were given land at Peddie (Peires 2011: 55).

Peddie was well within the Cape Colonial borders at that time¹⁶, situated east of the Fish River in close proximity to ‘settler country’ around and beyond Grahamstown. The particular circumstances of that set of events entwined the fate of the amaMfengu ever more closely with the colonial authorities in the Cape Colony, whereupon the name amaMfengu, derogatory as it had always been, took on added connotations of collaboration. The term came to be used in an increasingly undifferentiated way to distinguish the amaMfengu as people who supported the colonial project, and this identity has been deeply implicated in amaMfengu identity ever since.

The story of the early amaMfengu settlement in the Cape Colony has been complicated by radical, and at times conspiratorial, interpretations of their history by revisionist historians (Cobbing 1988, Webster 1995) who suggest that collectively the ‘Fingo’ was an invented category of amaXhosa whom the British enslaved. In a sweeping over-correction, Webster discredits the ‘conventional’ refugee version of amaMfengu history as propagandistic fiction, and replaces it with a discourse of bondage implying the entire process was a “unilateral expropriation of Fingo labor” (Fry 2007: 63). According to Webster, Rharhabe and Gcaleka (mainly women and children) were captured to serve “the labour-starved eastern Cape to work on the settler farms”.

¹⁵ It is important, however, to foreground my interest in land tenure more broadly, rather than any motivation to validate or invalidate the debates about historic identities of the people concerned, which is a by-product of the thesis, and to the complexity of which my research was not specifically geared.

¹⁶ Peddie is west of the Keiskamma River, which had been the official boundary since 1819 between colonial and independent indigenous powers. Peddie later became a magisterial district, and later still an important district in the African reserve, the Ciskei. See Switzer 1993: 200-207

Such slavery was illegal so they were described as an oppressed people rescued by British humanitarianism and given the name 'Fingo'. Included under the identity 'Fingo' was a range of other groupings who entered the colony during 1835. Their diverse origins were elided and were replaced by a single provenance as supposed refugees from Shaka who were settled at Peddie. (Webster 1995: 242).

Their proposition suggests not simply that the amaMfengu were trapped through deception by the British authorities, but that they had been "physically captured and coerced into slave-like labour against their will" (Peires 2011: 56; see Keegan 1996: 330; Webster 1995: 255-256). The implications are that they never originated in KwaZulu Natal, but were enslaved amaXhosa enshrined with a new identity by the British to mask the criminality of their actions.

The historiography on the amaMfengu remains contested and unsettled (Keegan 1996: 146). The traditional historiographical tradition continues to locate their origins in forced migration from the region north of the Mzimkhulu River. Revisionist historiography is complicated, since it is woven into a much larger picture of the turbulent processes occurring in present day KwaZulu Natal that set off a chain of events all around the south-eastern African continent. (Cobbing 1988; Keegan 1996: 330). Recent versions of the revisionist thesis are more cautious, suggesting that only a component of amaMfengu may have been drawn from Xhosa society as 'detrribalised' and socially marginalised people who sought protection under British sovereignty or cohered around mission stations after the colonial "land grabs" had rendered them "landless and cattleless" (Wright 1996).

Among them were a number of relatively coherent groups under the authority of chiefs, some of genuinely chiefly descent, others possibly poseurs, originally from Natal. It seems to have been round these groups that the major Fingo communities eventually formed, and from their chiefly families that these communities took on generic identities, in what was certainly a long and complex process, involving missionaries and colonial officials as well as Fingo powerholders, intellectuals and commoners (Wright 1996).

There is consensus that as a group they are a relatively recent formation with a 'constructed' identity. It is generally accepted that they owe their group or collective identification to the missionary John Ayliff in the Transkei who reported their situation as 'slaves' amongst the amaXhosa east of the Kei River. Exaggerations of their conditions under the amaXhosa could thereby be exploited by the Cape colonial authorities to justify British intervention, which could in turn be passed off as 'humanitarian' aid to bolster local alliances and to drive a wedge between incorporated blacks, and independent Xhosa still fervently committed to defending their territories and social organisation against colonial intrusion.

Some revisionist historians maintain that by stressing the non-Xhosa identity of the amaMfengu, the colonial government could more easily validate their relationship as allies, and hence mutual enemies of the amaXhosa. For these reasons the revisionist historians prefer to use the anglicised label 'Fingo' in preference

to Mfengu because it was the term that had currency among colonial society, whom they maintain created the category in the first place. In their argument, the use of the label 'Mfengu' would validate an invented ethnicity closely associated with the strategies employed by the colonial government to violently overthrow and subjugate the Xhosa.

While clearly the matter is still subject to debate, there is strong evidence that the people identified as amaMfengu who eventually settled in the eastern Cape border districts were mainly ethnic splinter groupings dispersed by the unsettled dynamics in Zululand during the preceding era. This does not preclude the likelihood that some marginalised individuals and groupings were dislodged from Xhosa tribal society for various reasons, resulting in labour servitude or other forms of dependence on the colonial authorities. Such people may have identified with, or been identified as amaMfengu.

Once in the Cape colony, there is little controversy about the social reality of the amaMfengu as a new group (Switzer 1993: 58). Their common experiences in the colony forged some measure of social cohesion over time, which in turn shaped a collective cultural identity. It is generally agreed that amaMfengu bought into the hegemonic ideology of the missionaries, which in turn generated a positive orientation to western individualist conceptions of the market economy¹⁷ and institutions of religion, education, property and authority. The conditions of their incorporation in colonial society involved commitment to new social values, such as literacy skills, new forms of land ownership and adapted social and familial organisation away from chiefs and polygamy.



The process of reorientation to new forms of authority, property and land relationships was accelerated by weak allegiance to binding chiefly structures of authority and power. Their attachment to chiefly governance had been loosened, not only by the more immediate circumstances of forced migration and resettlement, but arguably by longer processes of African political fragmentation on the margins of the centralising Zulu polity beyond the Cape's network of control.

A symbol of their positive outlook towards the missionary enterprise and western institutions was an alleged oath the amaMfengu took in 1835, which concretised their sincerity about embracing some of the social and cultural values associated with colonial society. The oath (commemorated annually) is said to have been a promise of allegiance to God, Christianity and the Queen and to 'educate their children'. The oath has been carried by oral tradition and is said to have taken place under a milkwood tree (in isiXhosa *umQwashu*) near Peddie. There is no physical document to prove the event ever happened. But whatever the form it actually took, the idea of swearing an oath became a symbolic core around which the new amaMfengu identity

¹⁷ See discussion in Fry 2007: 69 *et passim* on liberalism, the market

cohered, a statement of principles of outlook and direction that was positive towards Empire, Christianity and western learning.

The amaMfengu acquired relatively large tracts of land, attributable in some measure to their contribution to frontier defence at time when the British government was cutting expenditure in the Cape colony, and to the relatively low density of white settlers. Their forces in the colonial armies were, according to historical analyses, critical to the successes of the colonial military in the armed conflicts with the independent amaXhosa (Moyer 1974: 101-126). Altogether three frontier wars were fought in the two decades between the mid-1830's and the mid-1850's, and the amaMfengu featured prominently in all of them. In the latter two conflicts their roles as soldiers with skills in indigenous combat, adapted guerrilla strategies and western warfare were decisive in swinging the balance in favour of colonial dominance and land appropriation in the region west of the Kei River (see Moyer 1974: 101-126). The land awards are frequently attributed, both by the contemporary observers and the amaMfengu themselves, as a 'reward' for their services in the military. Reality was more complex. Their role in the military and in the agrarian economy nevertheless contributed to the expansion of the colonial borders, with the consequent availability of more land for reallocation among colonial subjects. Some scholars have used the labels 'colonisers' (ibid: 13-14) or 'subcolonisers' (Beinart & Bundy: 9¹⁸).

The larger groupings of amaMfengu in the frontier districts were generally settled collectively under leaders, some identifying themselves as chiefs. Those who were settled in groups acquired grants in so-called 'Fingo locations' in the exposed districts on the edges of the frontier, first at Peddie, then Alice¹⁹ and later in the Crown Reserve of British Kaffraria, a British colony east of the Keiskamma River, discussed below.

On the land they acquired, they adapted to new modes of rural production, such as the plough, farming with sheep for commercial purposes and exchanging surpluses of wool and crops. Many amaMfengu became what Colin Bundy has identified as 'peasants' (Bundy 1979; Switzer 1993: 88). A distinguishing feature of their relatively greater responsiveness to the market economy, was a corresponding interest by some Mfengu in acquiring land in individual title. Conversely, they were less willing to subject themselves to the authority of hereditary chiefs or traditional leaders (Bundy 1979: 34; Moyer 1976: 255). Traditional leadership in the form of government-appointed headmen was nevertheless accepted, and even encouraged for purposes of liaising with the administration and to generally act as a 'go-between' the people and government.

The amaMfengu are said to have arrived in the Colony with a propensity for agriculture, with men playing a role in a way that Xhosa men did not. The agricultural proclivity of the amaMfengu has different

¹⁸ Beinart & Bundy (1987: 8-10) discuss the idea of subcolonisers in terms of the complexity of relationships of loyalty and collaboration, arguing these were not linear or straightforward attachments.

¹⁹ In the area named Victoria, later to become the district of Victoria East

explanations. One interpretation by Fry (2007) identifies what she calls 'Fingo-ness' by new modes of production *within* Xhosa society, the Fingo emerging as category, thus an 'ideological construct' as result of their desire to accumulate "wealth and power outside the existing frameworks of chiefly control" (ibid: 36). Key to this process was their emphasis on agriculture, in particular, male roles in agriculture, which she claims was central to Fingo identity. The emergence of agriculture as a source of accumulation by its nature simultaneously implied more sedentary settlement patterns and de-emphasis on pastoralism and transhumance. These processes may initially have been a way for people without cattle to accumulate wealth, but whatever the origins the new modes of production and reproduction threatened Xhosa authority and male control over social reproduction, thus women and cattle (ibid: 44). Fry maintains that Xhosa social organisation was typified by a "social structure held together by reciprocity and clientage" (ibid: 40) under "patriarchal authority" that controlled social reproduction through a monopoly over cattle which she labels "pastoralist masculinity" (ibid: 26).

Her theory represents a key shift away from the idea that agriculture emanated outwards from mission stations, i.e. as a result of 'outside forces', but was rather a shift within Xhosa society "indicative of divergent attitudes and opinions within a larger African society" (ibid: 38). The corollary was that the conversion of agriculture to a masculine domain meant that Fingo men were ascribed a subordinate status among the amaXhosa, since agricultural tasks were associated with a lower social value, which Fry associates with the subordinate status of women. She suggests that the process of role-change began within Xhosa society, where the future amaMfengu were agriculturalists farming a larger range of crops than was conventional among Xhosa men, with men taking part in sowing and reaping. Her argument is significant for the ideological implications of the gendered relationships in Xhosa society, and she maintains that the cultivation habits of the amaMfengu challenged Xhosa gender roles (2007: 49). In following the view that amaMfengu identity was an 'ideological construct', Fry proposes that the shift to agriculture began as an ideological break rather than one of ethnic, biological or 'genealogical' identity, a shift associated with independent trade, a movement towards autonomy and resistance to established authority, (ibid: 37-39; 48) which struck "at the heart of Xhosa domestic organisation" (ibid: 39). The shift in emphasis towards agricultural surpluses elevated the status of amaMfengu among colonial official and settlers who saw this tendency as evidence that the 'Fingo' had broken away from the forces of 'backwardness' of the amaXhosa. She suggests that the centrality of agriculture contributed to the positive attitudes among colonial society towards the amaMfengu in general (ibid: 70).

Other explanations regarding the centrality of crop production in Mfengu society point out there was relatively higher dependence on crop production in the political economies north-east of the Transkei, e.g. Zululand, where ecological conditions favoured crops in contrast to the poor arable conditions of the eastern

Cape, to which the pastoralist economies of the amaXhosa were better suited.²⁰ This theory suggests that some amaMfengu had a proclivity for agriculture even before entering the economies of the amaXhosa and subsequently the colony.

The more conventional theory is the amaMfengu assumed socially differentiated roles as a result of the opportunities of the market economy at the Cape. When amaMfengu acquired their own land in the colony, they readily adopted the plough, and planted and sold surpluses, with even more radical inroads in the traditional gendered relations of production. Their use of the plough centred men in crop production and threatened the hardened boundaries of traditional gender relations that characterised the cattle exchange economy of the amaXhosa. The latter revolved around clearer division of labour between men and women, in which women were associated with hoeing and domestic reproduction. This theory puts the debate regarding agriculture firmly within the development of the market economy in the Eastern Cape, which provided the economic environment for the amaMfengu to produce surplus crops, and accumulate capital assets in the form of cattle from the sale of crops, and so work their way up the social ladder by gradually acquiring wealth. It is possible to increase output in arable production in a way that was not possible, at that stage, in cattle production. Crop production therefore provided a remedy for surplus accumulation in response to their initial lack of wealth in land and cattle. Some used their capital to purchase land.

The adoption of the plough intensified the process of production of surpluses, with involvement of men in ploughing further affecting traditional gendered relations of production, and the corollary, a shift away from chiefly authority as far as land relations were concerned. It is clear, whatever the explanation, that the amaMfengu were involved in arable production in a way amaXhosa were not (Bundy 1979: 17-18); and furthermore, were open to exchanging surpluses for currency, rather than for redistributive purposes. Fry (2007: 40-44) has suggested that an important strategy in defence of amaXhosa pre-colonial political economy was their continued and ongoing aversion to exchange for currency, exemplified at times in their singling out traders for violent confrontations as a symbol of their resistance to the infiltration of the colonial market economy into traditional Xhosa society. The penetration of currency, according to Fry's thesis, would threaten the integrity of the cattle exchange mode of political and social reproduction, including control over women (Fry 2007: 40-44). Regulated bartering, on the other hand, which was taxable by the chiefs, was considered acceptable.

The amaMfengu thus responded positively to many aspects of the changing political economy, such as the opening up of trade markets, and they readily participated in the rural mercantile economy. Their openness to western social values regarding the colonial market economy meant that they embraced opportunities arising from the accumulation of agricultural surpluses and availability of European goods for consumption. They

²⁰ Even the relatively well-watered Transkei region is regarded by agro-economists as having generally poor soil qualities for crop production.

were above all receptive to western educational institutions, and famous Eastern Cape schools and colleges like Lovedale, Healdtown, St Matthews and Fort Hare University have their roots in the ethos of amaMfengu incorporation. Their relative freedom from customary inhibitions regarding individual ownership of land meant that many amaMfengu grasped any opportunity to purchase land or validate possession under colonial title.

One of the hallmarks of the theoretical equality before the law was a propertied franchise. Those Mfengu who acquired sufficient property qualified for the franchise in terms of the constitution of the representative government of 1853, and enshrined in the Constitution of 1873. A process of political back-peddling regarding assimilationist policies signalled the decline in Cape liberal values, along with the central tenets of non-racialism (see Keegan: 1996; Fry, 2007). Settler society was replete with racial prejudice, which included resentment at Mfengu gaining what white settlers thought of as a 'competitive advantage' in the agrarian economy (Moyer 1976: 331-341).

Despite the professed allegiance of the amaMfengu, many of whom had internalised the very Cape liberal values that helped generate the discourse of assimilation, and their legal status as equal to the white colonists, they found that many of the principles of equality began to be systematically undermined. Various political tactics on the part of white society constrained the number of qualifying black voters, for example, tinkering with the qualification of 'citizenship' and later, legally excluding communally owned land from the definition of 'property', including individual quitrent title authorised by the Glen Grey Act of 1894.

Notwithstanding the openness among many amaMfengu to the opportunities of the market economy, western education and the Christian religion, they retained a strong sense of African cultural affiliation. (Bundy 1979: 34; Moyer, 1976: 260-341). I argue in Part Two of the thesis that social relationships informed by older African values shaped, and were shaped by, the emerging new land arrangements under title. The evidence among the landowners in the two research sites maintained and reproduced key elements of customary social organisation and family composition, in spite of a shift towards monogamy.

4.4 Resettlement in the Amatholes: the birth of Keiskammahoe rural villages

Reference has been made to the distinction between the Cape Colony and British Kaffraria. British Kaffraria had been appropriated directly to the Crown in 1847, when the land was still largely inhabited by the indigenous owners, the western groupings of the amaXhosa. The distinct characteristic of British Kaffraria, as opposed to the Cape Colony, derived from the fact that the amaXhosa were from the first recognised as permanent residents, over whom the British ruled arbitrarily. The British at first promised the amaXhosa that they could be governed under 'native law and custom'. In spite of the verbal terms of annexation that made allowance for the continuation of Xhosa customary law, this was at first ignored and later overturned (du

Toit, 1954: 164, Peires 1989: 54, 83; Keegan 1996: 243). British Kaffraria was in reality ruled by proclamation, the early period of which Keegan characterises as “naked military occupation” (1996: 243). Britain had until then only limited experience of ruling over a non-indigenous population, and in the South African context, British Kaffraria was one of the first areas where Britain ruled over an indigenous population who lived under their own social and political institutions. Rule by proclamation was legitimated precisely to give the colonial authorities the freedom to create administrative units on the ground and the discretion to create new forms of land tenure unfettered by the common law.

The western region of British Kaffraria is characterised by heavily forested mountains, the range known by the amaXhosa as the Amatholes, and still so named²¹. The Amathole mountains provided protection to the amaXhosa during the war of 1850-53 (the war of Mlanjeni) and the dense bush a natural base for guerrilla warfare. This confrontation was the penultimate armed conflict, by far the most ruthlessly fought, with devastating results for the amaXhosa²². The mountainous block was confiscated on the termination of the war, and the amaXhosa forcibly expelled²³. The enclave became the third block²⁴ of land alienated from the hostile Xhosa chiefdoms and awarded to the loyal Mfengu. This region within British Kaffraria became known as the Crown Reserve, within which the district of Keiskammahoek was later demarcated. The enclave was to be controlled and resettled directly by the Crown, and hence this land was marked by a special status within British Kaffraria. The idea was to resettle the area with Mfengu claimants to provide a defensive buttress and at the same time to weaken the capacity of the amaXhosa for further resistance. The settlements were to be compressed into a ring of villages to protect the Cape Colony.

By this time the colonial government had accumulated a body of thought and practice regarding the administration of the amaMfengu, based on experiences at Peddie and Alice. The plans for the village settlements contained elements of previous policies at the Cape, but were more comprehensive and systematic in aiming to fix the people to their plots, and in turn, plots to closer villages. The main purpose of close settlement was defensive, to prevent the Xhosa from returning, and also to prevent whites spilling unchecked over the borders (Peires 1989: 312). The objectives were also consciously calculated to reorient their social organisation.

When the land in the Crown Reserve was opened up to settlers loyal to the Cape government, many amaMfengu settlers jumped at the opportunity of acquiring good land in the Amathole area. Many were dissatisfied with the quality and quantity of their existing land inside the Cape Colony (du Toit, 1954: 270; Moyer 1976: 393) or with increasing confinement and overcrowding in existing settlements. With its

²¹ Amathole means ‘calves’, meaning the metaphoric offspring of the mighty Drakensberg range to the north-east.

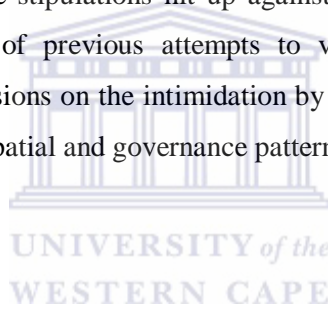
²² The resisters were the western amaXhosa known by the name of their founder, Chief Ngqika, at that time under a successor, Chief Sandile.

²³ The Xhosa resisters under Chief Sandile were evacuated to the ‘Nqika location’ to the north, in what was to become the Stutterheim district. They were permitted informal internal governance according to ‘native law’, but under the general surveillance of white Commissioners and superintendants. See Wotshela 1994; Bergh & Visagie 1985: 57

²⁴ The first block of land the amaXhosa lost to the amaMfengu was Peddie, following the sixth frontier war of 1834-5. The second was Alice, known as Victoria East district, after the ‘War of the Axe’ from 1846-47.

spectacular forested heights, and folds of undulating hills and valleys around the mountain foothills, there was good potential for grazing for cattle and cultivation in the river valleys of Keiskammahoek, one of the prime localities within the reserve. So great was the demand for more and good quality land, the numbers entering had eventually to be controlled (du Toit 1954: 270).

It must have been with great disappointment to learn of Governor Cathcart's plans for a military-style resettlement of the Crown Reserve, which included strict rules against dispersed settlement and large holdings, the very cause of some of their complaints in their old localities. Mfengu chiefs (including the leader of the Rabula group) were summoned to hear the terms of settlement: annual quitrent, compact villages, restrictions on cattle, and administration under colonial officials assisted by headmen. The wording foreshadowed much of what was to come. The third clause stated: "They will be located in villages which are to consist of not less than twenty dwellings". The fifth clause underlined this: "[n]o lone dwellings or unauthorised squatters will be allowed". "There will be a headman for each village". In an undisguised swipe at chiefs, the next sentence qualified this further: "He must, if possible, be the man chosen by the community" (Moyer 1976: 390). These stipulations hit up against the outspoken resistance of the chiefs. There had been widespread evasion of previous attempts to villagise the amaMfengu. The colonial administrators liked to blame these evasions on the intimidation by chiefs of their followers, hence the need for holistic policies that struck at both spatial and governance patterns of customary settlements.



4.5 Grey's World

Enter Sir George Grey, whose arrival was to change the social and demographic face of the two colonies. Grey was sceptical of exclusive African areas in the Crown Reserve. His arrival a year after the 1853 settlement signalled a change in policies that was to transform the African character of British Kaffraria into a mixed African and European territory, with mixed tenures; policies to which Grey set his mind with feverish single-mindedness. Key among them was to raze any notion that Africans retain their own law and custom in British Kaffraria. (Peires 1989: 309, 340-347)

Grey thought the Mfengu, though allied to the colony and positively oriented to the colonial ethic of the market and western education, were nevertheless "semi-barbarous" and did not fulfil his criteria of civilisation for the purposes of protecting a white settler colony. It was only after some persuasion that he accepted the Mfengu in the Crown Reserve as a *fait accomplis*. He nevertheless revised the previous plan by insisting on turning British Kaffraria, including the reserve, into a racially mixed territory, based on the radical idea of equalising the population between white and black (du Toit, 1954: 276; Peires 1989: 309). His plan involved importation of European immigrants. For this purpose he organised various immigration schemes (mostly German) and created specialised institutions to plan and survey the land, allocate the land to settlers and register the land. For the Crown Reserve, including Keiskammahoek, he revised the previous

land regulations to fit in with the more comprehensive settlement plan for the whole of British Kaffraria, aiming to turn the border belt into a mixed settlement. (Peires 1989: 70, 308-309, 347; Bergh and Visagie 1985: 56).

In the remainder of British Kaffraria (i.e. *excluding* the Crown Reserve), Peires (1989: 340) estimates that the Xhosa lost nearly 243,000 hectares (ha) of land after the 1850-53 war. Much of this land was distributed to white immigrants following the German immigration promoted by Grey. To formalise the arrangements, surveys of roughly 500 farms were undertaken by 1866, ranging from 600 — 800 ha each, and allocated to whites. In addition, whites acquired hundreds of smaller 30 ha allotments surveyed along the coastal strip, as well as several smaller enclaves and small farms in the Crown Reserve (Bergh & Visagie 1985: 56).

The vanquished amaXhosa turned to millenarian acts of protest, which principally involved the slaughtering of cattle and the destruction of grain reserves undertaken by a significant number of ‘believers’ in response to a prophet of self-destruction and rebirth²⁵. The epic and tragic response, known as the “cattle killing”, lasted from 1856-7, sapping the remaining strength of Xhosa resistance and contributed to the break up of their social and political organisation. The episode provided Grey with further incentive to restructure political, demographic and social relationships. Before the cattle killing, the amaXhosa outnumbered whites by 100 to 1, that is, whites comprised 1% of the population. The white population increased sixfold to over 5,000 during the “cattle killing”, bringing the percentage of whites to 12.5% at the end of it. While Grey’s fantasy of equalising the population distribution between white and black was not reached by a long margin, the land distribution was heavily skewed in favour of the relatively small white population, mostly on sizeable enclosed farms (Peires 1989: 347; Bergh & Visagie 1985: 56).

The increasing emphasis on land title corresponding to enclosed parcels of land, both farms and plots, must be seen in conjunction with the dramatic technological developments in the western world that made it possible to measure space with increasing precision. The availability of instruments for mathematical methods of land surveying at the Cape at that time added to the seductiveness of titling as a ‘quick-fix’ to the massive social and spatial engineering that accompanied Grey’s tenure in office. The broader context of the spread of scientific knowledge to the colonial outposts bolstered the unequal relations of power between coloniser and colonised, and fed into Grey’s propensity for grandiose technical solutions to land administration and authority. In order to maintain the flow of historical events in this chapter, I discuss aspects of these scientific developments and their relationship to land titling separately, in Part Three of the thesis (Chapter 11). It must, however, be borne in mind that ‘Grey’s world’ was intimately tied up with these global developments, and his illusions of power were very much a product of the new-found confidence in science.

²⁵ For a detailed history of this episode, see Peires 1989. Peires distinguishes between ‘hard’ and ‘soft’ believers. In the 2003 edition he responds to various critiques, which serves to broaden the dimensions of the discourse.

Under Grey's tutelage new governance structures were put in place in British Kaffraria, including the Crown Reserve, to further reorientate African society away from indigenous organisation. Along with surveillance by officials, surveys and village planning, the immediate intrusion into African social organisation was the payment of chiefs and headmen from the colonial treasury — in reality paid from taxes collected from residents — in conjunction with the introduction of magistrates in both an administrative and a judicial capacity.

Grey's taste for surveys and title for blacks was part of his overall conception of restructuring land relations and land distribution. Title was, in his terms, the surest means to appropriate the authority from the chiefs and the corollary, deplete the chiefs' power over individuals. The amaMfengu were the first targets of his plan to disempower chiefs "and the best way to do this was to issue individual titles to the land" (Moyer 1976: 396), which at the same time was thought to increase the willingness of blacks to defend colonial interests. "Give a man a real and unfettered interest in a country and generally speaking, they will help to defend it" was a frequently-heard justification among the colonial administrators for individual title (Moyer 1976: 398).

In the absence of parliamentary guidelines on titles (after a bill on titling had failed to get the necessary majority), Grey altered the previous land regulations in the Crown Reserve and added his own stamp. He "distributed [the land] on his own initiative and formulated his own conditions" (Moyer 1976: 403), which he was empowered to do as High Commissioner of British Kaffraria. His general approach was to restrict the size of garden lots to 2 acres (.8 ha) per family, based on a calculation of household heads, rather than individuals or wives, in a flagrant attack on customary dispersed settlement patterns, as well as polygamy and agricultural self-sufficiency. This ruthlessness and rigidity distressed even some of his own 'men on the spot' and some of the local missionaries (Moyer 1976: 404; du Toit 1954: 271).

Over a period of thirty years amaMfengu settlers resisted living in close village settlements on fixed plots, a resistance partially fuelled by the antagonism of Mfengu chiefs to loss of control over their kinsmen. Clustered residential arrangements, not to mention voluntary reduction of cattle, threatened the political economy of the Mfengu, as it did the amaXhosa. In emphasising the positive orientation of the amaMfengu to the market economy and western education and religion, it is easy to lose sight of the customary social structures of the amaMfengu. Mfengu historiographer Richard Moyer saw the Crown Reserve settlement as the most systematic attack on Mfengu customary social organisation to date, one which would allowed colonial officials and missionaries to "launch a full scale attack on traditional customs and practices" (1976: 389-390).

With the wisdom of hindsight, the stipulation of a minimum of 20 homesteads per village, considered radical at the time, was a modest foreshadowing of the village plans that followed in the next few decades, where villagisation was pursued with increasing vigour and in ever larger blocks, silently evaded with equal determination on the part of the villagers. Nineteenth century village settlement was the precursor to policies of systematic, forced villagisation known as ‘betterment’ a century later, the sheer scale of which was to put a blot on the agrarian history of modern South Africa.²⁶

During the actual process of resettlement, the amaMfengu settlers in Keiskammahoek escaped some of the rigidity of the official modalities (Moyer 1976: 390-92; 403-4). The Superintendent of the Crown Reserve, James Ayliff was inclined towards a more sympathetic outlook towards Mfengu social customs and their desire for economic independence. He relaxed many of Grey’s conditions, chief of which was the insistence on compact villages.

[Ayliff] ... appreciated their preference for scattered dwellings. Wherever terrain allowed it, he permitted them to settle on hillsides. This was possible in much of Keiskammahoek because the whites who were permitted to reside there preferred living in valley bottoms (Moyer 1976: 391).

Only a small number of white immigrants purchased land in the district, mainly concentrated around the town of Keiskammahoek. The district therefore became a predominantly black district, but the economic presence of whites was nevertheless to prove highly significant.

One of Grey’s most radical ideas was that Africans should be permitted to purchase land in freehold title, which was a far more radical step than quitrent title recommended by both previous and current administrators. Quitrent title was to become the conventional tenure applied to Mfengu ‘locations’, but the trajectory of quitrent title reveals that the adaptation of quitrent tenure to African tenure was in reality little more than an administrative measure and a technical means by which to fix Africans to plots of land within spatially controllable locations. By comparison, freehold was market-linked and less conditional and controlled by the administration. The popularity of both freehold and quitrent tenure among administrators at that time cannot be divorced from the dramatic technological developments in the metropolitan centres in the measurement of space, as mentioned above. These new instruments were accessible in the Cape at that time by virtue of the identification of the Cape as an important locus of scientific research on the southern arc of meridian, discussed in Chapter 11.4.

To promote freehold ownership for both white immigrants and African buyers, Grey put land recently appropriated from the amaXhosa on the market, redefined as ‘Crown land’, to bolster “the anticipated class of ...[African] peasants” (Peires 1989: 347).

²⁶ These nineteenth century interventions fed into the modernist ‘betterment planning’ of the mid-twentieth century, where hundreds of thousands of rural families across South Africa were forcibly grouped in close settlements, a policy that was at times met with violent resistance (see de Wet 1995).

For the bulk of former Xhosa resisters, this option was far removed from their straightened conditions and traditional affiliations. Few were in the position to purchase land. This did not mean they did not escape the emphasis on individual allocation of plots and villagisation of settlement patterns, but their future was more bound up with the evolving imperatives of bureaucratic controls and 'native administration'. The Keiskammahoek rural villages stand out as distinctive in this regard, in that the new settlers were given choice of tenure, and many opted for Grey's offer of purchase in freehold.

4.6 Rural Africans purchase land²⁷

Grey made provision for Africans to purchase land at a fixed price of £1 per acre (.5 ha). This was conditional on purchase of extents no less than 20 acres (about 8 ha), later dropped to 10 acres (4 ha), and more was allowed. Moreover, purchasers of double that extent, 40 acres (16 ha), could lease another 40 for five years at 1s. 6d. per acre per annum. This price was exorbitant by the standards of the white 'market' (Moyer 1976: 354; Peires 1989: 347). Nevertheless, a large number of Africans scrambled to purchase land under freehold conditions. Relative to the total population, however, the proportion who could afford to buy and/or lease land remained small.

In addition to the voluntary purchases and leases, Grey favoured making large grants to chiefs to win them over, and similarly, concessions were made to mission stations. By 1864, 8,000 ha had been granted to "chiefs and children of chiefs" and 13,000 ha to mission stations. Adding the figures in the 1864 return (see Table 1 below), 30,000 ha in total had been distributed to Africans outside of the confines of locations (du Toit 1954: 276).

Nevertheless, the land distribution in British Kaffraria as a whole was heavily skewed in favour of the relatively small, but increasing white population, mostly on sizeable enclosed farms, their numbers having been bolstered by Grey's German immigration projects, as mentioned above (Peires 1989: 340, 347; Bergh & Visagie 1985: 56). Whites were reported to have been paying less than half this price, while unimproved land went for two to four shillings an acre, almost comparable to what blacks were paying for leases. Since many whites refused to buy land at that price, many were allowed to pay an annual quitrent of a mere £2 for 1,000 acres (400 ha) (Peires 1989: 347).

²⁷ I have converted acres and morgen to hectares (ha) to standardise measurements in the thesis. Until metrification in the 1970s, acres and morgen were used. Regarding presentation of figures, I have departed from current South African practice and used commas to separate groups of three digits in large numbers, and the decimal point rather than the decimal comma, for example, one thousand is R1,000.00 and one million as R1,000,000.00. With metrification in South Africa the convention became spaces to separate groups of three digits and the decimal comma to separate whole numbers from decimal fractions e.g. one million rand is written as R 1 000 000,00.

Some historiographers of that period show that despite the high price for land, there was much enthusiasm among amaMfengu *and* amaXhosa to purchase individual farms (Peires 1989: 347, du Toit 1954: 277; Moyer 1976: 354), but most could not afford it. There is evidence of individual Mfengu having bought large farms of between 200 and 400 ha in Peddie and Middledrift²⁸ (du Toit 1954: 277; Moyer 1976: 354). Clearly the implication would be that only well-capitalised blacks could undertake such purchases, the capital most likely raised through the sale of cattle. The black purchasers were reported to have been mainly amaMfengu, many of whom had been able to use the market economy to their advantage, e.g. by selling surplus agricultural produce to invest in cattle.

Grey reported that within ten days of proclamation, 11 African applicants had bought 136 ha, rising to 184 purchasers of 1,247 ha by the end of that first year. The farm boundaries were surveyed only after the purchases, and the surveys had also to be paid for by the buyers. The figures of purchases continued to multiply. Six years on, in 1864, the number of purchasers and extent of land purchased was as follows:

Table 1: Return of land purchased and released by natives or granted to Chiefs and Mission Stations in British Kaffraria: 1864

Year	No. of purchasers	Hectares	Amount surveyed	No. of lessees	Hectares	Amount surveyed
1864	508	6,515	5,904	106	2,311	2,200

Source: Return of land purchased and leased by natives or granted to Chiefs and Mission Stations in British Kaffraria: 1858 to 1864 in du Toit, 1954: 276-8. Acres in the original converted to hectares.

To legally accommodate black private title, Grey's new land regulations of 1858 included an enabling section, Section D: "Terms on which Natives may obtain Country Land":

I do hereby grant in freehold unto [A.B.]. during the full term of his natural life and no longer²⁹, with remainder to his lawful children surviving at the time of his decease share and share alike and to their heirs according to the inheritance of land now in force in the Colony of the Cape of Good Hope, a piece of land(quoted in du Toit 1954: 276).

And so was born, not only a form of tenure for Africans whereby the new owners could escape some of the unpopular restrictions of the village locations and control by administrators, but also a clearly segregated market in land. Africans paid higher prices and were issued titles specially designed for 'natives'. Black and white were nevertheless allowed to transact this land between them. The data on purchases suggest that many blacks aspired to purchase in freehold during the short span when purchase by Africans was actively encouraged, but the numbers who managed to purchase, though significant, were proportionally miniscule.

²⁸ A white priest testified to the 1865 Commission on Native Affairs that 30 Mfengu purchasers in Peddie district had farms between 200-400 ha, and one had paid £1000 to a European (Moyer 1976: 354 n).

²⁹ This clause was presumably not an error (as implied by 'sic' in du Toit's citation of the legislation), but a possible restriction against patrimonial property (a feature of Roman law) whereby descendants could claim land rights to family property on an ongoing basis.

With Grey's recall, and the annexation of British Kaffraria to the Cape four years later, in 1865, the policy of encouraging disposal of Crown land to blacks through purchase receded, further distributions of remaining Crown land going to whites³⁰ (see Bergh & Visagie 1985: 56). Individual blacks were still permitted to purchase land in the Cape Colony, later Cape Province, until it was outlawed in 1936, but the momentous political transformation that followed the mineral discoveries and the amalgamation of South Africa under segregationary policies made this increasingly difficult and unlikely. There were social sanctions against resale by whites to blacks in the predominantly white districts. The market thus split even more drastically along racial lines. Evidence presented to the Beaumont Commission in 1916 indicates that Africans actually *lost* land between 1913 and 1936 on account of the wealthier landowners losing their land to whites on account of indebtedness (Switzer 1993: 199).

4.7 Aftermath

The evidence suggests that the relaxation of the military style planning originally posed for Keiskammahoek district resulted in many amaMfengu claimants choosing to purchase their land in the villages in freehold. One such was the research site, Rabula.

The village settlements of Keiskammahoek were administered at first directly from Keiskammahoek town³¹ under an official, later converted to the status of magistrate. The town evolved from a fort, from which colonial military operations had been launched, to the centre of local administration. The Keiskammahoek magistracy was in turn accountable to the administrative headquarters at King William's Town. After Grey's departure, the nascent magisterial system in the Crown Reserve was downgraded, Grey's successors not sharing his somewhat grandiose illusions of rural entrepreneurship. The various divisions became sub-districts of King William's Town, threatening to become rural backwaters under the bureaucratic administrative cultures of the succeeding era, until the mineral revolution rediscovered them as pools of cheap migrant labour. The district of Keiskammahoek gained full magisterial district status only when the Ciskeian administration came into being as a separate institution in 1928.

In both the Cape Colony and British Kaffraria the amaMfengu were becoming increasingly confined by new legal and administrative measures. Inside the Cape Colony, amaMfengu were for the most part grouped in locations, with increasing emphasis on registration, villagisation, quitrent tenure, survey and, in short, colonial control over individuals through regulated land allocations (Peires 1989: 313; Moyer 1979: 239-242, 359-360, 380). It would appear that freehold tenure provided a measure of relief from those developments, if not entirely. Magistrates were to be assisted by paid headmen, and even freehold villages conformed to the practice of local liaison with authorities through headmen. In practice white administrators relied heavily on

³⁰ In the predominantly black villages, such as Rabula, some remaining plots were available for purchase by blacks until the turn of the nineteenth century.

³¹ See R. Palmer (1997) for an historical account of the town of Keiskammahoek.

headmen, for day-to-day responsibilities, such as tax collecting and policing functions. Criminal law became the preserve of colonial law. In these developments Keiskammahoek district was no exception, but statistics in 1861 show that relative to the rest of British Kaffraria, there were markedly fewer salaried headmen in Keiskammahoek district than the rest of British Kaffraria, and relatively more policemen (du Toit 1954: 108) showing a distinctiveness that was to endure into the twentieth century. Mfengu chiefs were categorised as headmen. Some Mfengu chiefs, who had proven genealogical connections to their pre-colonial social networks in the north, retained a measure of social legitimacy among their followers³².

Grey's radical ideas of erasing customary law proved to be a far-fetched fantasy. In spite of its lack of legal recognition, customary law was accepted as part of reality. Colonel John Maclean, Chief Commissioner of British Kaffraria, compiled a version of Xhosa law entitled the *Compendium of Kafir Law*, published by the government printers in 1866. The text served as a guide to white (and over a century later, black) magistrates. Special Magistrates were empowered to adjudicate over criminal cases according to European law, and they could assist chiefs in civil cases, which were to be tried by 'native custom' (Bowen, J. 1985: 13; du Toit 1954: 98). From the evidence presented to a government commission appointed in 1883 to examine the question of native law and customs³³, it became clear that the prohibition against recognition had resulted in magistrates floundering around in a sea of uncertainty, illicitly and inconsistently administering 'native law' even where it was strictly speaking illegal and unsystematic (Brookes 1924: 184-51)

The problem was compounded when British Kaffraria was annexed to the Cape Colony in 1865. "Once Kaffraria had ceased to be an alien and defiant territory held down by force, it was easily absorbed into the [Cape] Colony ..." (Peires 1989: 340). The spatial and political engineering of land during the mid-nineteenth century resulted in the 'whitening' of the former and the 'blackening' of the latter, and there ceased to be any logical separation between the two colonies. The recognition of customary law, however, remained legally ambiguous, exacerbated by the blurred boundaries between white and black. The situation could be compared with the later annexation, between 1879-1894, of the various blocks of land that made up the Transkeian Territories. Unlike the piecemeal incorporation of the settlements west of the Kei River, the Transkeian territories were annexed *en bloc*, necessitating a measure of official recognition. In contrast, there was no automatic recognition of African law in the Cape Colony, which meant that Africans continued to fall under Cape colonial law, but without guidelines or standardisation of procedures. "[I]n consequence the Administration was forced to the adoption of illogical and spasmodic make-shifts" (Rogers 1949: 200).

³² As in the case of Chief Jama of Chatha village in northern Keiskammahoek district. Chief Mhlambiso in the neighbouring Amatola Basin was similarly recognised by his followers (Bowen 1985: 19).

³³ Native Laws and Customs Commission, 1883

It was in this ‘grey world’ of imbricated law and custom that the Keiskammahoek rural villages evolved. The legal framework had to accommodate mixed settlement patterns and individualised tenure in an emerging context where the trajectory was steadily moving towards segregation and ‘communal tenure’ for Africans. These jarring shifts and disjunctures impacted in particular ways in the Keiskammahoek villages on account of their somewhat unusual historical associations with Grey’s world of social engineering. While much about the spatial and administrative features foreshadowed developments throughout South Africa in the twentieth century, there was a distinctiveness that was not replicated in other African contexts. The mid-twentieth century inter-disciplinary study in four volumes, known as the Keiskammehoek Rural Survey, referred to in section 3.2 above, singled out the area on account of the comparable value of four different tenure systems, setting the benchmark for many further studies thereafter. The research attention suggests that the district has been ‘adopted’ as a microcosm of Ciskeian social systems and land tenure. This prism may obscure many singular and distinctive processes which Moore characterised as both ‘regularisation’ as well as ‘situational adjustment’ which warrant a microscopic lens, adopting the methodological tool of a ‘semi-autonomous social field’ to isolate aspects of this distinctiveness, as well as repetitive patterns that remained beyond the reach of formal law (see Chapter 2.9 above).

4.8 Titles under scrutiny

What became of African freehold title in a political context that viewed independent African land ownership with extreme hostility? Before I address that question more directly, it is necessary to briefly draw attention once again to the general change in political climate. This context is important in our assessment of the particular trajectory of African titling, revealed in the case studies.

There is unfortunately little data in various government commission reports on the two research sites, Fingo Village and Rabula. In general, the somewhat unique circumstances of these settlements militated against their inclusion in colonial government evaluations, which tended to focus on African settlements within the more clearly defined African reservations. Until the formal adoption of the notion of the ‘Ciskei’ as an emerging homeland in the 1920’s, Keiskammahoek was not viewed as a typical African area, but as somewhat exceptional.

As mentioned, the policy of disposing Crown land to Africans by way of purchase in freehold was short-lived. Its brief appearance for those Africans who had crossed the imaginary boundary into the land of the market economy is attributable to Sir George Grey and his belief in the power of science and technology. With him, and his era, the policy came and went, the transfers to blacks slowing down to a trickle after his departure. Legal capacity by individual blacks in the Cape to buy land survived the Native’s Land Act of 1913, until the jaws of legal segregation closed in under the legislation of 1936. Research suggests that more

blacks are likely to have lost land than accumulated land by way of freehold, though this hypothesis requires quantifiable data, which is still lacking.

As Switzer (1993: 75) points out, the magisterial district boundaries that eventually comprised the Ciskei did not change throughout the twentieth century. The formation of the Ciskei did, however, result in radical, *internal* land redistribution and territorial expansion, involving expropriation of white land during the decades following the 1936 Trust and Land Act (Wotshela 2001). Once all Crown land had been disposed, there were limited means of acquiring land outside of the framework of grants from the state, other than at mission stations³⁴. The small sprinkling of Africans who had acquired title, such as the landowners in Rabula, exercised their ownership under increasingly constrained conditions. In the late nineteenth century, the 'Crown' asserted itself as owner of all land in 'locations', including the commonages in freehold locations, a notion contested by the owners. The state also appropriated land for state or public purposes. Large blocks of common pool land were, for example, allocated to state forestry and surveyed out of commonages, a phenomenon that caused much conflict between land owners and the authorities, still ranking today.

Profound changes in the political economy brought about increasingly negative perceptions in settler society towards African title over time, reflecting a self-interest in maintaining sharp distinctions between European 'ownership' and African 'communal' tenure. Thus, when evidence began to emerge that Africans were not maintaining the currency of freehold and quitrent land registers, administrators labelled the condition as evidence of Africans' inability to manage privately owned land. In general, African management of titles was officially labelled 'chaotic' (UG 42 — '22; Rogers 1949: 115-117). Several commissions of enquiry into economic conditions, customary law and land matters commented on concerns arising from problems relating to African title, e.g. Commission on Native Laws and Customs, 1883 (see appendices) and the Native Affairs Commission of 1905. In 1921 a Commission was appointed to examine the specific problems of land titling (UG 42 — '22). After a sweeping historical review of African title to date, the Commission made recommendations to 'simplify' titles on account of an inferred conclusion that land surveys and registration were over-sophisticated for Africans. The Commission also took the view that Africans 'preferred' customary tenure. The overall affect of the Commission findings was to discourage the further issuing of title to Africans.

In a climate of hostility to title, it is surprising that the existing titles were preserved. Africans were fiercely protective of their titles. The differentiation had not resulted in the emergence of a land owning peasantry, but the status differential was important to landowners, and besides, new trajectories of ownership emerged, which could not be undone. Although causal links cannot be established between the presence of title and

³⁴ Missions petitioned for freehold ownership over the land of their surrounding congregations but only got transfer of their immediate 'church lands', the Crown retaining root title to the 'location' lands.

economic stratification, for a long period of time the amaMfengu enjoyed a social status that was underlined by the possession of land titles, and which provided a springboard for investment in education and ultimately a platform for absorption in the civil service (de Wet 1995: 124, 156). Today, amaMfengu are integrated into a wide and diversified spectrum of South African society, though there remains among them a sense of shared history. Their identity as amaMfengu is overlaid by broader African values and the common experience of racial discrimination and disenfranchisement among all Africans (see Moyer, 1976: 331-341). Newer identities are also concerned with the shared history of pre-colonial Africa³⁵.

Grey's attempts to integrate, and subsequent governments' attempts to segregate the societies of the Ciskei were in both cases only partially effective. The socio-spatial manoeuvring over a period spanning a hundred and fifty years has nevertheless left an indelible mark on the region, and few black people were unaffected by labour migration, resettlements, forced removals and asymmetries of power in which land relationships featured centrally.



³⁵ Some revisionist theories argue that modern Mfengu identities are increasingly relying on the reinvention of their 'tribal' history through genealogical or biological constructs to Africanise 'Fingo-ness' and identify with the broad resistance movements against apartheid. They see this as an attempt to de-emphasise the 'problematic' nature of Fingo identity, with its somewhat embarrassing association with colonial legacies (Fry 2007: 258-259). For the purposes of this study I did not experience Mfengu respondents engaging in convoluted attempts to 'invent' genealogies or manufacture African-ness. Clearly their investment in education and property over time has had a cumulative affect on their material and social standing, but their social and economic composition is as mixed as their political affiliations.

PART TWO In the Shadows of the Cadastre

CHAPTER 5 Notenga³⁶

5.1 Introduction

In Part One we saw how a range of complex inter-related problems arise with titling customary lands. The continued significance of descent groups and investment in kinship networks, rather than individual access to, and control of property complicates the already entangled legal environment of legal pluralism as a result of the imposition of colonial rule. These affect the trajectory of how African owners manage title to their land.

This chapter situates the historical conditions under which the freeholders in the two study sites acquired land in freehold. As pointed out in Part One, the process occurred a century prior to the titling programmes of the mid-twentieth century in many other African countries, such as Kenya. The chapter is concerned with some of the impacts of these colonial interventions. The changes in legal access to land, and its control, altered the terms of engagement with regard to the land. At the same time, the evidence suggests that customary social institutions continued to be important.

The history and current ideas of land ownership among the freeholders, discussed in the following chapters, reflect many of the themes in the scholarship on the impact of colonial land tenure interventions on African systems of tenure and production. Where these interventions result in attempts at privatisation, such as titling, analysis involves the cross-cutting interaction between western and indigenous ideology, technical knowledge and exchange “through discourse as well as through political economy” (Berry 1989a: 4). The findings resonate with Berry’s observations that more than one historical process is involved, and that tradition and history are in competition when it comes to claims and conflicts over land (ibid).

Lund similarly concludes that more than one past is invoked in Africa to vindicate claims to land and territory:

On the one hand reference is made to tradition as timeless past, a reservoir of ‘how things have always been done’ in the constant flow of time. On the other hand, there is a past made up of significant historical events, of actions and transactions that are invoked with various vindications. The two pasts are rather different from one another. One justifies claims to the future as a seamless

³⁶ “The people who bought” in isiXhosa, that is to say, the landowners. ‘*Thenga*’ is the Xhosa word for ‘buy’, the prefix ‘*no*’ being a formative noun denoting, in this context, ‘people’. The term refers to Africans who purchased land historically. The significance of the word lies in the conceptual distinction local people made (and make) between acquisition of land through purchase, on the one hand, and state allocation and quitrent grants on the other i.e. the distinction underlined the social differentiation of the owners, rather than the legal connotations of ‘title’.

continuation of the past; the other justifies them as the result of salient fortunate events. (Lund 2013: 14)

Space is similarly malleable to different interpretations of authority, control and ownership (ibid).

The narratives in the following chapters confirm the importance of ideas raised in the scholarship of Bohannan and Okoth-Ogendo, discussed in Chapter 2 above, that new spatial concepts do not easily displace customary social and spatial dimensions of land tenure relationships, which are characterised by graduating and interlocking socio-spatial units. They argue that to understand the dynamics of African production systems, scholars, and by extension, social reformers, need to have an appreciation of the social philosophy of a people, an approach followed by Moore and Berry in their analysis of the inter-relation between law and custom, social change and continuity (Berry 1989a: 4, 1993; Moore 1978, 1986).

Berry, Lund and Peters all stress the significance of historical dimensions, which affect the interpretation and multiplication of claims on land. As shown above, Lund argues that contested claims to, and authority over land hinge on interpretations of customary norms as well as invocations of particular events, both of which affect the trajectories of the dynamic unfolding of land and property relationships in any given region (Lund & Boone, 2013; Lund 2013). Peters, for her part, argues that it is important to move beyond general statements of the nature customary systems in the context of colonialism, and to look at the more precise nature of changing relationships. The stress on the general theme of African investment in social relations carries the danger of placing too much emphasis on 'negotiability' and 'embeddedness' of property (Peters 2002a, 2006). She argues that customary systems have the capacity to mask processes of accumulation and commercialisation. The implications of Peters' injunction are that the focus on social relations as a means to develop an alternative construction of property to western forms, such as title, may blind scholars to the processes of concentration behind the rhetoric of social relationships.

We now turn to some of the specific details of the historical changes in land tenure among the Africans who acquired land in freehold in the two study sites.

5.2 Broad historical context

During the mid-nineteenth century decades when freehold tenure was introduced in the Cape Colony, the social and political dynamics were in flux. Contrary to later developments, there was no neat parallel in the division between 'black' and 'white'; 'colonial' and 'customary law'; or 'private' and 'communal' land ownership. These categories were less clear-cut and differentiated during the era that saw the emergence of African settlements that were legitimated by colonial law, such as Fingo Village and Rabula. The fluidity in the land arrangements meant that various traditional and novel land systems dovetailed with each other. The diffusion of aspects of western law with indigenous concepts of landholding affected people's social

identities and views of land ownership in very specific ways, with a lasting impact on multiple claims to land in the present. Africans still contest the present in terms of different interpretations of the past. The arguments reflect the social diversity and differing experiences of the changes that permanently altered land tenure relations in the region.

The previous chapter discussed the relatively fluid land policies in an around the borders of the Cape Colony during the mid-nineteenth century when the inhabitants of the two research sites, Fingo Village and Rabula received title to their land. Colonial policies of that period differentiated between subject people in terms of their alliances and allegiances to the Crown, rather than solely by racial markers, and differentiation could be achieved by various scientific interventions, such as surveying land parcels. This period represented the confluence of many threads in the evolution of colonial thinking about the land rights and 'property' of subject peoples. A strand of 'humanitarianism' evolved into strongly social evolutionary ideas, which in turn hardened into rigid racial distinctions and cultural prejudices.

In contrast to the rigidity of control and uniformity of later land tenure policies, there was a degree of variability and experimentation with land tenure, to which the Mfengu 'locations' were amenable on account of the relative absence of strong traditional governance structures and the presence of social elements that responded positively to market forces in the agrarian economy. The willingness of the amaMfengu to accept many of the principles of mid-Victorian liberalism, such as production for the market, education and ownership of property; and their participation in the armed conflicts that resulted in the appropriation of large swathes of indigenous land, rendered their social systems more comprehensible to their British overlords. They benefitted from fairly generous grants of land, which, on account of the adjacency of their 'locations' to the growing numbers of white settler farms, had to be clearly defined, administered and individually taxed. Furthermore, the ongoing threats from Africans still relatively independent of colonial control, and who continued to resist colonial expansion, provided added impetus to the preference by the administrators for individualised forms of ownership among the amaMfengu. Individual identification simultaneously lent visibility, not only to the colonial subjects themselves, but to resisters who might take refuge in these settlements.

Among these new individualised land tenure maps that were implanted in the amaMfengu locations, freehold was relatively rare and unusual, the preferred official tenure being 'quitrent tenure' as a means by which to convert potentially allied African society to western concepts of individual visibility and separability. This form of tenure was disliked by the amaMfengu on account of its association with spatial compression, compartmentalisation and administrative oversight, which threatened to break up extended family units and traditional systems of land exploitation. Freehold was different: it was not an administrative response systematically imposed by officials and missionaries. Freehold was a response by Africans themselves to a small window of opportunity created by Sir George Grey to access land in full ownership. Grey's fanatical

ideas about assimilation included the encouragement of individual wealthier Africans to purchase land in freehold. By putting a high price tag on the land, the offer was highly contingent and only a minority could afford to purchase land; but those who could, did so with seeming alacrity. The opportunities to acquire land in freehold diminished sharply thereafter, as a result of the advance of segregationist ideologies. The theoretical possibility of individual purchase in freehold by Africans remained open until the mid-twentieth century, but the realities of the emerging political economy placed severe limitations on the incidence of individual acquisition of land.³⁷ Freehold in an urban setting was rarer still, and Fingo Village stands almost alone in the history of the country as an urban township that was historically surveyed and titled *en bloc*.³⁸

So far I have emphasised the features shared in common between the inhabitants of the two field sites in terms of social and cultural identities and new land tenure arrangements. There were also significant differences. Though physically separated by a mere 100 km (as the crow flies), the social composition of each site was affected by particular historical and legal contexts, and different geo-political trajectories.

Fingo Village came into being within the borders of the 'old' Cape Colony, which was by then an established colony with its own clearly defined, though evolving, common law imported from the west, slowly but surely adapting to local conditions. Blacks inside the colony were from the outset subject to Cape colonial common law. Rabula, on the other hand, was established in territory directly under Great Britain, where there were few whites, and where no colonial common law applied. Officials had to test new administrative frameworks *de novo*, though in practice borrowing from experiences in the Cape Colony and wider colonial contexts.

As discussed in the previous chapter, Rabula was situated deep within British Kaffraria on a section of land recently appropriated from the amaXhosa. The district of Keiskammahoek, of which it was part, was initially distinct on account of the strategic importance of the Crown Reserve as a loyalist buttress on the colonial borders. These ethnic and social status distinctions began eroding when the black inhabitants of Keiskammahoek district were subsequently incorporated within the evolving 'native administration' of the Ciskei,³⁹ where overt attempts were made to introduce uniformity with the administration of the Transkei. The latter was annexed *en bloc* and as a result the Transkei system of administration was clearly distinguished as a 'native reserve' in contrast to the ethnically multi-layered Ciskei. The implications of this were that blacks in the old Cape Colony were controlled as individuals by means of administrative mechanisms, with de-emphasis on traditional territorial markers and authorities. There was no simple dichotomy between race, sources of law, social status and residence. There was a rather more complicated inter-meshing and cross-cutting of ethnic, cultural, racial, legal and administrative dimensions.

³⁷ My stress here is on individual purchase. There are many examples of African communities purchasing land in the early Union period, particularly in the former Transvaal, see James 2006, 2007. Individual Africans also acquired land in freehold in some rural locations in the colony of Natal.

³⁸ The only other being Alexandria in Johannesburg.

³⁹ Ciskei means 'this side of the Kei', Transkei 'beyond the Kei'.

Many families today are the successors in title to the original freehold title-holders. Freeholders, known in the rural idiom as *notenga*, ‘those who purchased’, still have a sense of shared social identity rooted in the acquisition of the first grants in title. Most of the inhabitants of the research sites self-identify as ‘Mfengu’, a label which has over time developed into connotations of cultural rather than ethnic distinctiveness. In earlier times, land titling underlined conspicuous social differentiation between Mfengu landowners and non-titled plot-holders. In Rabula, a large category of people live in the village without title (the context of which is explored in the sections below), many of whom have Xhosa origins. Through sales and intermarriage, the Mfengu element among present owners in the research sites has been considerably diluted (Mills & Wilson 1952: 46). This is all the more interesting because the original collective identity in these settlements was linked to self-definition involving a distinction in social status between Mfengu and other black groups. This has been replaced by a broader, less ethnically defined, common African identity, and a shared African past. While the ethnic markers are no longer decisive in defining the lines of social differentiation, the long term consequences of differential land holding can still be seen in different degrees of wealth and status between the original landowners and the villagers without title in Rabula. The primary focus is not on agrarian production systems, but on discourses of land tenure.

The following sections and chapters examine the long-term effects of freehold titling on people’s conceptions of ownership. I start with a ‘visual tour’ of the two settlements to locate them geographically in the present. I go on to discuss the historical context of each site to show the complex layering of social identities at that time, resulting from momentous developments in the region which changed the demographics, racial composition, cultural mix, land distribution and tenure relationships. Using my research data, I go on to analyse the passage of property in the two sites over time. The data is more systematic and detailed in the case of Rabula than Fingo Village on account of the different way in which the respective deeds offices stored their registers (an aspect which I discuss under the ‘ethnography of the deeds office’ in Part Three). I conclude with some tentative findings from the data.

5.3 “Siyagoduka⁴⁰”

Situated within walking distance of the Grahamstown’s urban centre, Fingo Village lies to the east of the city, surrounded by older and newer black residential townships. A dense matchbox grid of a recently completed low-cost state-subsidised housing complex (known colloquially as ‘RDP’⁴¹ houses) on its border stands out starkly from Fingo Village’s large tree-lined plots. Perhaps visually unremarkable to the undiscerning traveller, to local residents Fingo Village is distinguished by its historic land ownership

⁴⁰ “We are going home!” in isiXhosa.

⁴¹ The term is derived from the former Reconstruction and Development Programme established immediately following the first democratic elections in 1994. The term has stuck in spite of the demise of the programme and the assignment of the housing function to the relevant line function.

arrangements. The owners of these properties are deeply conscious of their freehold titles stretching a long way back in time, and of the historical significance of these titles.

The wide street, previously the only route north from the city, is flanked by spacious verges and yards with an assortment of house-styles, some conspicuously modern suburban homes, others built of mud or dilapidated iron. At first sight the precinct is not noticeably different from the surrounding townships. The signs of crumbling infrastructure and poverty are everywhere noticeable; and the residents are quick to mention that services to Fingo Village have been no better than to other townships.

Closer inspection and familiarity with Fingo Village reveal distinctive features, which together create an impression of greater stability, continuity and less entrenched poverty than its surrounds. Most striking about Fingo Village is the spacious size of the plots, which have so far resisted subdivision, and the wide grassed sidewalks where much social interaction takes place. Many of the houses are still of the original wood and iron commonly used for residential building in the nineteenth century, some brightly coloured, others shabby and rusting. A fair number display a modest reflection of Victorian architecture, such as pillared verandas and pitched painted roofs — in some cases combined with modern brick extensions and other renovations. The admixture of rows of simple, square flat-roofed structures (called ‘flats’) extending perpendicularly from the main dwellings — some in rusted zinc, others modern and plastered — provides a touch of the contemporary African informal city, accommodating several hundred backyard tenants.

Apart from some conspicuously modern homes, the outside structures of the majority are in poor repair. Inside the homes are relatively spacious and many have been extended to include separate bedrooms and well-equipped kitchens. In some cases there is more than one dwelling on the property to accommodate multiple generations of the extended family. The properties have not been formally subdivided even where more than one dwelling has been established. The plots have contrived to maintain their sprawling yards for vegetable gardens, washing lines, domestic tasks and varied social activities. Many have hedges, shrubs or ornamental plants dividing their properties from the street fronts and neighbours. A number of large syringa, eucalyptus and erythrina trees further distinguish Fingo Village from its densely built-up neighbours.

A decade of reticulated water from yard taps has made the daily trudge to the street block corner a distant memory, but only a few have been able to afford plumbing extensions into their homes. A recent innovation are municipal-subsidised flushing toilets at the backs of the houses, bringing to an end the notorious ‘bucket system’ that historically pervaded Grahamstown’s black townships until recently.



Source: Chief Directorate Surveys and Mapping, Mowbray, Cape Town. Photo 1064. Strip 4. 1005/1998. Scale 1:4.000

Map 2: Aerial topographical photograph of Fingo Village.

One's eyes are drawn to a traditional Victorian spire attached to the classical nineteenth century Anglican church,⁴² fashioned from burnt-orange stone blocks, the historic St Phillips church — symbol of a colonial past, but sentinel to modern African Christian values. Eye-catching by its loftiness, the church is one among a half-dozen churches in the township, some outstripping the classical-colonial features of its founding period with distinct vernacular African styles, extravagant modern architectural flourishes or symbols of separatist orders.

Groups of church-goers, dressed in the distinctive habiliments of their religious orders, periodically impart bright splashes of colour as they assemble or proceed in lively groups to their practices. It is not uncommon to observe goats and cattle grazing in desultory fashion along the side streets, or in the mornings and evenings streaming in herds ahead of whistling herdsmen. The subdued and more hushed daytime tones transform into a vibrant social activity at night as several taverns (previously unlicensed 'shebeens') swing into action. Overall the visitor is treated to an atmosphere of genteel dilapidation, sociable sidewalk discourse and courteous hospitality. The ownership arrangements are communicated with pride, and invariably (and somewhat erroneously) attributed to the personal largesse of Queen Victoria.

The road north bisects Fingo Village as one travels through the rapidly expanding townships spreading out over the plateau above the city centre, the ridge of which was the launching post of the historic amaXhosa attack on the tiny garrison settlement in 1819, known as the Battle of Egazini. Chief Makana, after whom the new district municipality has been named, led the attack. Travelling north-east out of town, the road passes the edges of the townships on the higher plateau, intersecting towards Fort Beaufort to the north and King William's Town and East London to the east. Turning north to Fort Beaufort, one travels in an easterly direction through Alice approaching King William's Town from the west. From Alice (the former administrative centre of the Ciskei 'homeland') one traverses the undulating foothills of the Amathole mountain range in the direction of the former border colonial strongholds of Fort Hare, Middledrift and Fort Cox. Ever reminiscent in these names is the military legacy of the rural settlements that weave in and out of the former Ciskei. Fifteen km before reaching King William's Town, is a sign to Keiskammahoek.

Flanking this intersection is the former mission village of Pirie, with its central grid-like layout a reminder of the colonial penchant for neat, compressed village settlement, now dwarfed by informal sprawl and modern dwellings. Opposite lies the town of Dimbaza, erstwhile symbol of apartheid as subject of a 1970's documentary entitled "Last Grave at Dimbaza", clandestinely shot and smuggled out of the country to reveal the gross racist human violations of that period. Dimbaza was chosen in the title as a symbol of the forced removals of 'surplus people' from 'white areas' to desolate corners of South Africa's bantustans. Dimbaza was one of apartheid's 'border industrial zones', which apartheid's technicist economic planners situated on

⁴² The local Grahamstown newspaper recently described it as follows. "Almost unaltered, it has been cited by a historian of religious architecture as one of few remaining examples of "high ecclesiastical art" of this type in South Africa." Grocotts Mail, 20 June 2012.

the edges of the black 'homelands', in this case the Ciskei. It was part of a policy-complex to re-site residence and employment away from the 'white' urban areas. In the 'new' South African idiom, Dimbaza has spontaneously transformed into a fast-growing dormitory town connecting rural lives to the urbanising sprawl of King William's Town and East London, suburban homes fast overtaking the decaying factories of the previous era. Some rural landholders, including residents of Rabula, own 'town houses' in Dimbaza, providing easy access to both their rural homes and urban working bases, where new social networks have been established.

Turning off the main road here, the tarred road, formerly well-trodden wagon route, heads towards the town of Keiskammahoek. The terrain immediately becomes more mountainous and we enter the successively elevated, scenic river valleys of the Keiskamma River and its tributaries. Before reaching the urban settlements of Keiskammahoek, the road winds through a number of rural villages, the first of which is Rabula. Here we encounter the first river basin, the upper reaches of the Rabula River and one of its tributaries, the Nqenqen. The settlement is set in undulating grassland vegetation, grading upwards to the east into Afromontane forest, with clearly visible demarcated blocks of cultivated pine plantation. Above the forests and plantations, protrudes the majestic Hoho mountain, former stronghold of the KhoiKhoi queen Hoho. Its crowned rock face of dolerite is visible as a timeless sentinel from all corners of the surrounding settlements, which together comprise the rural 'village' of Rabula. The heights around Hoho form a human barrier to the aforementioned Pirie and other rural villages of the Ciskeian districts of King William's Town.

Altitude within the Rabula area ranges between 500m and 800m above sea level, although heights of up to 1,400m are reached to the east (Mountain 1952: 4). The elevation to the west of the tarred road, separating Rabula from Mbems village, is Ntaba kaNdoda, the mountain famed as a sacred spiritual site and later military symbol of the amaXhosa. The site has earlier roots as a legendary sacred shrine to the hunter-gathering clans who lost their territory to the western amaXhosa and later the colonial state. Ntaba kaNdoda was appropriated by the Ciskei homeland regime as a political symbol of its artificial statehood in the heyday of apartheid. A grandiose concrete 'shrine' reaching to the sky was built by the homeland rulers of the bantustan period, now threatening to become a derelict home to wild life. The mountain was resurrected as a Xhosa cultural heritage site when in 1978 the legendary nineteenth century military strategist, politician and Robben Island prisoner, Chief Maqoma (A! Jongumsobomvu wamaJingqi!) was re-buried at Ntaba ka Ndoda.⁴³

The Rabula River is a tributary of the Keiskamma River, after which the town and district is named. The Keiskamma River veers west at Rabula's northern boundary. The Rabula River flows through Rabula village from the higher altitudes of the upper catchment, crossing the busy transport road to the town of Keiskammahoek, snaking through the Rabula fields and emptying into the Keiskamma on Rabula's western

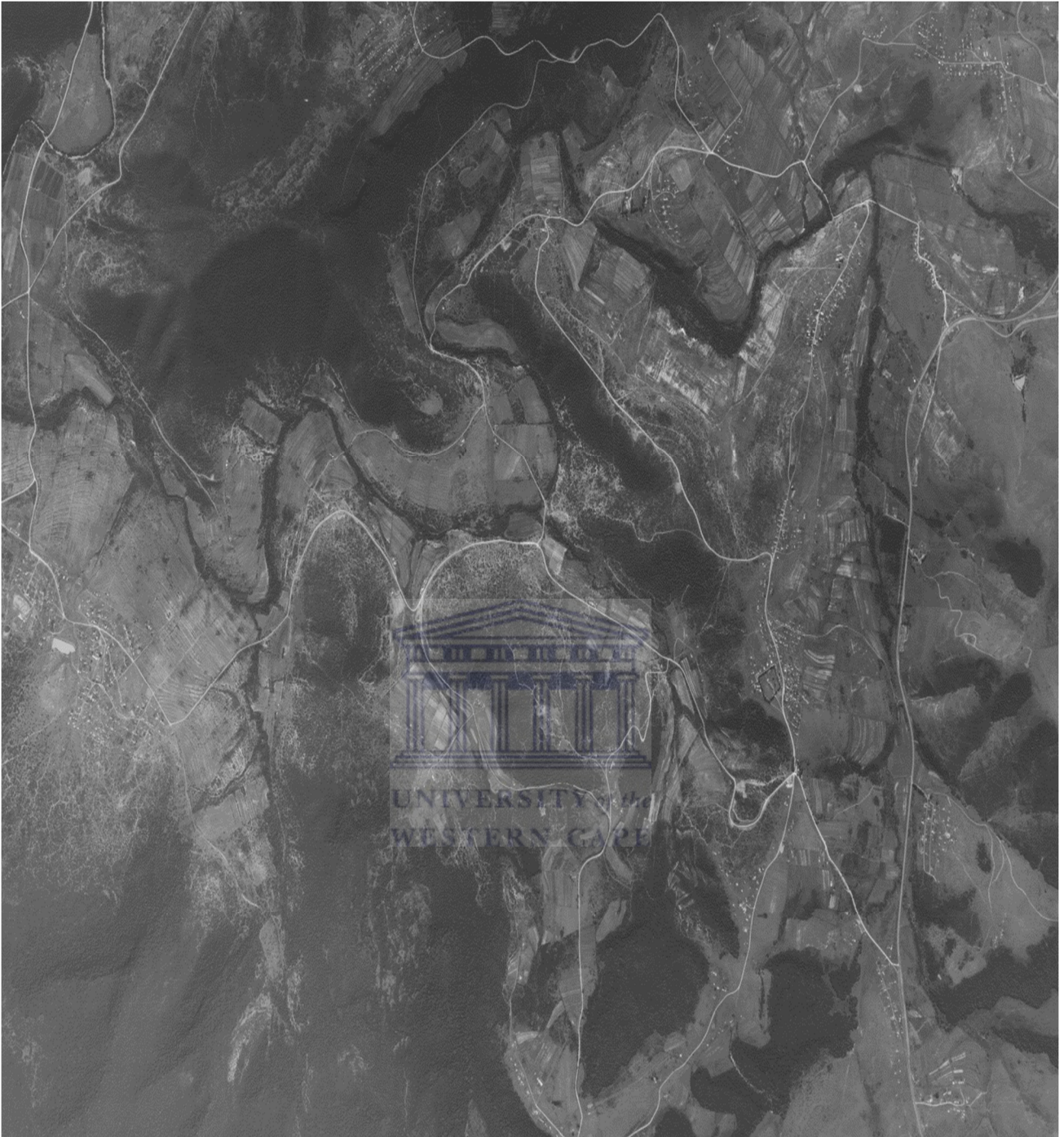
⁴³ Chief Maqoma died on Robben Island in 1873, having been among the early political prisoners of the colonial period. He died under mysterious circumstances after a total of 24 years of incarceration spread over two periods. I am indebted to Mazibuko Jara for aspects of this history.

boundary. The smaller NqeNqe stream enters the Rabula River perpendicularly from the southern highlands, inching through the valley that bisects the settlement into eastern and western sections, and which provides the passage to the main tarred road. The NqeNqe stream gives its name to a village settlement stringing out on the ridge above it. NqeNqe village is the largest and most concentrated settlement in Rabula.

Sprawling along the lower mountain slopes and ridges, concentrated around the river catchments, are an assortment of human settlements encroaching into the patchwork of arable fields and rangelands. Their differing densities, layouts, styles and dimensions are a visual reflection of incrementally shifting state policies that sought to define the place of the rural household in the broader political economy of South Africa.

On either side of the busy thoroughfare to Keiskammahoek, a 'ribbon' settlement of recent origin is spreading out thinly alongside the road. The unplanned expansion along the busy transport route is the modern rejoinder to previous state design which attempted to tame the rural countryside through tidily laid-out villages in locations preferred by officialdom. Architectural innovation reflects the close inter-connection of rural and urban lifestyles. Among the many mushrooming smaller modern dwellings are one or two extravagantly conspicuous 'suburban' homes, built, without title, by prosperous urban professionals. There are signs of busy human interaction and commuter transportation at the various intersections between the main tarred road and the web of gravel roads leading to the villages.

Higher up along the ridges of the western slopes are the older villages of the original settlement spilling over the commonage and arable fields, with homestead styles reflecting different stages of state-initiated resettlement schemes. The newer settlements do not overpower the rustic charm of fields, pastures, indigenous bush and grassy rangeland. Some of the older homesteads encompass large houses with pillared verandas and yards with pigs and fowl runs, but most are modest brick and cement homes with a sprinkling of wood and iron or daub. The older, larger residential plots have cattle enclosures and free-ranging fowls, with herds of cattle and flocks of goats grazed on the commonages. Ploughed and unploughed arable fields dot the landscape. Modest porticos and verandas, gables and castellation invoke a collective image of a distinctive vernacular style of the Ciskeian rural village, symbolising the strong ties of attachment to rural homes, as well as historical echoes of frontier defence, commercial enterprise and suppliers of labour (and for a brief period, of surplus food).



Source: Chief Directorate Surveys and Mapping, Mowbray, Cape Town. Photo 927. Strip 11. 980/1996. Scale: 1:16.6666

Map 3: Aerial topographical photograph of Rabula

Tucked away out of sight on either side of the main road, are smaller river valleys surrounded by mountainous slopes covered in indigenous thicket, aloe, sweet thorn and grasslands. Inner gravel roads and tracks meander through the undulating hills and valleys, providing the only access to a dozen or so inner hamlets consisting of clusters of large fields laid out in surveyed blocks. These are the homesteads of owners with freehold title. Spacious homes on the edges of these plots typically incorporate several buildings; usually a large main house flanked by smaller houses or huts and outbuildings, with traditional cattle kraal enclosures of woven wattle or mimosa.⁴⁴ It is not unusual among these homesteads to encounter homes with modern kitchens, attached vehicle garages, garden cottages, storerooms, fenced vegetable gardens, fowl runs and small orchards. Some are shuttered and motionless, waiting for their owners' intermittent homecomings.

Ubiquitous in the homes of the more prosperous families are ornamental pine ceilings, the signature of two creative local carpenters. Knocking on the doors of these homes, one is frequently met with the apology that the owner is away at work, or visiting, in the city or nearby town. Not unusual, either, to discover that among the absent family members are school principals, teachers, doctors, nurses, lawyers, policemen and other civil servants.

5.4 Contextual history of the respective study sites

As mentioned, a characteristic of the eastern Cape 'frontier' dynamics was the varied land arrangements within the colonial borders, each associated with particular histories and identities, which were at once both inter-related and distinct. A degree of social and political differentiation among the amaMfengu themselves had developed. Among the better-off and those seeking better quality land for farming, and to escape the congestion of some of the 'Old Colony' settlements (many of which were situated in the drier hinterland of the Fish River) were those who availed themselves of the land opened up for loyalist settlement in the Crown Reserve of British Kaffraria. The rural land claimants, including those who became landowners in Rabula, appear to have moved mainly in parties, with a degree of social cohesion among them. The largest group to migrate to Rabula were from a rural settlement outside King William's Town. With King William's Town as the nearest administrative centre, Rabulans tend to be associated with social networks in and around King William's Town and East London, and only to a lesser extent some rural settlements of the 'Old Colony'. Clearly not all the settlers migrated as collectivities. Many penetrated the colony as individuals. Among those who migrated as individuals or in family units, some found their way to Grahamstown, Port Elizabeth and Uitenhage, while many others subsequently moved, or were 'distributed' to the small towns like Fort Beaufort and Bedford (Moyer 1976: 260). It is such people with whom the cognates of Fingo Village are likely to be associated.

⁴⁴ Mimosa is the colloquial term for sweet thorn (Acacia Karoo), a genus of Mimosaceae, or Thorn-Tree family. Local usage of the word by landowners is widespread, usually in disparaging reference to neglected or unploughed arable plots, which are quickly colonised by thorn trees. The spreading sweet thorn on fields and commonage evokes the idea of threatening environmental destruction of the natural bush, in keeping with a prevalent theory of impending desertification, exemplified by acacia Karoo's tendency to proliferate in areas where primary bush has been destroyed by human activity.

In the next two sections I turn my attention to each site respectively.

5.5 Study site 1. Fingo Village: brief history

Fingo Village, Grahamstown is situated 150 km north-east of Port Elizabeth. The Xhosa defeat in 1819, and the British victory, became the signal for the importation of subsidised British settlers to bolster the colonial borderlands and tilt the balance of power in favour of colonial hegemony. Grahamstown became the social and economic centre of British settler society following the arrival of a large contingent of British emigrants, known, still to this day, as the ‘1820 Settlers’. Their arrival changed the face of the region socially, culturally and politically. Grahamstown came to represent the heart of British settler interests, both agrarian and commercial. Grahamstown evolved from a military post to economic hub, and by the mid-nineteenth century was the administrative and commercial centre of the eastern region of the then Cape Colony,⁴⁵ and was briefly the seat of government of the Cape. Grahamstown and environs developed a culturally distinct style associated with that history. The town’s status as regional centre of administration and trade provided the settlers with a political, economic and geographic springboard from which to expand into the interior. The rise of the sheep export market inevitably raised their aspirations for acquiring the former lands of the western amaXhosa, and set them in competition for land with the amaMfengu, many of whom had also taken to sheep farming. That very development led to Port Elizabeth overtaking Grahamstown as the main regional economic and political centre as a result of its strategic location as a port city, from where the wool of the thriving sheep industry of the interior was marketed.

During the earlier political and cultural ferment, a large number of individual Mfengu arrived and settled on the edges of Grahamstown, mostly to find employment. Moyer, historiographer of the Mfengu people, describes in detail the complex relationships that developed between white employers and Mfengu employees in the face of increasing racial prejudice on the part of the former, and attempts by the latter to stand their ground against economic and social exploitation. This despite the readiness among amaMfengu to adopt aspects of the individualist, commercial ethic of the market, as well as European dress, house styles, education and Christianity, and the corollary: the consumption and trade of western goods. Many became traders (mostly to the interior), transport riders and administrative intermediaries, and others had no other option than to take up menial jobs as domestic and farm workers. Moyer suggests that employment of this sort was often seen as a strategic and temporary measure to build up assets in the form of cattle. At one stage their numbers far outstripped the labour market, and many were ‘distributed’ to smaller surrounding towns (Moyer 1976: 260-341).

⁴⁵ “Graham” refers to Colonel Graham who led the armed forces of the small garrison town against the attack by the amaXhosa under Makana in 1819, and ‘Grahamstown’ is not surprisingly contested today in terms of its appropriateness as a place name. The District Municipality has been named after Makana. Grahamstown was classified as a ‘city’ when the Anglican cathedral was built, by virtue of a custom whereby the presence of a bishop’s seat (a cathedral) imparted the status of city according to its ecclesiastical ranking.

Moyer (1976: 260-341) shows how their economic and social positions varied across the main centres where they settled. There is little by way of written sources showing the story from the point of view of the amaMfengu settlers themselves, nor detail about their family structures and social relationships. One gathers that most of the Mfengu who came into the colony did so with the view to permanent resettlement, and thus brought with them their immediate kin — settling, marrying and raising families in their destination towns. These strategies were markedly different from Xhosa work-seekers who maintained their traditional family structures in and beyond the border areas, and sought work mainly to accumulate assets and remit goods and income, and thus tended to see the colonial employment axis in more temporary terms. The corollary was that settler society saw the amaXhosa as less socially (if not militarily) threatening than the amaMfengu, whose relative assertiveness, agility to adapt and adopt aspects of western cultural and material values, and readiness to root themselves in the colony was paradoxically more unsettling. Besides, they shared a common interest in acquiring land.

The Grahamstown amaMfengu lived in informal conditions on the edges of the town, leading to much anxiety among the white landowners about emerging slum conditions. Several attempts among the town administrators of Grahamstown to formalise and regulate the presence of the amaMfengu who had settled on the edges of the town were initiated from the 1840s. White owners were beginning to develop local civic structures and cultivate civic pride. From the little evidence available it seems they were motivated to regulate black residents by formally settling them within the municipal boundaries with title to their properties. In this way the informal area would be formalised and brought under the control of the town authorities under uniform municipal regulations for black and white (Davenport 1980: 11).

The town planning features of ‘white’ Grahamstown were visibly transforming as the town developed from military commissariat of the eastern Cape frontier into a burgeoning centre for the wagon trade into the interior. The economic upturn provided the impetus for neat and controlled urban design in the form of surveyed grids of land parcels under the control of municipal-style governance. Freehold title was becoming the officially preferred tenure for whites in the urban centres of the colony. Grahamstown was founded at a high point in English architecture, called the Regency period, when ‘Gothic revival’ and neoclassical styles were in vogue, which saw their counterparts in the grander private homes and commercial buildings. Meanwhile British vernacular and Cape Georgian styles were multiplying as artisans working for the Garrison and traders built their own homes (Reynolds et al, 1974: 46). With all of these influences, including the distinctive Dutch vernacular architectural styles, Grahamstown’s physical appearance was unique, even by comparison with other prosperous towns and cities in the south-west that had developed on the back of the Cape’s wine and wool industries. The enumerated 400 ‘huts’ and shanties belonging to the ‘Fingos’ must have stood in stark contrast to the elegant public buildings, solid cottages and town-houses and spacious

⁴⁶ I am indebted to Prof Robin Palmer for this source.

villas spreading out over the west of Grahamstown. Moyer quotes the authorities of the time desiring the formalisation of the 'Fingoes' to subject them to "rules as respect of the construction of their houses and the cleanliness of their streets, the enclosure of plots, etc" to which ends the levying of rates was considered a high priority. Official discourses reveal the brazen associations between title and the social evolutionary fantasies of the town authorities (Moyer 1976: 316). An earlier plan submitted to then governor of the Cape to formalise the village was motivated in terms of inducing the "Fingoes" to form committees

... under proper rules and regulations to be enforced with the aid of sanctions of law and administered by their own headman; by the construction of their cottages [i.e. square houses]; the dress of villagers; and the systematic instruction of their youth; shall be rendered more conformable to their own true permanent interests, and the advantages of European Colonists. (Moyer 1976: 314)

There is convincing evidence that the context and impetus for assigning 'Fingos' to their own plots arose among signs and reports of eroding social control, impoverishment and general threat to the 'respectability' of social society in Grahamstown, though the process took two decades to implement. By way of contrast, the title holders themselves hold onto a more euphemistic interpretation, no doubt used to win them over, that their titles were a 'reward' for their heroic acts of support for the colonial military endeavour. Throughout the 1840s Municipal Commissioners pressed for formalisation. One appeal was pitched in a discourse of inclusivity:

... with the view to locating and domiciling Fingo's ... and to improve their condition – to confer on them the rights and privileges enjoyed by the Resident Householders of the Municipality (Moyer 1976: 312).

It was only after the Municipal Commissioners received control of town lands in 1848 that they were permitted to appoint a "superintendent of locations" and assert their case more forcefully (Davenport, 1980: 11). In 1855 the colonial office finally agreed to authorise the surveying of plots. It should come as no surprise that Sir George Grey made the recommendation — shortly after his arrival. Grey authorised the survey of 327 plots to be sold at the cost of £1 with corresponding Title Deeds issued as crown grants. 318 were taken up (Moyer, 1976: 317).

As mentioned , a common mythology among the title holders, as well as the general public in Grahamstown, is that the land was granted as a reward for services rendered during the frontier wars; and that Queen Victoria personally issued the titles, the latter giving a particular reverence to Fingo Village titles, even today. The title deeds bear the insignia of Queen Victoria as sovereign ruler, but the signature of Sir George Grey.

Like most myths, there are strands of truth in both explanations, but the emerging municipal planning discourses of the time provide a more compelling and convincing explanation.⁴⁷ The persistence of the sentiment that the queen played a personal role in allocating the titles is understandable, as blacks formed opinions about colonial systems of governance, as did the white settlers of black society. One Fingo Village respondent in casual conversation somewhat humorously referred to her as their Paramount Chief, a translation that is conceivable in view of the tendency by Africans to draw analogies between the powers of sovereign rulers, drawing correspondence between African and European kings and queens. Her stature might also be heightened by her unseen presence as a sovereign dispensing rights, seated as she was at a distance from the harshness of day-to-day political realities and racial prejudices.

In an ironic twist, Chanock (2001: 401-4) observes that Fingo Village was cited as a reason why freehold should *not* be granted to Africans in urban areas some fifty years later, when Union native policies were under debate. Administrators, commenting on the poor physical state of Fingo Village in the 1920s, complained that titles immunised the owners against direct administration and harsher penalties characteristic of other urban areas. Titles reinforced the inaccessibility of the title holders to the state, which in turn, according to this view, encouraged the falling standards in the township (Davenport & Hunt 1974: 16; Davenport 1980: 9). This is an important theme in the historiographical observations of the complex social consequences generated by titling. According to Davenport, the authorities during the 1930s seriously considered expropriating the title holders, and in 1941 a formal request from the Town Clerk to the native Affairs Commission was made to that effect, citing “rent arrears, illicit brewing, slum development and crime” (Davenport 1980: 12), which could not be controlled due to the fact that ownership in title had precluded Fingo Village from inclusion in the Cape Native Reserve Locations Act of 1902 as well as the infamous Natives (Urban Areas) Act of 1923 (*ibid*). In the end, the representative responsible for ‘inspection of native locations’ in the Native Affairs department prevaricated, saying that expropriation would be an “unmoral act deeply resented by the Natives and one which the Department could not rightly support” but thought that ‘influx control’ should be applied (*ibid*).

The threat of expropriation raised its head again three decades later. In this instance, Fingo Village demonstrates a further twist in the convoluted trajectory of land tenure in South Africa. During the apartheid era of forced removals, it was the settlements with title (quitrent or freehold) situated outside of the black reserves that were among the first to be identified for removal. Title deeds paradoxically facilitated the task of identifying owners, upon whom individual notices could be easily served. In 1970 Fingo Village was proclaimed a coloured ‘group area’ (apartheid’s notion of racially-linked spatial cleansing), and all Africans were given notice to move. Their destination was a barren site in a deep and remote rural corner of the Ciskei, situated symbolically across the first frontier boundary, the Fish River. The removal was successfully

⁴⁷ Davenport (1980: 11) points out that two of the wars alleged to have provided the rationale for titling as a ‘reward’ occurred after officials began applying for formalisation. The reason nevertheless provides insight into the collective perception among Mfengu of their often unacknowledged role in military offensives and defenses, including accounts of highly skilled marksmanship and bush war tactics, neither of which were matched by the British soldiers (see Moyer 1974)

contested on legal grounds following the mobilisation of extensive public opposition⁴⁸ (Davenport 1980: 21-22). There is wry irony in the indignity and violation of forcible removal visited on very title holders who had earlier been labelled as allies of the government, and who had pledged loyalty and allegiance on the very basis of their landownership.

Among Grahamstonians of all cultures, Fingo Village is regarded as unique on account of its historic system of land ownership, but the norm among whites. This very uniqueness reveals its mirror image: the ubiquity of non-ownership among black South Africans, which was the *sine qua non* of centuries of white rule.

5.6 Study site 2. Rabula: brief history

Rabula is situated in the south of the Keiskammahoek district, adjoining the town commonage of Keiskammahoek, and easily accessible to and from King William's Town, 30 km to the east. As discussed in the previous chapter, pragmatism and flexibility had prevailed over the original plans to populate the area in dense, military-style, defensive villages under quitrent tenure. Seen as a whole, the official historical records give credence to the oral tradition that the Mfengu settlers were given choice of tenure⁴⁹ (see Mills & Wilson 1952:2; Westaway 1997: 16). Only one village in the district, Burnshill, was systematically surveyed under quitrent, largely on account of its mission status.⁵⁰ Mfengu chiefs were solidly opposed to quitrent villages (Moyer 1976: 232-234), and it would seem to have been generally rejected by the new settlers.⁵¹ Five of the larger settlements opted for 'communal' tenure, including Chatha in the far north. The claimants to as many as ten settlements opted for freehold allotments. In all the locations with freehold, a mixed regime of tenure emerged over time (see 5.10 below). None remained exclusively freehold. Moreover, upon deposits for the costs of survey, existing settlements could at any time apply for survey and title in the future. In one case an application for survey was made by a group in the location neighbouring Rabula and deposits were paid. The applicants later changed their minds on account of infighting and prolonged, acrimonious conflicts with their neighbouring Rabula allotment holders regarding boundaries, tenure and local allegiances. They withdrew their application and were refunded their deposits, a process that illustrates the relative flexibility in official attitudes to tenure at the time. Negotiations with the authorities lasted decades, indicating some fluidity in the land arrangements.⁵²

⁴⁸ For a detailed account of the removal threat, the resistance and the legal victory, see Davenport 1980. The sub-title of this booklet is "The Agony of a Community".

⁴⁹ NTS 6942 187/321 (also filed with BAO 5984) containing volumes of correspondence regarding a particular conflict that reveals glimpses into the early history of titling and surveys in Rabula.

⁵⁰ Quitrent was the conventional tenure for mission stations. The colonial state was reticent to grant missions freehold title on account of the large extent of mission land held by tenants. Missions pleaded for freehold and were eventually granted title over the church lands alone, but not to the villages that were to be subject to the administrative imperatives of 'native administration' under quitrent tenure (du Toit 1954: 273).

⁵¹ Mfengu Chief Mhlambiso, in the neighbouring Amatola Basin of the Middledrift district was among the most ardent opponents of surveys, but was the first Mfengu chief to eventually capitulate to a systematic survey, completed in 1858. He was recognised as a senior chief by the British and by his people, with a royal ancestry traced to Kwazulu-Natal. See Bowen 1985:15, 23).

⁵² NTS 6942 187/321 (also filed with BAO 5984).

The social composition of claimant groupings, in all probability, affected tenure preferences. Some claimants comprised coherent and fairly cohesive ethnic sub-groups, preferring to settle collectively under traditional chiefs, others came in smaller parties under leaders, and others still as individual families. For example, the large Chatha location in the far north was settled along ‘communal’ lines under Chief Jama, from the Mfengu amaZizi clan (Mills & Wilson 1952: 2). The Rabula purchasers, on the other hand, comprised diverse smaller groupings and individual families. The core group was from Bhalase⁵³ on the outskirts of King William’s Town (the administrative centre of British Kaffraria). Their leader, Chief Ngudle, was well disposed to individual tenure. His group was associated with the amaHlubi tribe or clan,⁵⁴ but there were also other claimants in small groups and families from small towns in the heart of the Cape Colony, contributing to the mixed identities and origins of Rabulans. The KRS v 4 mentions a family from Fort Beaufort, deep within the ‘Old Colony’ (Mills & Wilson 1952: 47). Chief Ngudle appeared willing to forsake control over land allocation, and contented himself with the position of ‘headman’, which he shared with another.⁵⁵

In keeping with Grey’s desire for mixed settlement, whites were also allowed to purchase. German immigrants purchased 14 properties in Rabula, including two of the largest (see below) and settled interspersed with the black owners. The black settlers appear to have come with, or attracted, adherents who lived with them as tenants, and provided labour on the fields. The KRS v 4 provides some insight into the social relations between the title holders and tenants, whom the authors maintain were referred to as ‘servants’: *izicaka*, suggesting a status somewhere between landless adherents and labour tenants, but without the formalities associated with the latter. Some were impoverished amaXhosa recovering from the cattle-killing and military conquest of the earlier period. Over time the ‘tenants’ freed themselves of some of their obligations to the freeholders and moved onto the commonage (Mills & Wilson 1952: 45), but according to de Wet, continued to be accountable to the landowners (de Wet 1995: 124).

5.7 Rural surveys

The Keiskammahoek settlements, termed ‘locations’ in keeping with contemporary official lexicon, differed quite substantially in size. According to figures in the Keiskammahoek Rural Survey, conducted a century later in the 1950s, the extent of land per location ranged from between 1,600 ha – 8,500 ha, but most were under 4,000 ha (Mills & Wilson 1952: 3-4). Rabula conformed to the uppermost size, the largest by a long margin, but later divided into two for administrative purposes (there were two headmanships from the outset). The Surveyor-General was put in charge of formal surveys of the outer boundaries (du Toit 1954: 270), but evidence suggests these were not completed until much later. In Rabula’s case the perimeter

⁵³ Bhalase is adjacent to Bhisho, the administrative capital of the former Ciskei, and presently the Eastern Cape.

⁵⁴ Under apartheid a hundred years later, these ethnic identities, muted as they were, were manipulated to validate the establishment of two Tribal Authorities in Keiskammahoek district, namely the amaZizi in the north, and the amaHlubi in the south. NTS 9064 219; NTS 9064 313/362; URU 5626 [1968] 2268.

⁵⁵ NTS 6942 187/321; NTS Vol 195 5/40; 7/39-7/40.

boundary was not proclaimed until many decades later, partly attributable to, or caused by, boundary disputes that waged into the twentieth century. Once the outer boundaries were proclaimed, they remained unchanged to the present.

The buyers had to bear the costs of survey of the individual allotments. By piecing together evidence from the Rabula survey maps and registry records it would appear that most of the surveys were undertaken in 1863, several years after the claimants had moved there.⁵⁶ The numbering on the cadastral maps suggests that the first surveys followed the geographical contours of the Rabula River, thereafter its tributaries, the largest of which was the NqeNqe stream. This approach differed significantly from the surveys of quitrent villages, the allotments of which were compressed into dense grid-style planning, a feature that contributed to the general dislike by Africans of quitrent tenure. Fifty years later, official assessments of the surveying methods of the time blamed the surveyors of quitrent villages for cutting costs and ignoring the agro-ecological conditions of the individual plots (UG 42—'22), but these criticisms appear to have overlooked the official policies of the nineteenth century that insisted on closer settlement of Africans. The fact that Africans were expected to pay the costs of the surveyors contributed to cost-cutting methods, but this was clearly only half the story. In this respect Rabula stands out as exceptional. Surveyors appear to have followed the natural contours of the environment, and there is considerable variability with regard to the size of the plots, no doubt in response to each individual claimants' capacity to pay for the land.

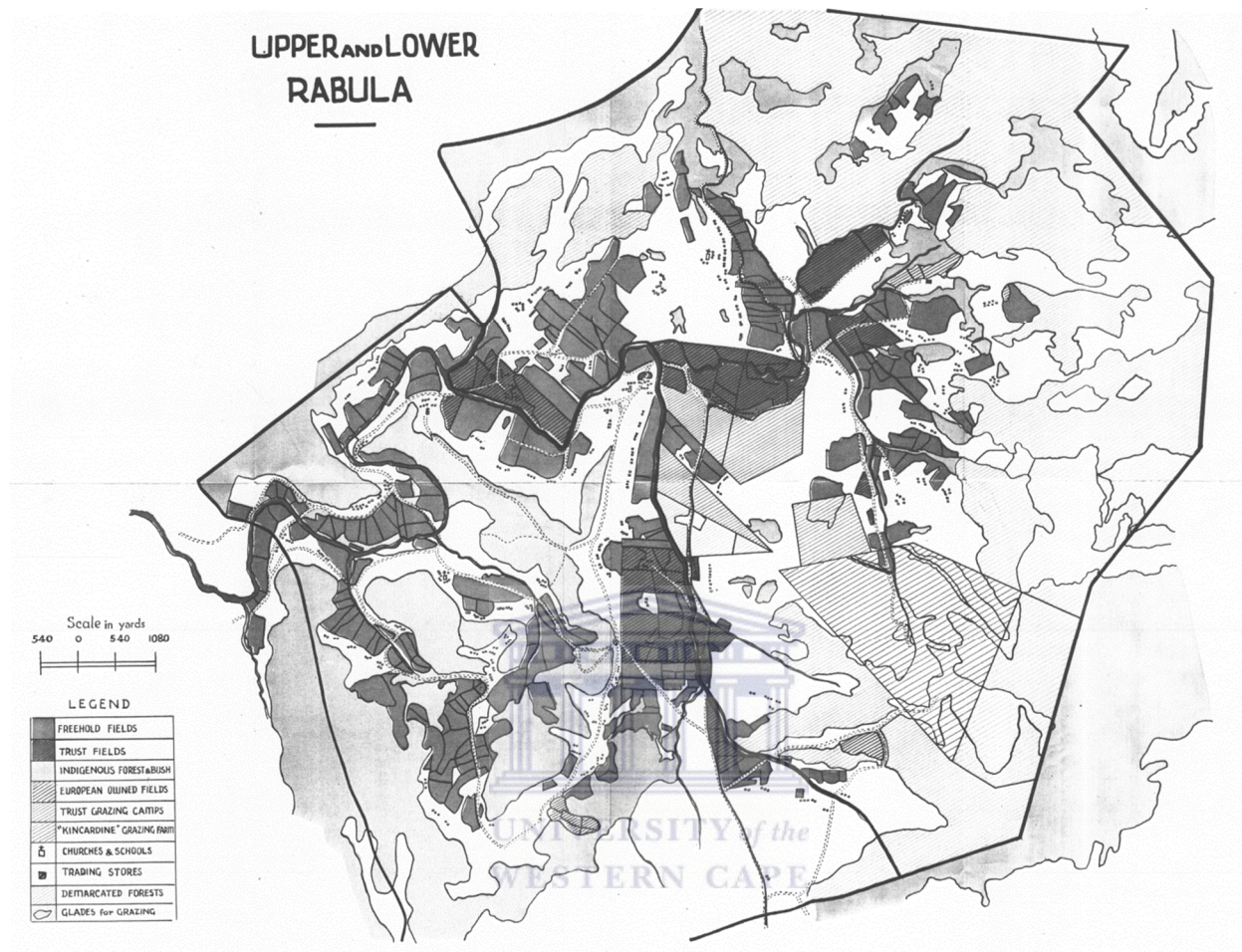
Rabula is punctuated by a series of mountainous plateaus, kloofs and river valleys. The natural segmentation of the environment was suited to relatively dispersed settlement, and the surveyors followed these natural geographic divisions. The freehold plots were surveyed in separate clustered blocks. It seems that many of the claimants were already settled in Rabula when the survey was conducted, and surveyors may have been influenced also by existing settlement patterns, but this is conjecture. Wherever possible the individual plots appear to have been surveyed to include both valley and elevated ground. Historical records suggest that whites preferred to build their homesteads in the valleys, while the black settlers, where the terrain allowed, preferred to reside, according to traditional patterns, on the ridges (Moyer 1976: 391; see Peires 1981: 3).

The ultimate lay-out of the settlement resulted in a dozen or so sub-units or neighbourhoods which may be termed hamlets, which are not all visible to each other. The surveyed plots were envisioned as the cultivable land, the remaining unsurveyed extent reserved for a shared commonage, comprising forest, bush and grassland. When the location was later divided into two sub-locations, the allotments around the upper reaches of the Rabula River fell under the headmanship of 'Upper Rabula', those around the lower reaches 'Lower Rabula'⁵⁷. The Rabula River flows in an east-west direction, while its main tributary, the NqeNqe stream, further intersects the settlement perpendicularly, forming a low-lying contour along which main road

⁵⁶ NTS 6942 187/321 (also filed with BAO 5984)

⁵⁷ For the purposes of the thesis, I treat Rabula as one area. For administrative purposes, Rabula was divided into Upper and Lower Rabula. The social networks and issues concerning title are not affected by this distinction.

to the town of Keiskammahoek runs, from where a network of gravel roads spread northwards and eastwards, connecting Rabula to neighbouring villages and districts.



Source: Mills & Wilson 1952

Map 4: Lay-out of Rabula village sections

5.8 Contested Rural Boundaries in Rabula

The process of delineating Rabula's outside boundaries was complicated by ongoing disputes. Boundaries and commonage rights were far from concluded when the claimants eventually took transfer of their plots. The evidence gives insight into the fluid and even volatile conditions that eventually gave shape to the district of Keiskammahoek. The more solid depiction in the scholarship of a district fully hatched obscures the messy negotiations and disputes that must surely have accompanied the settlement process, and certainly was so in the case of Rabula.

An early record shows that a boundary dispute between Rabula and the neighbouring settlement, Upper Nqhumeya, lasted for generations, and still rankles today.⁵⁸ The demarcation of boundaries between the two locations was eventually established after a prolonged process of hostilities and dispute resolution from the 1870s onwards. This particular dispute is significant as it sheds light on some of the socio-spatial issues of resettlement. The local magistrate had allowed a small group, an off-shoot of the Nqhumeya chief, to settle within the limits of the large Rabula commonage, after they had already clashed with another group elsewhere in the district. The group's second attempt at settlement had resulted in their homesteads being built in the neighbouring location of Nqhumeya. Another group, who claimed to have been promised this land, disputed their presence, so they removed to the large Rabula commonage. The Rabula landowners agreed to their incorporation provided it was on the basis of acquisition of surveyed plots along the lines of individual tenure, in keeping with the rest of the location. Over time, additional families joined the first settlers following 'communal' patterns of settlement, provoking ongoing conflict with the affected Rabula plot owners. The newcomers to the group appear to have been related to the neighbouring Nqhumeya chief through one of his wives, rather than by agnatic affiliation, which might explain why the chief did not settle them directly within his own village. The resulting dispute underwent prolonged mediation by successive white magistrates, and eventually a boundary line was drawn.⁵⁹ Some members of the present generations of that section of Rabula still dispute the boundary.⁶⁰

The delineation of state forests around Rabula was another bone of contention, and like the example cited above, still rankles over a century and a half later. Government officials insisted on cordoning off the afforested sections as proclaimed 'state forests', alleging destruction of indigenous bush. Eventually boundaries were drawn and proclaimed. This process led to a fresh round of hotly contested boundary disputes between the Rabula landowners and the native authorities. The landowners argued against the separation of forests from their grazing grounds, as these were considered the best source of particular grasses that grew between the trees. They agreed not to cultivate there. Despite their protests, the forest land was eventually divided from the commonage, and formally surveyed and fenced off⁶¹. The forest areas were only formally demarcated in 1911 and proclaimed in 1912⁶².

The government attempted to compensate by purchasing a large white-owned farm for the black villagers in 1928. It was converted into a grazing camp, but instead of smoothing over the hard feelings, created a new

⁵⁸ Archives. Interview, M. Makuzeni, King William's Town, 4 April 2008.

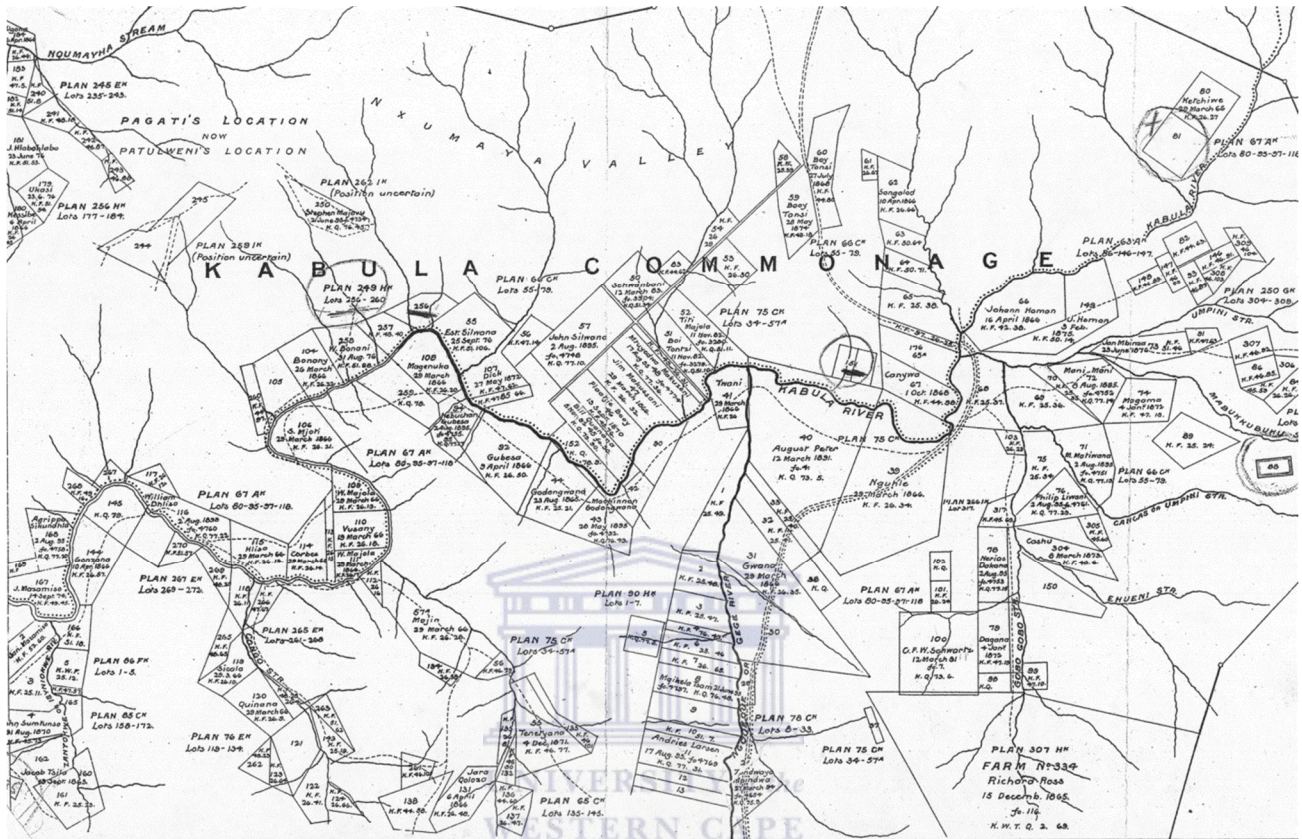
⁵⁹ NTS 6942 187/321 (also filed with BAO 5984): Resident Magistrate to Civil Commissioner – 17 April 1907 correspondence from 1858- 1907 attached.

⁶⁰ Interview, Mlungisi Makuzeni, King William's Town, 4 April 2008.

⁶¹ BB L2000/324/1 – 39 1686: Re: demarcation of Forests of Rabula, Mngqesha & Burnshill. Asst Forest Officer, KKH – Civil Commissioner (CC), King William's Town (KWT); 1 /1/1910; Ben Kwinana – Prime Minister 3/1/1910 (Rabula Commonage Rights); Chief Conservator of Forests to Secretary to the Native Affairs Dept (SNA) 23/3/1910; SNA to Prime Minister (PM) 14/4/1910; SNA– Chief CC 9/5/1910; Resident Magistrate (RM) KKH & Conservator of Forests – CC, KWT 24/10/1910; Asst RM, KKH – CC, KWT 15/11/1910 (Rabula Commonage Rights); Minister of Native Affairs (MNA) to SNA 15/6/1911; SNA to CC, KWT 12/7/1911; Tontsi and Magadla to RM 5/9/1911; Kwinana and 8 others to MNA 28/9/1911; SNA to CC, KWT 7/10/1911; Petition B. Kwinana obo Rabula Committee to MNA 29/11/1911; Deputation Gcilishe and Skundla obo Rabula Natives CT & Minister and others 7/6/1912; Chief Conservator to SNA 88/1912; RM – SNA 30/9/1912; Skundla – NAD 4/10/1912; RM to CC, KWT 30/12/1912.

⁶² Government Notice 396 15 March 1912.

round of hostilities as the government put the grounds up for lease. The magistrate prevailed on the department to reduce the rents, but the latter refused to review or withdraw the terms⁶³. It is not clear how, and for how long, the rents were administered, but the arrangement eventually lapsed with time.



Sate Archives, Pretoria. ACT v. 284. Scale: 200 Rds=1 inch

Map 5: Aerial lay-out of Rabula plots showing commonage (nineteenth century)

5.9 The Rabula properties

The disposition of the surveyed properties occurred over a period of three decades, between 1866 and 1900, the bulk in the 1860s. 164 properties in total were disposed to almost that number of claimants (some bought two plots), including 14 properties bought by 11 whites.

The extent of each individual surveyed property is indicated in Table 2 below. The total extent of the surveyed properties by 1906 (i.e. excluding commonage) was 2,635 ha.⁶⁴ Including the commonage, the total extent of Rabula was recorded in the 1950s as 9,969.523 ha (21,105 acres) (Mills & Wilson: 4). While figures for early period of settlement are missing, it would appear that the Rabula commonage had been considerably reduced over time as a result of the demarcation of two neighbouring settlements, Upper and

⁶³ BB L2000/325/1 - 8.8.1911-29.10.1968: Chief Conservator of Forests to SNA 23/6/1926; Chief Conservator of Forests to SNA 6/10/1926

⁶⁴ This figure was reached by adding the extents of individual surveyed properties in the Deed Register, King William's Town Deeds Office.

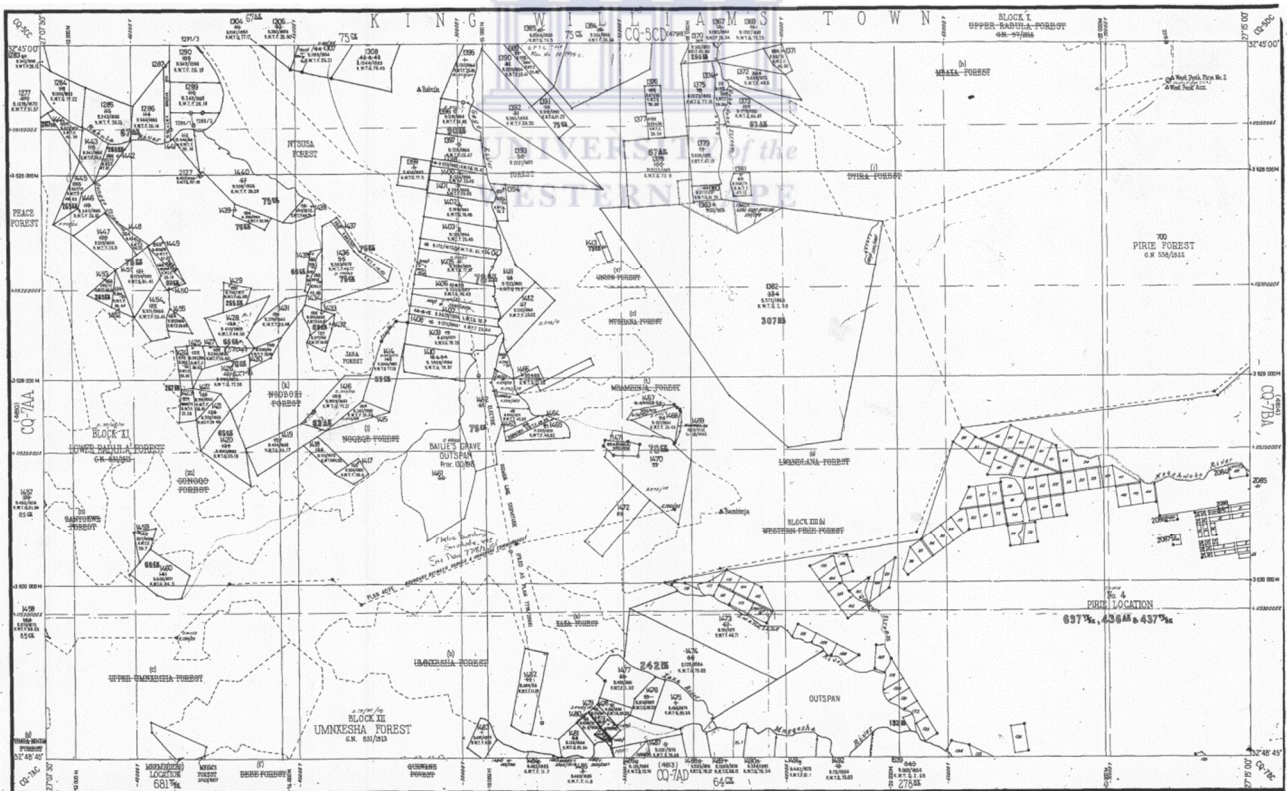
Lower Nqhumeya, and the excision of state forest land. Based on a calculated guess, the proportion of arable land to commonage was perhaps around 1:4 (see Mills & Wilson 1952: 65).

The original allotments, called ‘grants’⁶⁵, ranged from 4 to 40 ha. One or two large farms were in a different scale: a German settler owned a 400 ha farm (later converted into the grazing camp referred to above) and Chief Ngudle’s grant was 103 ha. He subsequently lost or sold this to a German under circumstances that are unclear. The average size holding was 16 ha. It should be remembered that Grey’s legislation stipulated a *minimum* of 10 acres (4,05 ha) per purchaser to tie the scheme to the stimulation of an African peasantry.

Table 2: Original land grants Rabula 1866-1906 (excluding subdivisions/consolidation) N=164

1860s	1870s	1880s	1890s	1900 + 1906	Totals
77 properties	43 properties	5 properties	35 properties	4 properties	164 properties
1,536.31 ha	345.95 ha	77.06 ha	612.33 ha	63.74 ha	2,635.39 ha
Ave: 20 ha	Ave: 8.5 ha	Ave: 15 ha	Ave: 17.5 ha	Ave: 16 ha	Ave: 16.1 ha
4 white	2 white	1 white	5 white	2 white	14 white

Source: King William’s Town Deeds Office, King William’s Town Registered Division, Farm Register. (Extrapolated from individual property entries as at August 2007)



Source: Office of the Surveyor General, Cape Town. Top Survey sheet No 3227. Trig sheet 141. CQ-7AB. 8.9.1958. Scale 1:12500

Map 6: Aerial lay-out of Rabula properties

⁶⁵ In legal terminology, a ‘grant’ meant the first registration of property in private ownership by way of a grant from the state, which does not necessarily mean ‘free’. Subsequent transactions are ‘transfers’.

Whites acquired additional properties from blacks over time, and some properties were subdivided (see below). The number of properties in private ownership thus rose from 164 to 180 as a result of sub-divisions.

Three of the 14 white purchasers had second properties, thus reducing to 11 the number of white grantees. It would seem from close examination of the Deeds and cadastral maps that the white owners were interspersed with black owners, all in the Upper Rabula catchment. These and other whites subsequently acquired many of the smaller properties from blacks along the NqeNqe Stream.

5.10 Internal redistribution in Rabula

Two inter-related policy interventions brought about changes in land tenure, the second of which permanently transformed the tenure relationships in Rabula.

Quitrent vs. freehold titles

After the initial distribution of freehold plots in the 1860s, additional allotments were available for purchase thereafter. The records suggest that plots continued to be sold up the end of the 1890s. From the 1890's, the grants were issued, not in freehold, but in quitrent title. Thus two forms of tenure became operational within the same locality. Since some of the original families purchased additional land for their sons, some families held land in both types of tenure.

This change was in keeping with a general shift in Cape colonial policy towards either quitrent title or 'communal tenure' for Africans. If, over the course of the late nineteenth century African freehold titling had not exactly died in colonial discourse, it was constantly re-invented in the form of quitrent tenure to hedge African ownership within ever narrowing sets of conditions, to which quitrent was more amenable than freehold. It was common, and later standard, to exclude alienation, mortgage and subdivision in African quitrent regulations. In Rabula, however, the presence of white owners complicated the segregatory terrain: Rabula tended not to be viewed as a 'native location' in the same way as most of the other African locations⁶⁶. Thus the form of quitrent that was applied there was not the conditional African variant administered by the native administration, but the common-law model applicable to whites, which was not subject to so many restrictive conditions.

Once all the surveyed plots had been distributed, the quitrent titles amounted to roughly one quarter of all properties. As mentioned, many owners held titles in both freehold and quitrent tenure, the trend being to acquire second or third plots for sons. In practice, owners tended to ignore the distinctions between quitrent and freehold, and to all intents and purposes quitrent was viewed and treated in the same way as freehold (de

⁶⁶ The mixed population of Keiskammahoek meant that most of the locations in the district were not listed in the schedule of the Natives Land Act of 1910 as formally part of the Ciskei reserve administration. The regulations were, however, retrospectively applied after the locations were declared 'released areas' under the Native Trust and Land Act, 1936, whereafter Keiskammahoek district was considered fully incorporated in the Ciskei, and thus subject to the sanctions of cross-racial land transfers.

Wet 1995: 123), except that, in theory at least, there was an obligation in some cases to pay annual quitrent. In 1934 the state matched law with reality (freehold having become the *de facto* form of ownership for whites), and abolished the quitrent payments⁶⁷ (Mills & Wilson 1952: 145), though the tenure itself was abolished somewhat later⁶⁸.

The difference in title deeds, though not amounting to a substantial difference in practice, was nevertheless a source of administrative confusion, and is sometimes puzzling to the owners themselves. This is partly accounted for by the fact that quitrent title in Rabula was a different variant than existed in the black locations, as described in 5.7 above. The latter model was specially created, first for the 'Fingo locations', and then extended to other planned locations and districts in the south of the Transkei in terms of the Glen Grey Act of 1894. The African variant of quitrent had always been subsumed under the overall control of native administration. There was a great variability of conditions regulating the black version of quitrent tenure, which tended to differ from village to village. These were eventually consolidated by measures and proclamations enabled by the Native Administration Act of 1927, bringing quitrent under the more direct administration of the Native Commissioners. In this way, quitrent tenure was increasingly modified to bring the system as a whole in line with principles of segregation and customary law, as for 'communal' tenure.

In contrast to the 'native' variant, quitrent title in Rabula was regulated, as for freehold, by the common law applicable to whites. Although the Rabula Africans with quitrent title fell into this category, officials were faced with the challenge of interpreting distinctions they could not always understand, and the anomalies became more puzzling once the white landowners had departed from Rabula (see below). Thereafter, the village increasingly resembled any other black location. Professor Alistair Kerr, who became one of South Africa's foremost legal scholars on African customary law in former times (see, e.g., Kerr 1990), began his career as a Native Commissioner, and his first posting was at Keiskammahoek. He told me in an interview that one of the features that stood out in his mind, and remarked on by his colleagues, was the lack of any obvious difference to be seen with the naked eye between the land tenure in Rabula and the other communal locations (though he of course understood the legal distinctions)⁶⁹. As we shall see in the following chapter, these legal niceties were generally beyond the scope of comprehension of ordinary people, their irrelevance matched only by their occasional unexpected invocations.

Obscure as they were locally, these distinctions, were nevertheless indicative of the broader policy shifts that were transforming South African society into racially compartmentalised administrative grids; in some cases of such complexity that officials were baffled. The complexity stemmed from the fact that past models, where conditions had been more variable and fluid, had somehow to be forced into new moulds to conform to racially distinct institutional channels. The new racial order resulted in complex administrative lattices that

⁶⁷ In terms of Act 54 of 1950.

⁶⁸ The last remaining vestiges of the 'white' variant of quitrent title were removed from the statute books by laws issued in 1968 and 1977 respectively (Zimmerman R & Visser D 1996: 669).

⁶⁹ Interview, Prof A. Kerr, Rhodes University, Grahamstown, 3 March 20 March 2010, 19 March 2010.

not infrequently eluded the administration itself. And since administrative fixes invariably neglect the imprint of sociological relationships associated with older arrangements, the situation on the ground did not readily yield to new rules imposed from above. Frequently the old arrangements continued in the shadow of the law, oblivious to its changes.

The emerging centralised native administration attempted in these measures to control the finest detail of land administration in order to maximise the distance between white and black land tenure. The landowners were seemingly as unaware of the implications of being issued quitrent titles in the 1890s as they were of the demise of 'white' quitrent title half a century later. For officials, the distinctions were more important, since with each transfer or estate they administered, there was a plethora of legal criteria to fulfil, depending on which side of the racial barrier the case fell, further complicated by multiples sources of law (e.g. depending on marriage contracts). Sometimes for people contesting the claims of other family members, frequently women, these distinctions could also prove useful in recognising one claim over another.

Thus we see in these apparently insignificant and small-scale changes a microcosm of the broader shifts that were under way. Just when the 'white' model of quitrent was being phased out to give way to a uniform hierarchical system of ownership with freehold at the pinnacle, the 'black' model was being set into a concrete mould subject to the rules of 'official customary law'. There is an irony in this shift considering that one of original rationales for titling was to wean Africans of their customs.

Entitling the untitled

A second policy shift initiated from the 1930's was far more consequential, and led to lasting changes in the tenure and social relationships in Rabula. The segregationist state of the 1930's was concerned with 'purifying' the mixed border areas in and around the Ciskei region to fulfil the national policy imperative of consolidating native reserves. The idea was to create a territorially consolidated Ciskei homeland. The Trust and Land Act of 1936 created a Trust, known as the South African Native Trust, later the South African Development Trust (SADT), to purchase additional land, and manage land for Africans. This involved land expropriations and physical moves on both sides of the racial frontier. Reversing Sir George Grey's mixed frontier into segregated racial zones deeply affected the socio-political dynamics of the entire region (see Wotshela 2001; Switzer 1993: 193-242). In Rabula, the white owners were expropriated.

Though the white landowners in Rabula made up a relatively small percentage of the overall ownership (18 white owners were recorded by the late nineteenth century) (see de Wet 1995: 123), their presence was of great social and economic significance. Some became local traders and money lenders, providing credit in anticipation of crops that were exchanged at the trading stores. Some lent money against the security of title for land, leading tragically in some cases to land foreclosures for non-payment of debts⁷⁰. These

⁷⁰ Confirmed in the Deeds records. Cf Mills & Wilson, 1952: 3.

arrangements all came to an end when the whites left. Their land was redistributed to those who had formerly lacked legal occupation, that is, to claimants from among the former 'squatter' class in Rabula.

A growing number of occupiers, former tenants or labour tenants, who did not have legal access to plots, moved onto the commonage and established independence from the landowners, in spite of strict laws preventing residence on the commonage. Headmen were on several occasions removed from their positions, or heavily penalised for permitting people to build on the commonage⁷¹. People without formal rights were collectively referred to as 'squatters'⁷². In some cases their number included the offspring of landowners (Mills & Wilson 1952: 46; de Wet et al 1992: 19; de Wet 1995: 126).

As a result of these changes, Rabula's already mixed tenure regime was further complicated by yet more layers of tenure. State allocations of former white-owned properties to black holders became known as 'Trust tenure', on account of the role of the South African Development Trust in buying up and transferring the land to the state; and then administering the land on behalf of the state. Trust tenure was in diametric contrast to the concept of freehold title. Since the land was categorised as 'state land', the holders were fully accountable to the state: the rights to the land were inalienable, and in theory at least, non-heritable. 'Trust tenure' thus had more in common with official 'communal tenure', except the rights were arguably even more circumscribed, since the state was regarded as the actual owner of the land, rather than simply holding it in trust on behalf of the landholders. Native commissioners, with assistance of headmen, were empowered to govern the land by administrative imperative.

The resettlement of the new land holders followed two phases. First, the original parcels were subdivided into small plots and re-allocated to applicants, grouped in four 'trust settlements'. Each was named after the number of allotments in the new cluster, or by reference to the number of original freehold parcels. Thus the new settlement on Chief Ngudle's former allotment, which had been one of the largest but had been later transferred to a white owner⁷³, became known as *kwaTwenty* (the place with twenty plots); then there were: *kwaSix*, *kwaFifteen* and *KwaForty-five* respectively. The first settlers had access to both agricultural plots and pastoral commonage⁷⁴ (Mills & Wilson 1952: 93-95,150-151; de Wet et al 1992: 19-21, de Wet 1995: 124,129,146-149, 176). By 1955 some 74 families were settled on the new allotments (de Wet 1995: 129). The land itself was regarded as the property of the South African Native Trust, and hence known as 'trust land', which now included the Rabula commonage, formerly part and parcel of the freehold package.

⁷¹ NTS 195 5/40; 7/39-40; NTS 982 8/146 vol 1 – 19/146 2/23/2/1/3.

⁷² The word squatters endured to the present, but there are social sanctions against its open use. The politically acceptable replacement is *abahlali*, 'residents'.

⁷³ It is not yet clear whether this 'sale' was in execution for debt.

⁷⁴ Trust tenure was very similar to communal tenure with Permission to Occupy (PTO) certificates with limited heritability. In theory the administration kept a tighter reign on the regulations concerning the former, but over time the differences diminished (Mills & Wilson 1952: 151; de Wet 1987: 465). See Cousins 2008b: 112 for discussion of characteristics of the PTO system.

The resettlement process merged into a policy known as 'betterment', which, among a package of agrarian restructuring measures, involved the forcible clustering of people into villages across all black reserves. Over time the betterment interventions, referred to by the black villagers as 'the Trust', culminated in sustained resistance and in some localities, violence⁷⁵. The policy as applied to Rabula followed the prevalent discourses of improvement of 'Native Agriculture', which envisioned the creation of a class of full-time commercial farmers on 'economic units' assisted with technical support and advice from the state. In terms of this logic, non-productive farmers were to be accommodated in concentrated residential settlements without access to land, but to jobs (de Wet 1995: 134, 145). For a while, the schemes at Rabula yielded surpluses, but over time they collapsed (see de Wet 1995: 131-146).

Since a large number of 'squatters' had not received Trust grants during the first phase, a second wave of resettlement followed during the 1970s, which was a "comprehensive movement of almost all non-landowners into concentrated settlements in the early 1970s" (de Wet 1995: 146). In addition to the existing residential villages on the Trust settlements, four new residential areas were established. These abutted the freehold localities, creating great misgiving among the freeholders (de Wet 1995: 149). De Wet calculates that roughly 237 households were accommodated in the new residential areas, a large proportion of whom lost access to arable land. Many of families in the new residential areas were not issued with certificates or formal rights, though much later some received 'Permission to Occupy' certificates⁷⁶, or PTO's as they are generally known, a system that is slowly unravelling into informality. Two of the new residential areas are situated on the ridge above the NqeNqe river valley, called respectively, New Rest and NqeNqe. They have developed informally over time, and their expansion may result in their eventual merging. They constitute the main village settlements of Rabula, clearly visible from the main tarred road which winds through the NqeNqe valley below.⁷⁷

De Wet provides a detailed account of the stages and processes of resettlement as it affected Rabula in his book on betterment planning in Keiskammahoek (1995: 122-174). The betterment process affected Rabula less fundamentally than, for example, the large 'communal' village of Cata to the north. There betterment resulted in the entire structure of social organisation, based on extended families, residence and garden plots, being turned on its head. Families of several generations deep were moved from their land holdings into small uniform concentrated residential areas, separated from their fields⁷⁸. In Rabula, it was somewhat the other way around, and brought about the distribution of rights to formerly rightless, thus diminishing the rights of freeholders, since the new tenants had access to the commonage. The following table compiled by de Wet (1995: 153) shows the categories of landholders in Rabula following the resettlement.

⁷⁵ See de Wet 1995, for a detailed account of betterment in Rabula and Cata.

⁷⁶ Interview, Z. Mayekiso, Rabula, Noxolo village, 17 July 2006.

⁷⁷ Local people know the village settlements on the by ridge various names. I use the generic label New Rest and NqeNqe. Some landowners call the settlement 'Palenthloko', seemingly a disparaging name in keeping with the lower social status of former 'squatters'.

⁷⁸ Cata village was awarded restitution in 2000 in a ground breaking case that argued that betterment was dispossession as defined by the new restitution laws. See Westaway 2008.

Table 3: Number of household by type of tenure (1987-1990)

[Freehold] Landowners	± 500 households (60%)
Trust Areas	59 households (7%)
New Residential Areas	237 households (28%)
'Squatters' and commonage	± 40 households (5%)
Total	± 836 households (100%)

Source: De Wet 1995: 153

In this way, Rabula's land tenure arrangements transformed into a complex mixed tenure zone, accompanied by state-induced restructuring of internal land tenure relationships. The socially dominant form of tenure continued to be freehold, but interestingly, the state invested agricultural technical support and improvement, not in the freehold smallholders, but in a new class of smallholders drawn from the previously untitled. The local vernacular name for freeholders, *notenga* ('those who purchased'), gained particular significance on account of underlining the distinction between locally self-administered land and land administered directly by traditional authorities and native commissioners. The connotation implied by the term *notenga* is not the legal connotation of title regulated by the common law and the Deeds Registry, but the idea that *notenga* are people who manage and transmit their land independently of decisions by headmen and traditional authorities.

The changing patterns of land settlement and land rights fundamentally affected social relationships in Rabula. Over time the strings that attached tenants or occupiers to landowners loosened to the point where the former ceased to acknowledge any obligations (legal or otherwise) to the landowners. Previously, their rights to live in Rabula rested on certain obligations to the landowners. The corollary was that the landowners had some authority. The post-1936 era changed these relationships. The state effectively legalised the presence of the 'squatters' (Mills & Wilson 1952; de Wet 1995:), which affected the political leverage of the freeholders. This did not amount to extinguishing the long-felt status differential between the landowners and the others. Over the generations the freeholders had invested in the education of their children, who benefitted from many senior positions in the burgeoning homeland bureaucracy (de Wet 1995: 124, 156).

The changes nevertheless fundamentally altered freeholders' access to resources, and access to wider networks of authority. Locally their power to control local resources diminished imperceptibly over time. The changes affected the land use pattern of the entire settlement, and even more so, the social and property relationships. The process significantly diluted the range and scope of the landowners' rights to the commonage or to additional arable land. The proportion of people with legal access to the commonage was dramatically altered, as the previously 'landless' were now officially recognised as rights holders, albeit under a restricted form of tenure. The ratio of freeholders to the newly recognised families was 3:2. 40 of the original 186 properties (21.5%) passed to the state in the late 1930s (see below).

Under Trust tenure the state held the residual ownership rights to the land, which meant the land could not legally be transmitted to the next generation. In practice, however, the Trust plots became heritable. In addition to acquiring legal access to the commonage, several of the larger farms were converted into grazing camps reserved only for them. From the mid-1950s to the mid-1960s the state initiated subsidised irrigation, dairy and other rural development schemes in the Trust areas in the hope that this would stimulate rural productivity through cash crops and dairy schemes (de Wet 1995: 132-142).

The most immediate consequence for the freehold owners was that they lost control of the commonage. Their control of the commonage had never been absolute, and in practice relationships regarding the commonage were somewhat permeable and negotiable, but these were on the freeholders' terms. Now they shared the access with legalised tenants, who also wished to invest in cattle and the rural economy, and conversely, could withdraw labour from the freeholders. The power relations regarding both agricultural production and cattle economy were irreversibly altered. The change affected freeholders differently. For some, the new residential areas did not impinge on their grazing lands, which remained relatively unaffected. For those grazing lands fell within the altered land use arrangements, and who wished to continue investing in the cattle economy, and the effects over time were quite dramatic.

The following tables, reconstructed from Deeds registry records⁷⁹, show the extent of land transferred to the state, as well as other indicators of transactional history. The first phase during the 1930s to 1950s saw the transfer of 40 former white-owned properties to the state. The black landowners retained 140 properties, which figure is still the case today.

Table 4: Number of surveyed properties Rabula

Parcels	
186	Total properties including subdivisions
6	Church registration
40	State Registration. Farms transferred to the SADT from white ownership in the 30's, representing 21,5% of all surveyed properties in Rabula. The inclusion of a large 400 ha farm raises the extent to one third
140	Private ownership – current (remained in private black ownership after redistribution)

Source: King William's Town Deeds Office, King William's Town Registered Division, Farm Register. Extrapolated from individual property entries as at August 2007

Whites owned the three largest properties, but beyond that there was no correspondence between race and plot size. The largest farm of 400 ha, previously white-owned, had been bought by the state in 1928 (some time before the resettlement processes had begun) and converted into a regulated grazing camp called Kincardin. The second largest property of 103 ha was the original grant to chief Ngudle, which passed to white ownership, as mentioned. The third largest, adjoining Ngudle's, was also white-owned.

⁷⁹ The Deeds research was conducted between 2007 and 2008

Highly significantly, 22 of the 40 properties that the state acquired from whites for redistribution and resettlement had previously been black owned. This figure tells a story about a pattern of alienation from black to white in the early history of Rabula.

5.11 Passage of Rabula properties over time

Turning attention to the legal performance of the titles. From the point of view of the Deeds registry records, what did the official eye see?

Regarding the market-based transfers, the registry records show that whites acquired 22 black-owned properties during the period prior to the expropriation of the white-owned properties by the state. All 22 subsequently passed to state ownership. The evidence of market activity between black owners is unclear on account of a likely informal market in land between blacks, and because of the general tendency to avoid formally registering transactions. Family property passed through generations without registration. Furthermore, the state stepped in to adjudicate titles in the 1960s to regularise the registers that had fallen out of currency (see 5.11 below). Titles adjudication, or 'adjustment' as it is called, is a device first adopted by the state in terms of the Native Administration Act of 1927⁸⁰, as a legal instrument to update registers to reflect the name of a present owner. The scale of non-conformity to legal transfers by title holders had been reported in numerous government commissions, and eventually the administrators opted for this method of bringing the registers up to date⁸¹. It is not known precisely how commissioners went about their work, or what criteria they used to arrive at their decisions. Glimpses into the discourses they engaged in suggest that they tracked back through family genealogies to trace individually identifiable heirs in each successive generation by applying strict legal formulae based on common law or customary law rules of succession. This approach diverged from the local processes of social validation of rights (discussed in depth in the following chapters of Part Two), which gave access to property to all members of the family group. Adjudication, based as it was on individual succession, arrived at a legally recognised heir who was registered as the new owner by way of an 'award'. Since these awards did not reflect social realities and social procession of property across generations, it is not possible to base an accurate assessment of ownership on the registers.

Registers do have indicative value, however. For example, registers help to show where family property has remained in the family, since there is a strong emphasis on retaining the name of the lineage with respect to the property; but even here there are caveats. For example, in former times names customarily evolved from father to son: the first name of a forebear might become the second name, and eventually the surname of the family. Another caveat is that an adjudicator might make an award to a sister who has married, and has a

⁸⁰ Section 8. This law was replaced by the Land Titles Adjustment Act, No 22, of 1992, and is still in operation.

⁸¹ It is significant that the state opted for adjudication rather than de-registration of title, considering the scale of non-compliance, but it would seem that once titles were issued, it was not considered morally defensible to withdraw them.

different surname, but her ownership is not socially recognised as such by the family. Registers do not reveal what is actually happening, and therefore have limitations, but it has nevertheless been possible to trace discernible patterns in land ownership using the registers.

A calculated estimation from the registers suggests that perhaps 80% of the land remained in the hands of family lineages passed down over successive generations; and roughly 20% of the properties may have exchanged hands between black owners. The majority of these transactions occurred in the earlier period, prior to the changes described above. The market in the second half of the 1900s slowed down even further, but a smaller number of transfers between blacks did occur during this period.

Change of ownership between white and black can be calculated more accurately, since here legal conveyancing was used and the evidence is clearer, as shown in the table below.

Table 5: Change of Ownership by race, Rabula. N=186

Parcels	
38	properties passed from black to white ownership, mostly before 1920, representing 20% of all surveyed properties in Rabula.
22	(58%) of these properties subsequently passed to the state (the SADT), mostly between 1937-8. Hence, of the 40 properties acquired by the Trust, 22 were previously black owned
16	(42%) of these properties passed back to black ownership
6	properties passed from black to white to black ownership again
1	original grant to a white passed to black ownership, but this white owner subsequently acquired three other black owned properties

Source: King William's Town Deeds Office, King William's Town Registered Division, Farm Register. Extrapolated from individual property entries as at August 2007

Subdivision of land is usually a yardstick of both market activity and transmission through inheritance. In Rabula, only 11 properties of the total of 164 original grants — less than 7% — were affected by subdivisions; some more than once. Four of the 11 properties that were subdivided were white-owned, some into multiple divisions. Three were black-owned, but resulted in all or some portions being transferred to white ownership. The remaining four were black-owned properties. Most of this activity took place in the first two decades of the 1900s. The total number of surveyed land parcels in Rabula properties thus climbed from 164 to 184 surveyed properties.

In addition, 24 properties were at one time or another owned in undivided shares, mostly occurring on black-owned properties. In three cases properties passed from black to white ownership in shares. In 15 of the 18 cases of black-owned properties held in shares, the transactions occurred between 1896 and 1922. In four cases the same share holders held shares in other properties simultaneously. The remaining three properties were apportioned in undivided shares in 1949 and 1962. The apportioning of undivided shares was apparently not a choice made by the black owners. Rather, the records suggest that administrators encouraged this method to divide and apportion plots between family members. It is a highly legalistic

mechanism which, if legally maintained, results in an incremental increase in the number of undivided shares into infinitesimal fractions over time, as the number of family claimants increase. The value of the portions proportionately decrease until the fractions become meaningless. The records show that this method ceased to be used once the state officials withdrew from direct involvement in administering estates and adjudicating titles, confirming the conclusion that this was not a method preferred by the black owners (see 5.11 below). It is patently unsuited to family ownership, which was paradoxically precisely the reason for the choice of this ‘solution’ by administrators to recognise multiple family claimants.

Table 6: Number of properties with formal subdivision by incidence and race, Rabula N=186

Parcels	
11	properties affected by subdivision (2 multiple subdivisions).
4	of the subdivided properties occurred on purely black-owned land.
4	of the subdivided properties occurred on purely white-owned land (transferred to SADT).
3	of the subdivided properties were subdivided when ownership changed from black to white ownership.

Source: King William’s Town Deeds Office, King William’s Town Registered Division, Farm Register. Extrapolated from individual property entries as at August 2007

Table 7: No. of properties with formal undivided shares by incidence and race, Rabula. N=186

Parcels	
24	properties were owned at one time or another in undivided shares.
18	of these properties resulted in shares to black shareholders only.
3	of these properties resulted in shares to whites shareholders only.
3	of these properties resulted in shares passing from black to white.

Source: King William’s Town Deeds Office, King William’s Town Registered Division, Farm Register. Extrapolated from individual property entries as at August 2007

The statistics in Tables 6 and 7 reveal that the vast majority of properties were not affected by either subdivision or undivided shares. Evidence suggests that on black-owned land, these subdivisions and undivided shares were imposed by the administration whose officials insisted on applying formal procedures of inheritance, sometimes through subdivision and undivided shares. These transactions occurred mainly in first two decades of twentieth century, after which the rate of formally recorded transactions decreased dramatically. Only one recent subdivision has occurred, in 2006. The most notable formal transactions occurred on white-owned farms through inheritance and sale, resulting in frequent changes in ownership. These features are largely absent from the black property registers.

The figures suggest strongly that formal procedures were not a significant feature of property transmission in Rabula, if one considers the average white rural area, where subdivision and consolidation are an ongoing and ‘normal’ functioning of the market. Secondly, formal procedures, limited as they were, declined over time, corresponding also to the departure of the white owners from Rabula, and the constriction in the land market more generally. What the statistics do *not* reveal, but which the detail contained in the title deeds reveal, is that when formal procedures were applied, they were usually the work of white commissioners

adjudicating titles (see 5.11 below). The involvement of state commissioners resulted in transfers of properties into the name of the spouse, or next of kin, who were therefore identified as the ‘owners’ in terms of the legal formulae. The evidence suggests that these formal procedures were generally avoided when state commissioners were not involved.

Significant changes of ownership occurred between black and white during the earlier period, frequently as a result of foreclosure for debt, of which there is clear evidence in Rabula. A similar trend has been observed in other African contexts, where black-owned land frequently passed into the hands of white ‘purchasers’, most frequently to creditors, with evidence that Africans misunderstood the powers of alienation implied by land being held as security for debt.

5.12 Currency of the Rabula Deeds Records

The most significant evidence in the Deeds registry records pertains to the currency of the Deeds. The legal strength of registration in South Africa rests on legal transfers and transactions being recorded between buyers, and also between generations as a result of succession and inheritance. The rationale and logic of the Deeds system is that current owners must be registered: property ownership must be traceable to a living owner at any given time, which means back-to-back transfers must occur when someone sells, subdivides, creates a servitude or mortgage, inherits intestate property or bequeaths property. It is clear that these processes were not followed. The Deeds Registry records lost currency immediately after the acquisition of land by the freeholders, and the trend has continued to the present.

In contrast to the legal requirements, four properties are still registered in the names of original grantees (i.e. the first grantees in the nineteenth century), and a further 15 have been untouched by updates of any nature in the past 50-100 years. The records suggest further that, but for the intervention of state commissioners through the process of ‘titles adjustment’, this would also be the case in the large majority of cases.

In Table 8 below, we see that only 19 of the 140 black-owned properties (approximately 13%) reflect current legal ownership status, and this may be an over-estimate. Of these, only 9 were conveyed by private lawyers, the remainder having been updated by state commissioners. A further 19 properties were transferred through private conveyancing at one stage in the distant past, but have since fallen out of currency. All the remaining ‘updates’ were authorised by state commissioners.

Table 8: Mode of property conveyance, Rabula. N-140

% parcels	
13.6%	property information is current (estimate).
86.4%	property information is not current (estimate).
77%	of all properties were adjudicated administratively (by award and endorsement) in terms of s.8 of the Native Administration Act of 1927. Half of the awards were adjudicated in 1962, the rest between 1963-1969, by a state commissioner.
70%	of all properties have only had administrative action and no private conveyancing.
20%	of all properties have had only legal conveyancing and no administrative action.
7.5%	of all properties have had both administrative and legal conveyancing.
2.5%	of all properties have had no legal action at all since first grant.

Source: King William's Town Deeds Office, King William's Town Registered Division, Farm Register. Extrapolated from individual property entries as at August 2007

5.13 Fingo Village Properties

The Fingo Village registers are integrated with all the others in the Cape Town Deeds office, the jurisdiction of which covers part of the old Cape Province, south-east of the Fish River. The Fingo Village registers do not lend themselves to aggregated statistical analysis, since the registers are not kept according to each property (i.e. per parcel), such as the case for Rabula, but by date of transfer (i.e. temporal criteria).⁸² This means that all properties transferred on a particular date are stored together, identified by a unique Title Deed number that applies to the particular transaction, and not to the parcel. Current registers are easily sourced electronically, but historical information is more difficult, since transaction histories have not yet been fully captured electronically, though this is planned. To track the changes over time for each property involves knowing the Title Deed number for each individual transaction. This is a prolonged activity, which could only be done for a small sample of the properties. I relied on individual interviews with family members in Fingo Village, and where possible, I followed up the narratives by tracking the various Title Deeds across time. My initial sample was 32 families, but over time additional cases were drawn to my attention, particularly where there were problems or disputes⁸³. The sample was never entirely random, and there may have been a bias towards trouble cases, as mentioned in the Introduction.

The number of plots in Fingo Village is 318, roughly double that of Rabula. The plots are uniform in size, and large by urban standards —1000 sq m. Owners take in tenants and build tenant houses (some of extremely poor quality) but interestingly, the plots, which are laid out in an urban grid, have retained their original boundaries, i.e. the plots have not been subdivided. It is clear that there have been more numerous property transactions in Fingo Village than Rabula, and this trend is continuing. The higher incidence of market activity is in keeping with urban contexts where land was historically a significant constraint. State supply of housing was extremely limited, and there were high levels of 'illegality' in the black townships, with severe overcrowding. Fingo Village occupies a prime position within walking distance of the city

⁸² See Chapter 10.6 below.

⁸³ Families approached me hoping I could help them with Title Deed information and history.

centre, and poorer families were more exposed to pressures to sell. Nevertheless, a significant number of properties have remained in family ownership over several generations. The socio-economic profile of the landowners is more diverse than Rabula, with higher levels of poverty. There are nevertheless many very well off families, as well as some who are extremely poor.



Source: Dept of Technical Services, East Cape Administration Board. 1988. DRG No GT/LP64 Scale: 1:2500

Map 7: Aerial layout of Fingo Village properties

The trend in Fingo Village, in common with Rabula, is that owners conduct transactions without recording transfers formally, whether these represent transmission to family members or sales. It would appear that in Fingo Village the registers lost currency fast, and this trend continued to the present. The incidence of non-registration was of concern to the municipal authorities, since these unrecorded transaction meant that it was difficult to identify owners for purposes of service and rates payments. As a result, the titles in Fingo Village were subjected to three successive Titles Commissions being appointed to adjudicate title and update the records.

Davenport’s view of this phenomenon was that the title holders’ failure to transfer their properties was the “weakest point” in the owners’ case against the threat of expropriation in the late 1930s and early 1940s. His view, in line with officials and land professionals, was that “chaos had reigned” (Davenport 1980: 13).

Whether the blame for this should be attributed to the owners of the properties or to the local authority is debateable; but conditions had reached the point of such confusion by 1927 that provision was made in the Native Administration Act of that year for a system of substitute title⁸⁴, under which an occupier whose right to possess was not contested, could receive a simplified title deed which cut through the irregularities of the past for a down payment of £1 (ibid).

Based on diachronic examination of several individual Fingo Village Deeds, a pattern similar to Rabula regarding the legal passage of the properties emerged in Fingo Village. Fingo Village titles have been updated through more regular intervention by Titles Commissioners — in the 1940s, 1960s and 1980s, with one about to commence, indicating consistency with generational cycles.

My examination of selected deeds followed two phases. Firstly, I looked at documentation produced by my oral informants from a sample of 32 cases. Of the respondents interviewed, most could not produce Title Deeds or official documents. Of those who could produce documents, these indicated intervention (‘titles adjustment’) by a Commissioner. In most of those cases, the entries reflected the most recent titles adjustment performed by Commissioner Jameson, who spent nearly a decade ‘regularising’ titles in Grahamstown in the 1980s. Older documents showed evidence of previous commissioners: Major Apthorp during the second half of the 1940s, and a retired magistrate, Mr Warner in the 1960s and early 1970s. The state has recently initiated a fresh round of titles adjustment, which shows a continuous trend of adjudication by the state in four successive generational cycles, which indicates the extent of the problem.

In statistical terms, of those who could produce documentation, 90% indicated the ownership had been adjudicated and awarded by a commissioner.

Table 9: Transfers by administrative action and adjudication, Fingo Village

Respondents N=32	Confirmed Commissioner’s Awards
1	Commissioner Apthorp award (1940’s)
3	Commissioner Warner award (1960’s/1970s)
5	Commissioner Jameson award (1980’s)
Total: 9	Commissioners’ awards

Only two showed ‘normal’ conveyance by a private attorney:

⁸⁴ Section 7 of the Act was worded as follows: Substitution of new title to land in certain cases: (1) The Governor-General may revoke any grant of land in a tribal settlement made on individual tenure to a Black upon quitrent conditions, and issue a substituted deed of grant in favour of the holder or of such person as may be adjudged to be entitled to be registered as the holder in conformity with the procedure prescribed in section eight: Provided that in the case of the areas comprising the Fingo and Hottentot Village situate within the urban area of Grahamstown in the Province of the Cape of Good Hope, this subsection shall be construed as if the words “upon quitrent conditions” were omitted therefrom.

Table 10: Method of conveyance or transfer

Respondents N=32	Method of transfer/conveyance
9	Commissioners' awards
2	Conveyancing by private conveyancers
21	No documentation/ method of transfer unknown
Total: 32	

Individual cases that came to my notice after completing my first sample were not included in the table, but followed similar patterns. In many cases, properties have been adjudicated by more than one commissioner, and sometimes by all three.

5.14 Conclusions

Both study sites, despite their significantly different contexts, show the following features:

(a) A general downgrading of the status of freehold in the eyes of officialdom, seen in the threat of expropriation of Fingo Village titles twice during the twentieth century; and the forced redistribution of land in Rabula to the landless, including the commonage, which effectively neutralised the supposed advantage of title if viewed from the perspective of formal law.

(b) A general lack of currency of title deeds. Officials from an early stage remarked on the prevalence of the general disregard for legalising transfers.

(c) The imposition of administrative measures to adjudicate ownership details, rather than private legal conveyance of transfers.

(d) A general low level of formal transactions. There has been a higher frequency of transactions in Fingo Village than Rabula. In both cases the transactions occurred at a higher rate during the earlier period as compared to the later period. There appears to be an upturn in Fingo Village as result of greater market pressures in recent times on account of the active presence of money-lenders who use land as security for debts. The opposite is the case in Rabula, where there is currently virtually no market activity currently, but evidence of limited market activity historically.

(e) There have been no formal or informal subdivisions in Fingo Village, but rather a tendency towards tenancing the backyards of the properties. Even so, there is room for subdivision, but this has been resisted⁸⁵. The willingness of municipal authorities to build state subsidised houses on the properties of qualifying owners in recent times will no doubt provide even more motivation to retain the large plots. There were a limited number of formal subdivisions in Rabula in earlier years, but the incidence was negligible. In the following chapters we will see that informal internal subdivision of plots for individual use rights occurs with each generation, but always remain part of the family estate for later redistribution to family members.

⁸⁵ The conditions in the Fingo Village titles do not specify that subdivision is disallowed.

(f) In the rural study site we saw how multiple layers of land tenure interventions by the authorities, motivated by political concerns, overtook the initial titling programme. These successive waves of changes initiated 'from above', led to multiple conceptions of space and property in Rabula. The rights of freeholders became subject to previously untitled occupiers gaining rights to the commonage, which previously formed part of the package of exclusive rights held by the title holders. The creation of new, overlapping rights to property impinged on the power of title to sustain deep social divisions based on differential property rights. The interventions diminished the political and economic importance of title. The former 'squatters' prefer to be known by the name *abahali*, residents as symbol of the changed hierarchical relationships.

(g) The evidence in title deeds shows a strong correlation between the low level of formal transactions and social interpretations of title. The analysis in the following chapters suggests that forces 'from below' constrain the impact of titling on marketability and alienation of land, as well as the ability by administrators to enforce the law strictly. The evidence suggests that freeholders increasingly engaged in strategies to keep the properties in the family group, which put pressure on the common-law conception of individual ownership and inheritance.

One of the most significant indicators of the effectiveness of a country property system is the extent of engagement with the property market. The property market activity in both field sites indicates, firstly, a very low level of market activity, but nevertheless some activity. Land access for blacks contracted radically during the course of the twentieth century as a result of legal segregation and the deliberate thwarting, by a range of laws and regulations, of black land accumulation. These political circumstances affect any assessment of the 'market', which cannot be studied in isolation of its wider political context. Clearly these factors affected both access to the market, and marketability of land in title. Nevertheless, the social profile of the owners in the two study sites, which does not conform to a generalised pattern of poverty, suggests that in addition to these political constraints, there were social constraints. Why has land resisted commoditisation?

In Fingo Village, there is a nascent property market induced by urban dynamics and close proximity to town centre, but land transfers are constrained and contingent, inhibited by social factors I describe in the following chapters. In Rabula there is, to all practical purposes, no property market, although every now and then, when a landowning lineage dies off, plots become available for purchase. This is rare. Mills & Wilson (1952: 48) confirm the virtual absence of a land market when the field research for the Keiskammahoek Rural Survey (KRS v 4) was conducted between 1949 and 1950. De Wet et al (1992: 26) found an increase in sales during the forty-year period between the KRS and the research project conducted under the auspices of the Institute of Social and Economic Research (ISER), Rhodes University between 1989 and 1990.

My own research reveals there was an embryonic property market in Rabula in the nineteenth century when landowners still had a vestige of mobility, assets and available land to purchase for their offspring (see Mills

& Wilson 1952: 47-48; de Wet 1995: 123). A corollary, however, as discussed above, was that up to 20% of all the surveyed properties passed from black to white ownership in the earlier years. Many of these 'sales' were a result of foreclosure for indebtedness to white loaners, the land being held as security.

The failure on the part of most owners in both study sites to register transfers means that it is not possible to come up with accurate statistics of market activity. Through qualitative research it is, however, clear that families strive to retain properties within the family lineage. This in turn provides an explanation for both the low level of market activity, and the avoidance of formal transfer.

The 'title biographies' reveal that most transfers have been affected, not through the usual system of conveyancing as required by South African property law, but through a system specially set up to transfer titles where (black) owners neglected to do so. Despite this systematic state intervention, evidence from both study sites suggests a continued general disregard for formal transfer and registration of property.

In Fingo Village, titling has led to conflict and contestation in some families. There is evidence of a greater incidence of family conflicts in Fingo Village than in Rabula. Only four out of 32 cases in my early sample in Fingo Village had uncontested or unproblematic ownership combined with a current title deed. In Rabula, there is less contestation, but most title deeds are not current — only one in my sample was in the name of a current owner.

The registers clearly did not capture local conventions of succession and inheritance, or the way property rights are distributed within the family and readjusted after births or deaths. Title deeds are like the 'mini-maps' of the official system. But behind the curtain of law, something else was taking place. Enumeration and delineation according to rules and categories provided useful symbols for officials and lawyers to traverse the land, but bureaucratic perceptions of the map could never equal the territory, only their version of it.

As discussed in Part One of the thesis, it is in the processes of transmission that the social meaning of property is best understood and interpreted, and it is to these processes that the following chapters turn.

CHAPTER 6 “THE LAW CANNOT PRODUCE A PERSON TO REPRESENT THE HOME”⁸⁶

6.1 Introduction

The evidence in the previous chapter shows that there was a growing disjuncture between the official maps and registers of African freehold land tenure, and local processes of social validation of claims to ownership among and across families. Freehold title clearly did not extinguish ambiguity and multiple claims to land and space, as implied in the economic theory of titling. Nevertheless, the range of rights to land were significantly narrowed by new parameters of inclusion and exclusion, which became more clearly defined as a direct result of titling, albeit according to African interpretations of these concepts.

We saw that over time, the currency of the African registers in Fingo Village and Rabula tended to lapse as families avoided the conditions of registration, while the land market appears to have functioned only minimally. The empirical evidence of the passage of these freehold properties shows that their owners did not in general observe the official legal procedures for either subdivision or registering transfers on sale or inheritance. The evasion of formal procedures to survey and register transfers prompted officials to conclude that Africans were simply incapable of managing private property. When faced with the option of legally expropriating or de-registering titles, however, the political authorities prevaricated. They clearly recognised the risk to social stability involved if they stripped the owners of their title, and concluded that African titles should be protected by simplified methods of recognising their titles in law. They generally intervened by administrative actions to ‘regularise’ the titles in the eyes of the law.

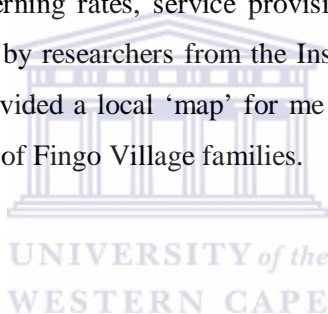
The technical interventions by the authorities, however, failed to stem the tide, since they were also premised on the overall western philosophy underlying title, i.e. privatisation and individualisation of property relations. The records discussed in the previous chapter suggest that the African freeholders embraced these principles highly selectively, which meant that they did not follow the freehold ‘package’ as a whole. This had, and has, dramatic consequences, since the law conceives of freehold precisely as a single package made up of multi-faceted parts that are intimately connected. The parts all revolve around a single concept of private individual property. By disassembling the package, the freeholders upset the legal rationale and the administrative framework of freehold title.

The paradox in these legalities can be seen in the disregard that African freeholders have shown towards the very legal device designed to provide clear-cut evidence of ownership, viz., through the recording of transfers. Yet, African freeholders valued their titles, and the status differential that went with it. It is clear from the historical evidence that they observed the property boundaries and regarded their titles as secure

⁸⁶ Interview, W. Mabusela, Fingo Village, 15 March 2006.

proof of ownership. The ambiguity in ownership that title is intended to eliminate is, however, only partially achieved, since the family as a whole (past and future) has rights of access, which increases elements of negotiability, albeit within families. The mismatches between law and social realities meant that over time, the legal stature of title was diminished by the introduction of administrative remedies, but the social value to owners persisted.

In the following chapters I turn to the perspective of the landowners themselves. I draw on the perceptions of the freeholders, as well as documentary evidence, to construct a picture of the ownership arrangements in practice, illustrated by individual case histories from Rabula and Fingo Village. It is their explanations from which I draw to embroider together the somewhat fragmentary documentary evidence to be found in title deeds and official records discussed in the previous chapter. Through oral testimony I have attempted to piece together the local discourses on private ownership, using registry records or title deeds merely as a backdrop against which to interpret their narratives. In Fingo Village, owners' produced a range of documents other than their Title Deeds to show that they were the 'owners' of the land, such as municipal bills and official correspondence concerning rates, service provision, etc. For Rabula, I was fortunate in having access to genealogies drawn up by researchers from the Institute of Social and Economic Research (ISER), Rhodes University⁸⁷. These provided a local 'map' for me to traverse the property and territory of Rabula. I had no equivalent genealogies of Fingo Village families.



6.2 Socio-political context

Before proceeding to the local narratives, there are important local socio-political dynamics that help to contextualise the study sites in the present. In addition, there are certain aspects of the spatial features of both sites that are specific to the trajectory of freehold title discussed in this thesis.

In the past, there was a conspicuous difference in social status between freeholders and the untitled in the rural study site of Rabula. In Fingo Village, bearing in mind the historical context of titling discussed in the previous chapter, these distinctions were less pronounced. Title as a marker of socio-economic differentiation was, and is, less pronounced in Grahamstown's townships than in Rabula. Historically possession of a title carried status connotations, since urban title was such a rarity. Moreover, the pervasive insecurity of tenure in South Africa's urban areas generally fostered high levels of 'illegality', which the presence of title helped to counteract.

⁸⁷ I am indebted to Prof Chris de Wet for making these genealogies available to me. The original genealogies were drawn up by Michael Elton Mills, former student of Monica Wilson, at Rhodes University in 1950. De Wet and Mills updated these records in 1986 and distributed them to the families concerned. The originals are stored in Cory Library, Rhodes University.

Institutional reforms carried out by the African National Congress government have removed some of these restraints, since it is the explicit policy of the government to eventually issue titles to all the holders of township properties, which has changed the local dynamics of tenure.

In Rabula, the freeholders have maintained their economic power, seen in their greater assets and control of more land, better housing and generally more livestock, but increased tenure security among the non-freeholders in the village, coupled with municipal servicing, has shifted the power relations between the villagers and freeholders. A critical element in realignment of social power has been the restructuring of rural municipal institutions, whose focus is on providing services to the village settlements, i.e. the non-freeholders.

The state has not invested in agrarian production in Rabula since the collapsed schemes of the mid-twentieth century (discussed in Chapter 5 above). Investment in production has continued to decline, and freeholders are continuing the trend of widespread withdrawal from agricultural production. There is some evidence to suggest that many freeholders were able to ride on the state-subsidised agricultural projects among the Trust villagers. Many were able to use their social influence in the Ciskei homeland government to secure a flow of investments in rural development under the Sebe⁸⁸ regime, in spite of the fact that these resources were not formally channelled through the freeholders. Examples are access to state-subsidised tractors and seeds, and upkeep of the inner gravel road in the village. The latter played a vital role in accessing urban centres of employment and markets, which in turn meant that freeholders could maintain close links between family properties and places of employment. These services helped sustain their relative mobility, both physical and social. Under the African National Congress-led government, their local political power has waned, which means they can no longer lever state resources in agrarian production. Many bemoan the poor state of rural production and the general disrepair of roads and infrastructure⁸⁹.

Rather than investing their surpluses in expanding productive capacity, the freeholders have generally tended to invest surplus wealth in education for their children, and in acquisition of formal employment in the civil service, which means that many freehold families continue to be better off than the majority of villagers. The results of differentiation can be seen in the high proportion of families who have members working in the civil service, many of whom are teachers, nurses, and school principals, and some are professionals, such as lawyers. It is nevertheless clear that title is no longer the critical marker of social differentiation that it was in the past.

According to de Wet, the strategic location of Rabula played an important role in the social mobility of the freeholders, and their ability from the late 1950s to access state resources and employment in the burgeoning

⁸⁸ Lennox Sebe was the dictatorial head of the Ciskei pre-independent and 'independent' Ciskei from 1972 to 1990.

⁸⁹ Interviews, Tsengiwe, Rabula, 18 July 2006, 17 July 2008; M. Njemla, Rabula, 18 July 2008; M. Makuzeni, King William's Town, 4 April 2008, Rabula, 16 May 2008, Quzini, 11 July 2008.

homeland bureaucracy centred in Bhisho, which is within easy access of Rabula. East London expanded rapidly in the 1950s, as did King William's Town and other Border towns in the 1960s. The government's industrial decentralisation policy created jobs in places like Dimbaza, about 10 km from Rabula (de Wet 1995: 156). The proximity of Rabula to these urban centres, as well as other serviced rural towns and villages with schools, clinics and police services, meant that a number of members of the landowning families have accessed employment at relatively high levels of remuneration.

While we do not have figures for the freeholders as a separate group, De Wet has calculated that in 1987, 35.9% of cash income sources in Rabula were from wages and salaries earned within Keiskammahoek district and by daily commutes; 24.1% from pensions, 10.1% from 'local sources' and 29.9% from remittances. Considering these figures include the less well-off householders in Rabula who live in the villages without title, these figures help to paint a picture of relatively higher levels of local economic stability than other rural villages, which in South Africa are marked by poverty. The educational profile of Rabulans is also generally higher than neighbouring villages. This profile is indicative of notably greater economic power than neighbouring villages, including Cata (de Wet 1995: 156-7).

It is important not to generalise the obvious success of some family members to the households as a whole, since there can be sharp social differentiation within families. There are indigent family members among the prosperous, as well as poor families as a whole. Nevertheless, there is a tendency to invest in the social reproduction of the family as a whole, which means that all family members benefit directly or indirectly from the successes of individuals. This is an important principle in the logic of investment in social networks, and some narrators in my field sites stressed this principle as one of the rationales for maintaining family property.

A critical result of these combined circumstances was that many members of the landowning families were able to continue to live permanently in Rabula, and commute to their employment daily or weekly. Others acquired properties in the urban centres in and around East London, King William's Town and Dimbaza and were, and are, able to return to Rabula frequently. These smaller units maintain close links with their Rabula properties through actively nurtured ties of affiliation. The Rabula properties continue to be held as the symbol of family unity and reproduction, a theme that I follow up in the following chapters.

Freeholders' housing is generally of a higher quality than the norm in rural villages. In some cases there has been conspicuous investment in modern architecture with embellished finishes, enclosed yards, vehicle garages and other modern domestic spatial arrangements. Their economic power has not translated into employment of full-time labour on their land, and labour remains a key constraint to expanded production. The minority of freeholders who produce surpluses make use of short-term seasonal labour, relying entirely on the use of tractors for ploughing. Some farmers continue the traditional practice of hiring work parties

who are paid in kind, and not in cash. Two farmers⁹⁰ hire out their tractor services in the village and sub-district, and they are actively attempting to reinvest these and other incomes in expanded production (Field, 2008). Another hires a combine harvester for his wheat crops. Even among the more productive landowners there is no evidence of a permanent salaried work force, and family labour is highly constrained, since children are at school and many women are also employed.

Currently there have been a range of local attempts to stimulate agriculture, and a number of freeholders formed a local farmers' association, to which membership is open to non-title holders. Its aims are to distribute seeds (which it has done at a modest scale), technical knowledge and access to markets. In general production is extremely small-scale and confined to a handful of smallholders. Many of the freehold smallholdings lie fallow. Investment in cattle remains a strong prerogative among many freeholders and villagers alike.

Many older conflicts continue to surface, based on different interpretations of the meaning of 'particular events' in the past that affected access to the commonage. These mainly involve contests between freeholders and Trust settlers regarding rights of access to commonage for grazing purposes. These simmering tensions have in some cases resulted in litigation⁹¹. The tensions are reflected in different interpretations of rights on each side of the land tenure divide, which in turn feed into the social divides.

Although there is evidence of continuing social distance between freeholders and non-freeholders, there is social intermingling and intermarriage, confirmed also in the research of de Wet, who observes that freeholders do not act as an "endogamous" group (de Wet 1995: 165-169). Strongly exogamous principles of marriage ensure social variability in family composition. The servicing of the village settlements with water and electricity has increased the attractiveness of residence in the village settlements by the offspring of some of the freeholders who now choose to live there, rather than on the freehold allotments. They invest in good housing in the villages in the absence of title.

In short, freeholders' former political, economic and social power in Rabula is more constrained than it was in the past as a consequence of new ideologies and constitutional values. Many local non-landowners challenge the notion of hierarchical rights in land in Rabula, and some challenge title. Many landowners are now viewed as a conservative elite, who appear to be reinvesting in old traditional sources of authority, such as the revamped system of traditional authorities and local headmanship. The position of headmanship was historically open only to freeholders, but this is no longer the case, and new civic structures have emerged to compete with the older style of leadership. The position of headmanship in the Eastern Cape was renamed

⁹⁰ One of whom has since died tragically in an accident on his tractor.

⁹¹ Interview, M. Makuzeni, King William's Town, 4 April 2008.

iNkosana ‘little chief’, from the meaning, ‘son of a chief’, in terms of provincial legislation in 2005⁹², the position of which has been filled in Rabula by a freeholder⁹³. This change is in line with the ANC government’s reinvestment in policy positions that uphold the legitimacy of traditional authorities in rural local governance, a stance that is openly challenged by a segment of Rabula residents⁹⁴.

The socio-economic profile of Fingo Village freeholders was always more diverse than in Rabula, with the original owners less well off than the rural land purchasers. Today there is great variability in the socio-economic profiles of the Fingo Village freeholders. Elaborate houses with considerable investment rub up against tin dwellings, and there is a range inbetween. In Fingo Village there is not the same social tension around tenure as there is in Rabula, given the absence of tenure pluralism. Most freeholders in Fingo Village have tenants, but their rights are clearly subordinate to the owners. Some individual family members do try to exert independent power over the family properties for purposes of generating other sources of income. I came across one case where brothers wished to turn the property into a tavern, and another where a female resident, who had invested heavily in upgrading the property, wished to run a bed-and-breakfast. In both cases their strategies had to be tempered due to the constraints imposed by the rights of other family members in the family property⁹⁵.

There is a tendency among some of the better-off members of the landowning families in Fingo Village to acquire properties in some of the newer townships, or the former white suburbs in Grahamstown, leaving the family properties to be occupied by the poorer members of the family. Some cognates are scattered more widely, for example, Port Elizabeth. Non-resident members of the family nevertheless retain close ties with the family and continue to have a say in the management of the family property.

6.3 Spatial characteristics

In Rabula, the title deeds refer to the surveyed plots. The large surrounding commonage was regarded by the title holders as owned in common, though the state later claimed ownership. The plots were intended for both residential and arable purposes⁹⁶. In Rabula these surveyed plots are very large by the standards of black land access historically. In comparison with the village plots that characterise most of the other African tenures, these plots could be described as small to medium ‘smallholdings’.

⁹² In terms of the Traditional Leadership and Governance Act, 2005 (Eastern Cape) (Act No. 4 of 2005), chapter 4, drawing validation from the Traditional Leadership And Governance Framework Act 41 of 2003.

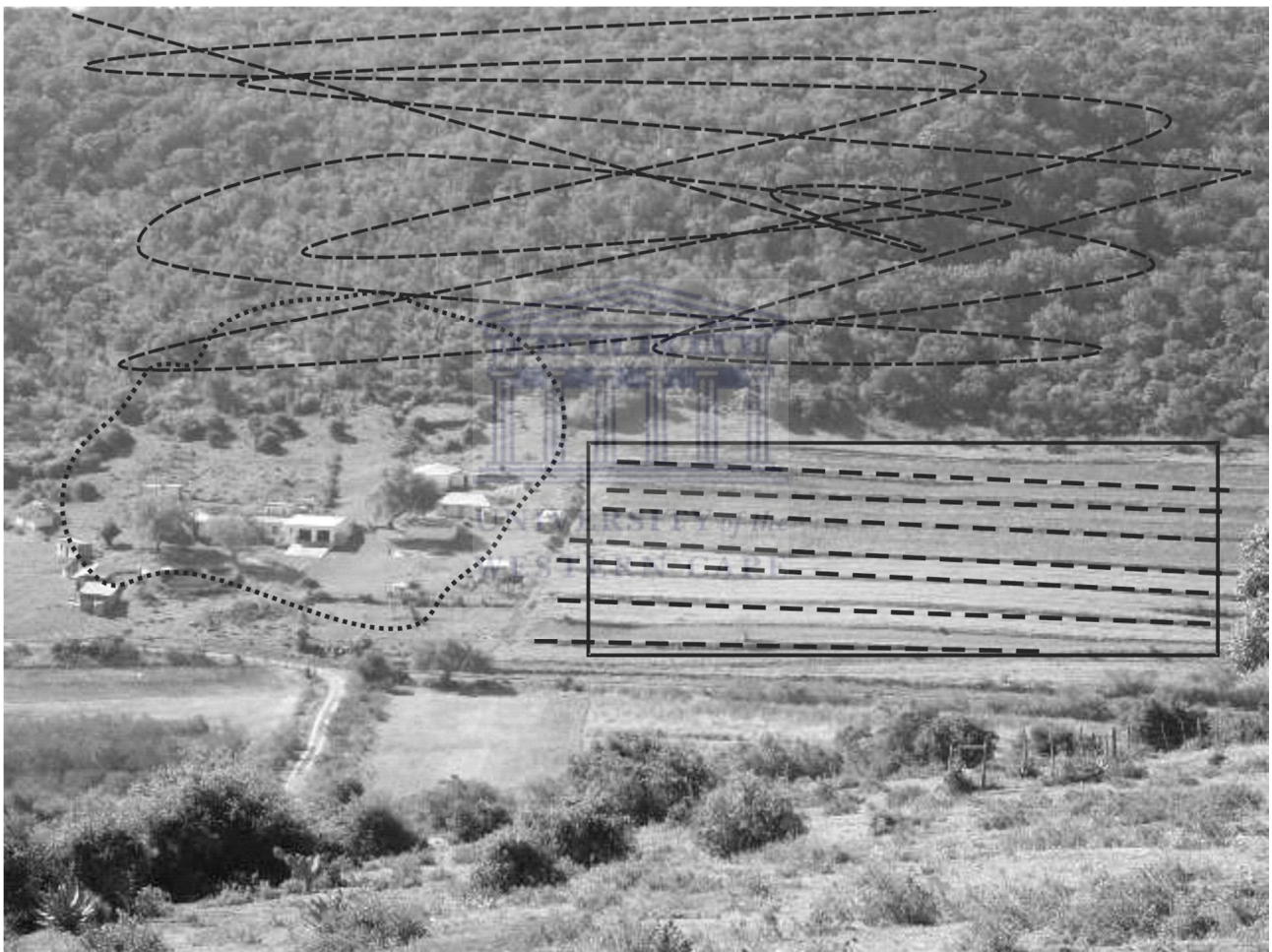
⁹³ Interview, Mati, Rabula, 18 March 2010.

⁹⁴ Interview, M. Jara, Rabula, 18 March 2010.

⁹⁵ Interview, Margaret Spekman, Fingo Village, 11 April 2006; 15 February 2008.

⁹⁶ This was a departure from the norm in other black settlements (quitrent and ‘communal’), where the native administration worked hard at separating fields from residential sites, discussed further in Part 3.

The formal surveyed boundaries of these plots have changed very little since the original surveys were undertaken. There is, however, evidence of a great deal of informal subdivision among individual family members, male and female. As shown in the previous chapter, statistics are given to show that it has been extremely rare for properties to be formally subdivided through surveys and registration. Only four black-owned properties were historically affected by subdivision in the past. If one considers the properties have been in private ownership for over a hundred and fifty years, and compared to the high frequency of subdivision on white-owned land, this rate is negligible. Related families live in separate homesteads on, or adjoining, the surveyed properties. In some cases multiple properties are linked to the same extended family.



Key:




	Commonage
	Homestead on edge of commonage
	Surveyed property with informal internal allocations

Figure 1: Typical lay-out of land use in Rabula showing commonage, homestead sites, and surveyed plot (informally subdivided)

In Fingo Village, the plots are all roughly 1000 sq m — considerably larger than the norm for black townships, possibly as much as four or five times the size of an average township plot. The properties have altogether resisted formal sub-division. There is usually one main homestead, with several simpler backyard ‘flats’ for tenants or other members of the extended family. In some cases there are two family homes. There is great variation in the lay-out of the houses, but in most cases the yards around the homes retained their spaciousness.

We will now examine aspects of property management reflected in the following five narratives from Fingo Village and Rabula.

6.4 Case 1. The Ncanywa family, Rabula: tension between conflicting sources of law and social norms for determining succession.

6.4.1 Narrative

The main thread of this story is the stark disjuncture between official perceptions of ownership and ‘inheritance’ of freehold land, and local normative ideas about rights of access by all members of the family to the family property.

In the later 1950s the native administration set about trying to locate a legal successor in title to the Ncanywa property in Rabula, in order to get formal approval from the owner for the creation of a legal servitude over the property in favour of the state for a furrow through the property. The proposed servitude was to create third party rights to clearly differentiate the private property from public property. The judicial branch of the native administration went to enormous lengths to track the current legal owner of the property in order to get a signature, since the title deed was still registered in the name of the original grantee in the mid-nineteenth century. The title had not been updated since the first acquisition, as was common throughout Rabula at that time. Various officials painstakingly traced the line of descent retrospectively from the date the property was first acquired.

The administration tracked the family’s descendants through two legal routes, in accordance with the dual legal provisions of the common law and customary law. The distinction between each was made on the basis of whether a marriage had been concluded on the basis of Christian/civil or customary law⁹⁷. The divide between the two sources of law had to be recalculated with each successive generation to take into account the marriage of each ‘heir’. The process therefore became exponentially complicated. In the end, the matter got more and more entangled in legalese, with very little unanimity between the various white customary law

⁹⁷ See Chapter 9.8 for discussion of reforms of marriage and succession law following the Constitutional Court judgement in *Bhe & others v Magistrate Khayelitsha & others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1.

'experts' who debated the matter amongst each other. The problem was eventually solved by an administrative intervention.

Tatase (Stewart), Matolokazi (Virginia) and Ntsomi (Dickson) Ncanywa, and their families, live on family land acquired in 1868 by their great grandfather, Ncanywa, referred to by the family as *ukhokho* (forefather) the founder of their lineage. Ncanywa subsequently acquired other properties, though this one is considered the original family land that devolved through his eldest son. The other two sons got an adjoining property, separated from the original home by a valley through which passes the main road to Keiskammahoek. From that point, the family split into two branches. Each family traces its genealogical and social history from the point of acquisition of these two large plots. Two smaller plots acquired by the family play a minor role in this history.

The branch with which this story is concerned is known by the name of Ncanywa's eldest son, John, known to the family as *utat'omkhulu* (grandfather). His grandson, Tatase, was in charge at the property at time of interviewing, but as he was very ill, his sister (the eldest child of John), Virginia Matolokazi, intended to take over as the manager in the future. She has three children, and lives on the property. She has maintained the Ncanywa surname, as have her children. The wife of a sibling born out of wedlock also lives with her children on the property⁹⁸.

Fifty years ago, in 1959, the government wanted to establish an irrigation scheme in Rabula, which required an aqueduct to pass through their property. Officials needed to trace the owner in order to survey the strip, and draw up a servitude. The property was still registered in the name of the original grantee, 'Canywa'. Registration had skipped two generations since. Over twenty letters and memos were exchanged between various officials in the offices of the Bantu Affairs Commissioner, Chief Bantu Affairs Commissioner, Legal division of the Department of Bantu Affairs, the Native Appeal Court and the Deeds Registry spanning a period of four years. The fastidiousness and attention to detail were extraordinary. Marriage and baptismal records were sought, family trees were drawn up and Prof Kerr, the customary law professor at Rhodes was consulted.⁹⁹

These white officials never reached agreement, but the matter drew to a close when they discovered a Titles Commissioner had been appointed in terms of another legal imperative (title adjudication), with no direct connection to the water scheme. The Titles Commissioner was appointed to sort out 'lapsed' titles throughout the entire Rabula. Commissioners exercised these powers (and still do¹⁰⁰) in terms of special

⁹⁸ Interviews, Stewart & Virginia Ncanywa, Rabula. 22 July 2006; 31 March, 1 April & 22 July 2008; and Nimrod Ncanywa 1 April & 16 July 2008.

⁹⁹ NTS 51/337. Correspondence 1959-1962. Bantu Affairs Commissioner: Keiskammahoek: N8/20/3(5): 20 July 1959, 18 August 1959, Chief Bantu Affairs Commissioner: (47) N8/20/3/7 12 August 1959, 13 January 1960, 4 February 1960, 29 September 1960, 18 January 1961, 23 September 1961, 2 December 1961, 21 April 1962, Secretary for Bantu Administration and Development: NTS 51/337 Rabula Irrigation Scheme 8 June 1960, 22 August 1960, 29 August 1960, 17 July 1961, 28 October 1961, 5 March 1962, 6 June 1962, 11 June 1962.

¹⁰⁰ In terms of the Land Titles Adjustment Act 111 of 1991, derived from the previous legislation that dates back to the Native Administration Act, No 38 of 1927, section 8.

legislation that was passed earlier in the century when government recognised that freehold and quitrent title holders generally refrained from transferring title into the name of the current owner, as strictly required by the Deeds Registry, as discussed in Chapter 5 above, returned to in Chapter 9 below. The Commissioner awarded the property to ‘Simon Ncanywa’, son of John. That drew the matter to conclusion from the state side, and the file was closed.

Simon alone was consulted when the issue surfaced, and to whom the Commissioner subsequently awarded the property in 1962. He made a sworn statement to the Native Commissioner of Keiskammahoek in 1959, witnessed by another female family member, in which he stated: “As far as I am aware my father John was not regarded as the sole heir, it being understood that the children inherited jointly.” He listed the names of 40 family members, male and female with possible claims to the property. In spite of his statement he was later identified as the true owner by virtue, not of the common law, but ‘official’ customary law, the eldest deceased son having been skipped over because he had had only daughters.

The main legal issue with which these officials were grappling was whether to apply the common law or customary law of succession¹⁰¹. The reason there was some doubt was that the original grantee was assumed to have married by “native custom”. Officials painstakingly checked whether there had been a Christian marriage in Church records but could find none. They did, however, find the marriage records of Ncanywa’s eldest son, John, who had clearly married by Christian rites.

The dilemma was: whose property was it? As the title deed was still registered in the name of the first grantee, one line of highly technical legal argument concluded that the property still belonged to him in law, requiring careful conveyance through each successor to the present owner as required by law¹⁰²; and furthermore, if customary law applied, it should devolve by custom through the male line only, which would have the effect of excluding a bevy of daughters by the eldest son, to pass collaterally to a younger brother who had a son. If, on the other hand, it was the valid property of his unregistered heir, John, it would possibly devolve by common law because of John’s marriage by Christian rites. If it devolved through this route, it had first to be established if the estate was inherited before or after the law of succession changed in 1927 under the Native Administration Act, No 38 of 1927. A notorious clause in this legislation, applicable only to blacks, removed the automatic ‘community of property’ provision associated with the common law i.e. applicable to Christian and civil marriages. Prior to this, community of property applied automatically unless an ante-nuptial contract stated otherwise, a situation that persisted for white marriages (see Chapter 7.4.2). Following a Constitutional Court judgement in 2005, the *Bhe* judgement¹⁰³ (see Chapter 9.8), this is the case for all South Africans currently. Before the removal of this automatic provision of community of

¹⁰¹ ‘Succession’ is the common law term for identifying heirs for purposes of devolving property, and is also the English term for processes of succession to positions of office. In African custom, succession tends to denote the latter only, particularly hereditary positions, though white legal officials used the term in customary law in both senses.

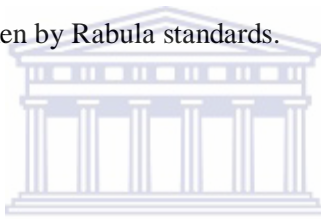
¹⁰² South Africa has a system of Deeds registration, not Titles registration as in the Torrens system. The Deeds system requires conveyance for each successor; retrospectively if a generation has been skipped.

¹⁰³ *Bhe & others v Magistrate Khayelitsha & others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1.

property, spouses were co-owners of property acquired during the marriage, in the absence of a pre-nuptial agreement to the contrary.

It had also to be established whether one of four mid-nineteenth century colonial laws applied¹⁰⁴, as there remained a remote possibility that one of these validated customary law. There were further intricate legal complications concerning a great-grand daughter who had children out of wedlock, and a grandson who took a customary wife after the death of his first wife. These questions were never resolved, nor were they resolvable through legal calculation. The administrative solution satisfied state requirements, and took the pressure off the requirement to identify an heir, Simon being accepted as the person registered on the title.

The family, when interviewed¹⁰⁵, was unaware that there had ever been a ‘succession crisis’. They have continued to devolve property according to family norms and values. All family members, male and female, have rights to the property within a patrilineal system of descent. Arable land is informally subdivided among the children and women are allocated fields as long as they are domiciled within the patrilocal residence. The sister of the current head of family expects to take over the function of family head from her brother, an unconventional step for women by Rabula standards.



6.4.2 Analysis

The story reveals the acute observance by officials to the intricate details of the case histories in order to protect black freehold property rights. The case unfolded paradoxically at a period in South Africa where black land rights in general were undergoing profound devaluation following the introduction of apartheid laws, with the imminent introduction of Bantu authorities, and rural villagers undergoing forced resettlement or ‘betterment’. The official emphasis on ‘communal tenure’ may partly explain the need to draw stark differences between the common law and customary law. Officials turned a blind eye to the difference in interpretation between their version of ‘inheritance’ and the local ideas about devolution, which they simply disregarded.

The current owners whom I interviewed had no idea that their property had been subject to a lengthy official debate which had produced voluminous correspondence, and appeared not to comprehend the substance of it. For their part, they were as completely removed from the legal realities as the officials were from the social realities. They explained that they own and manage their property as ‘family property’. By ‘family’ they mean the patrilineal descendants of the forebears who first acquired the properties. All family members, male and female, have rights to the property, provided they qualify as family members and follow the family norms. No individual has a right to alienate the land.

¹⁰⁴ Act 18 of 1864, the Native Successions Act. The British Kaffrarian law was drafted specifically for the customary devolution of “Fingo property” when it was observed that amaMfengu observed different practices from Europeans. See Chapter 4 for historical context of British Kaffraria.

¹⁰⁵ Interviews, Stewart & Virginia Ncanywa, Rabula. 22 July 2006; 31 March, 1 April & 22 July 2008; and Nimrod Ncanywa 1 April & 16 July 2008. Oral information on technical details is confirmed in deeds office and survey information.

The search for an identifiable 'heir' is entirely foreign. Individual family members have socially defined rights relative to their position in the family, which is defined by principles of descent. All the siblings and older children who have retained the identity of the Ncanywa family have rights to individual fields. Arable land is informally subdivided among the children, and women inherit fields as long as they are domiciled within the household.

The Ncanywa family defines itself in terms of affiliation through the male line of descent. The family includes all the descendants of the original purchaser. This fits with the category of a 'lineage' membership, in this case patrilineal, clearly distinct from a nuclear family based on conjugal relationships (as discussed in Chapter 3 above). The offspring of couples in the patrilocal residence are members of the paternal kinship group or patrilineage.

The resident Ncanywa family members explained that women are not excluded from property rights in the family, so long as their claims flow from their recognised membership of the Ncanywa lineage.¹⁰⁶ The word they use for lineage is 'family'. The claims family members make on property depend on their affiliation to the lineage, though there are contingencies that might vary the rule, e.g. conformity with family norms. In Rabula, residence is almost universally established on the basis of patrilocality, meaning that women customarily move to their husband's residence on marriage. Her social identity is circumscribed by the marriage, symbolised by the surname of the patrilineage and the patrilocal household. As discussed in Chapter 3.5 & 3.6 above, marriage does not accord women independent property rights as a spouse. She has use-rights of fields but cannot transmit property. She does, however retain rights to property in her own lineage, providing she gives up her claims as a wife in her husband's patrilineage. Unmarried, separated or divorced women can return to their natal home and resume their rights at any time.

The Ncanywa story provides a graphic illustration of the lenses worn by white officials. The lengthy correspondence is a rare glimpse into the importance officials ascribed to the letter of the law, which, paradoxically had very little meaning for the people it was supposed to benefit. The narrative draws to one side the curtain of opaqueness that more typically screens the disjuncture between official ideas and the norms and practices of families on the ground.

The Ncanywa family draw from social norms to manage the devolution of property. Chief among them is tracing family linkages through the male line of descent, common and consistent throughout Rabula. Descent defines family relationships and the scope of 'family property'.

¹⁰⁶ In strict anthropological discourse, a lineage that branches or splits produces 'lineage segments' or 'lineage remnants', as is the case among Rabula families. I do not make these distinctions, and stick to the simpler term 'lineage', or 'branch lineage' which serves to distinguish this modality of a family 'group' from a nuclear family arrangement.

6.4.3 The contingency of lineage composition

An indirect theme that emerges from the story relates to signs of land accumulation during the second generation of family ownership in Rabula, one that is repeated in several other families, clearly the wealthier families. Unallocated land was available for purchase in Rabula until the close of the century. Many of the original grantees purchased more than one property to provide for sons. In this case, the original forebear of the family, Ncanywa, purchased four properties. The property that was subject to the enquiry was the original grant, which was regarded as the main family property, farm no 1336, roughly 17 ha in extent. It passed through the eldest son, John to the present generation. The other three properties are across the valley. These went to the other sons, at which point the lineage branched into two. Two are small plots (under 6 and 4 ha respectively). The third is 23 ha and home to a large lineage that thereafter branched off into a distinct family lineage for the purpose of property claims. The present generation associated with this property trace their descent from two younger brothers of John, Enoch and Eneb or Magala, who took over the property from their father Canywa, who is the common ancestor to both lineages before the family split into two. The two respective extended family lineages regard themselves as closely related and celebrate family ceremonies together, but to all intents and purposes, their day-to-day lives are lived quite separately, the property being totally separate.

Table 1 has been compiled from Deeds information. The main family property (farm no 1336) is interestingly one of the few properties where the family has registered the property in the name of a living custodian, namely Stewart Tatase. He was suffering ill-health when the interviews were conducted. His sister, Virginia wished to succeed her brother as the custodian of the property.

Table 11: Current Registration Information Ncanywa property, branch lineage

Ncanywa, Stewart Tatase	1336 (lot 67)	Title deed T1225/1988 - CS	16.7937 ha Kabula Valley
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Registered owner & Property	Title Deed & Date of registration	Current claimants	Legal procedures	Details and relationships
Stewart Tatase Ncanywa (alive) in 1988 Farm no. 1336	Canywa first grant 1/10/1868 Current registration: 23/05/1988	Descendants of John, eldest son of the original grantee, Canywa. John had three sons, Paul, Simon and Alfred.	Grant. In 1931 i.t.o. Act 38/1927 and Proclamation 119/1931, the property passed to control of the Chief Native Commissioner, Cape. Endorsed in favour of S.G. [Simon] Ncanywa in 1961; transferred to Stewart Tatase in 1988	Original grantee: Canywa (1868). Awarded to S.G. Ncanywa 16 May 1961 by administrative action. Transferred to Stewart, son of Simon in 1988. Simon's eldest daughter, Virginia, wants to succeed Stewart

The Ncanywa narrative reveals that exclusion from the property — what makes you 'other' and not family — is based on whether or how you are affiliated to the lineage. In other words, exclusivity and inclusivity

are harmonised with patrilineality. The exclusionary principle is applicable to all freehold properties in Rabula and to a large extent, Fingo Village. Over the course of the succeeding chapters we shall see that this is a crucial concept in African land ownership as narrated by the respondents in the field sites (there are of course exceptions). The norm is strongly evident in both case study sites. In the Ncanywa case, one of the senior sisters plays a leading role in the property affairs, but as ‘sister’ and not wife. She has her own children, but has retained her natal family surname, Ncanywa. The social code for transmission of property rights is an ongoing process of ‘sideways’ devolution in accordance with principle of patrilineal descent, discussed in Chapter 3.7 above.

6.5 Case 2. The Jara family, Rabula: tension between heredity and modernity

6.5.1 Narrative

The second story shows how generational cycles have affected property ownership through broader historical changes. The story¹⁰⁷ reproduces the themes raised in the first case, highlighting the continued significance of lineage land, in this case by a landowning family that regards itself as thoroughly modern. The present generation wishes to resurrect agricultural enterprise, which became virtually moribund over a long period of time. Issues of agricultural investment have again sparked the problem of title registration. The family is facing challenges regarding the currency of the title for purposes of official recognition. The case also illustrates changing and contested women’s rights.

Over several generations, the family has, like many other prominent landowners in Rabula, invested surplus income, not in expanded production, but in educating children. But now members of the Mangala lineage¹⁰⁸ of the Jara family want to invest in agriculture. Fencing being seen as a critical precondition to expanding production — their property is surrounded by commonage and other homesteads — they approached the Department of Agriculture for assistance in terms of one of its subsidy programmes. The Department insisted on verification of a current owner on their title deed. The title, however, is registered in the name of my respondent, MJ’s, great-grandfather, Livingstone, dated 1964, the result, not of conveyance in the usual sense, but of an administrative intervention to update title deeds¹⁰⁹. As a result of the inability to produce an updated title reflecting the current ‘owner’, the initiative stalled.

MJ, now a prominent political activist and intellectual, played a key role in these negotiations. He remembers an introduction to his family land in Rabula as a small boy. He grew up in his mother’s village

¹⁰⁷ Interviews, MJ, Grahamstown 20/08/2010; 14/10/2010; 14/04/2011; 4/07/2011; Deeds office and survey records of Jara properties; a genealogy of the Jara lineage.

¹⁰⁸ Named after a second generation forebear, from whom the family traces its descent and familial relationships in relation to the family property. The lineage is called either *indlu ka Mangala le* (house of Mangala) or *ngabendlu ka Mangala* (... of/by Mangala)

¹⁰⁹ By Commissioners similar to the process referred to in the first case, and explained in Chapter 5.11.

near East London and at the age of five his parents set up their own home in Mdantsane¹¹⁰, from where he began his schooling. His story relates to a memory, aged seven, of trudging up the hill with his father towards their Rabula plot, and being sternly rebuked when complaining of the distance to ‘this place’, his father shouting back that it was not a ‘place’ or a ‘house’ but “its your home! ... *Siyagoduka*, we are going home!”

From then on MJ had no doubt as to the weight of this assertion, and the attachment to family land solidified over years of weekend and holiday time spent at their rural home with both paternal and maternal cousins, tending the cattle and becoming acquainted with rural family custom. By chance of political history, he had the opportunity to strengthen his sense of Rabula as ‘home’ when, as a result of country-wide school boycotts in the mid-eighties, he was sent to school in Rabula for two years, living first with his aunt in the village settlement, and then later his grandfather on the family plot. His sister and brothers, (who include the sons of his father’s brothers, translated as ‘cousin-brothers’), and maternal cousins all grew up outside Rabula.

Each of his father’s brothers, and his father’s uncle, have separate homesteads on the family plot, the original ancestral owner having shared the property with his brother. Now MJ, his father and one of his uncles want to invest in agricultural enterprise on their plot in Rabula, seen partly as a way of honouring the earliest generation of Jaras who were able to sustain their family from the rural base, processing and selling surplus grains, wool and vegetables. The slow contraction of their rural livelihood that forced his grandfather, father and father’s brothers out of Rabula into urban employment is described in terms of failure or ‘loss’, and hence the commitment to renewal and restoration of pride in the agricultural capital that once existed. With surpluses generated through employment, other family members were educated in efforts to restore family capital, but at the expense of rural accumulation. The inculcation of values of industriousness and strict discipline runs through MJ’s account of experiencing his rural family home.

The acquisition of property in the previous century is bound up with the way the family traces its genealogy, the latter simultaneously legitimating family claims to property. The original family is thought to have emigrated from KwaZulu-Natal, passing through Mpondoland into the Cape Colony, but not identified with the Mfengu movement or identity. The family was wealthy in livestock. MJ’s great-great-great grandfather, Jara Qoloza, purchased land in Rabula in the 1860’s after the calamitous frontier conflicts led to the expulsion of the Xhosa from the Amatola Mountains. As we saw in Chapter 4 and 5, what unfolded was a new territorial arrangement to populate the confiscated land with colonial subjects, including blacks seen as outside the immediate conflict between British and Xhosa. This case shows that a minority of purchasers included individual families from ethnic groups other than amaMfengu. Jara Qoloza bought a 16 ha plot¹¹¹ in Rabula in 1866, and his name appears on the title deed as Jara Gqoloza. This land devolved on his first-born

¹¹⁰ Mdantsane is currently a suburb of East London, but was formerly the largest black township in the region, zoned as part of the ‘Ciskei’.

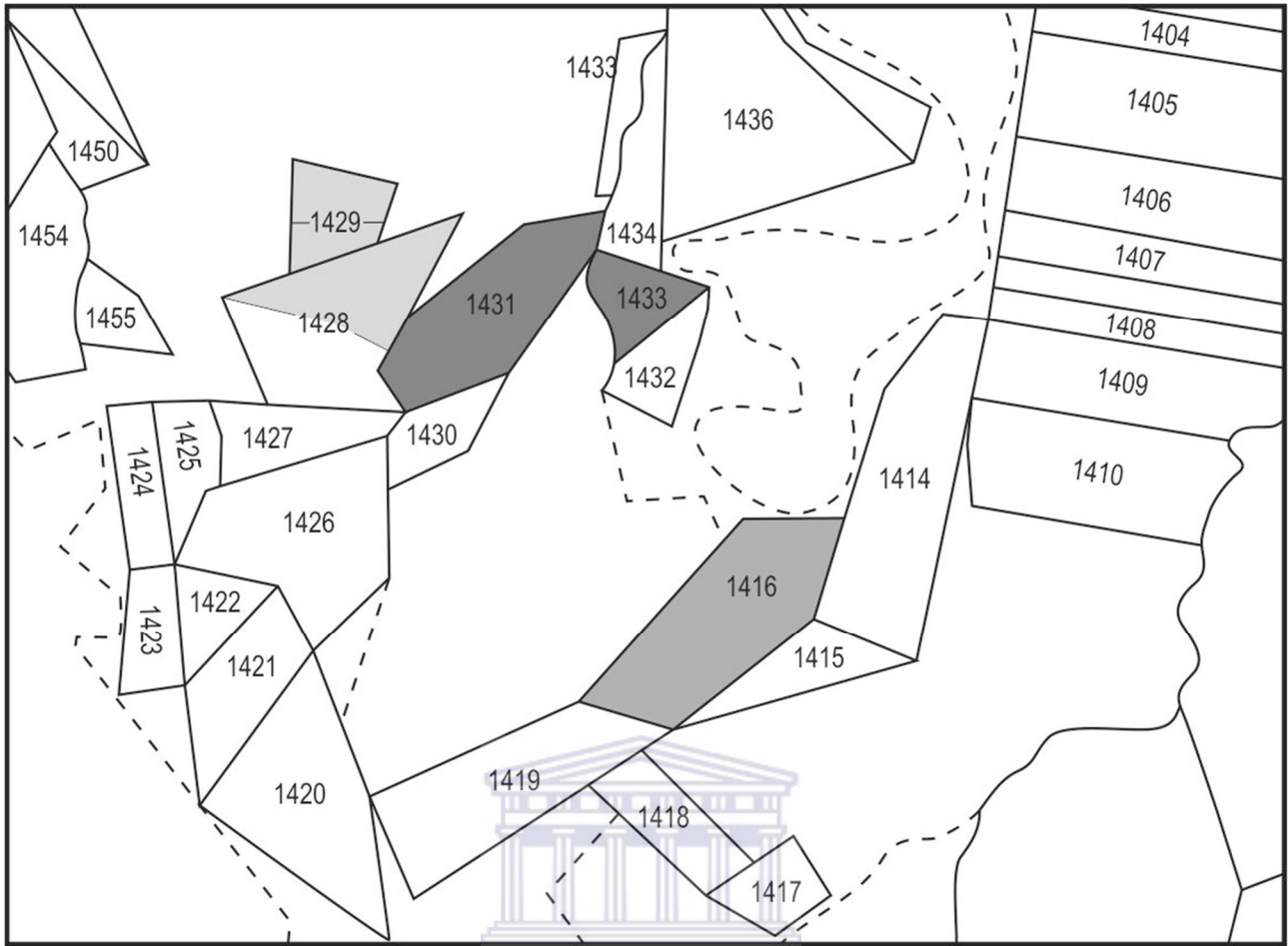
¹¹¹ Plots were for residence and arable purposes, with access to the commonage for grazing (see Figure 1).

son, followed three decades later, in 1895, by the purchase of a second large property about 17 ha in extent, along with smaller plots, for the other sons.

From that time the Jara family branched into two. MJ is associated with the second. Many modern Rabula landowning families can be traced to additional properties acquired during the second or third generation, as in the Ncanywa case recounted above. This process resulted in sons other than the first-born acquiring properties. At that point, the large lineages branched into two or three lines. Families tend to trace their genealogy from whichever generation acquired the title. This means that families tended to fissure, and the present generation traces descent, not from the first title in the family, but from the first title in the relevant branch of the family.

MJ's family traces their lineage from his great-great grandfather, Mangala, whom MJ and his siblings refer to as *tat'omkhulu*, son of Jara Qoloza. Mangala appears on the title deed of the second property as 'Woodland Jara', and through his line of descendants numerous descendants claim rights in the family property. The family distinguishes between 'their' ancestor Mangala from the first title holder, great-great-great grandfather, Jara Gqoloza whom the family recall as Ogaba. The family, however, generally refer to Jara Qoloza as *indlunkulu*, which means 'first man', or *ukhokho-wokhokho*, 'original ascendant'.

Besides the homesteads and open areas, the property has three fields owned by particular members of the family (all men), and a fourth is about to be cleared. Individual family members have life-time use rights to sections of these fields, and see themselves as 'owners' of these portions, but they cannot transmit the land to heirs independently of the family lineage. These portions are informally subdivided amongst family members whenever an event precipitates a change, e.g. a death. The subdivisions are not surveyed or registered, which would have the effect of conveying independent rights of ownership, a principle strongly resisted.



Key:

1416	The sub-lineage of Woodland branch. Original title No. 1416: Jara Qoloza. Awarded Woodland 1964. Home of MJ (respondent).
1431 1433	The sub-lineage of Edmund branch: Original title No.1431: Jara Qoloza. Awarded Edmund 1960s. First title No. 1433: Majova. Alfred Jara bought, awarded to Edmund 1960s.
1429 1428	The sub-lineage of Lennox branch: Original title No. 1429: Jims Jara (later subdivided); Original title No. 1428 Finca. (Split into undivided shares. Lennox had half share, which was later divided by further undivided shares.
The homesteads of all the properties are on ridges. Respondent's property (No 1416) is separated from the other branch of the family by a deep valley, each set of homesteads visible to each other on opposite ridges. Other members of the original Jara lineage have properties elsewhere in Rabula, including the residential settlement	

Source: Adapted from Topographical Survey Sheet No 3227. CQ-5CD. 1958. Office of the Surveyor General, Cape Town

Figure 2: Jara lineage properties showing original land of first forebear, Jara Gqoloza (*ukhokho-wokhoko*)

The Jara family continue to attach great importance to their lineage, for which purposes the customary male-male pattern of tracing descent is adhered to (see Chapter 3.4 – 3.6 above). Male-male succession is however more diluted than customarily practiced in the past. In their modern discourse, the male first-born is still regarded as *inkulu* (from the stem word for 'big', or head of family), which, however, is a mark of respect, rather than power to take unilateral action. The family employs 'more democratic' principles in decision-making these days. The natural talents, skills and interests of each family member can be harnessed to enrich the social capital. The family attempt to arrive at agreement through discussion and consensus, women playing an important role. An aunt of his father was an influential national figure in nursing and seen as a

role model of modernisation. Her education was, however, shouldered by her father to the exclusion of her brothers who went straight to work. To this day, his own aunts — his father's sisters — play pivotal roles in decision-making in all important matters including property. These sisters of the lineage who have married (MJ's paternal aunts) may not in theory make claims on the family land as married women, but neither have they done so. Their continued involvement in the management of lineage land is a reminder of how strong women's lineage ties remain, even after marriage.

For property to remain in the direct line of the Jara men, wives similarly do not have independent rights, but have use rights. As widows they carry the important status as caretaker, but they are 'in charge' of the property only in the temporary sense, until their sons get married. Wives or sisters may not transmit rights directly to a daughter, as this would threaten the lineage with loss of 'territorial' control over the family land. Unmarried female members of the patrilineage continue to belong to the Jara lineage, as do her children, providing they keep the name of the patrilineage.

The customary position of *'indlalifa'*, the male who inherits the moveable property and the position of head of family has virtually disappeared from the Jara family repertoire (a situation repeated in most families in Rabula and Fingo Village). *Indlalifa* means the person who 'consumes the inheritance' from *'ndla'* to eat and *'ilifa'* inheritance, in the past denoting the 'first born'. The term is an anomaly today. The connotations of exclusivity and heredity, with associated gender distinctions, create anxiety about the concept of *indlalifa*. There are nevertheless some claims that may be associated with the first-born as a mark of respect or recognition. For example, a particular field. MJ describes this interweaving process as an 'interplay — an in-and-out of *indlalifa* and *inkulu*. New norms do not entirely displace customary norms, but are increasingly subject to a range of contingencies that restrict independent power over the land.

The family is thinking of registering the property in the name of a family Trust, in an attempt to harmonise legal necessity with the practice of recognising multiple family members. If the Trust becomes a reality, the family propose to name it after Mangala, the 'first man' of their particular branch of the family.

Jara property 1416 multiple homestead layout

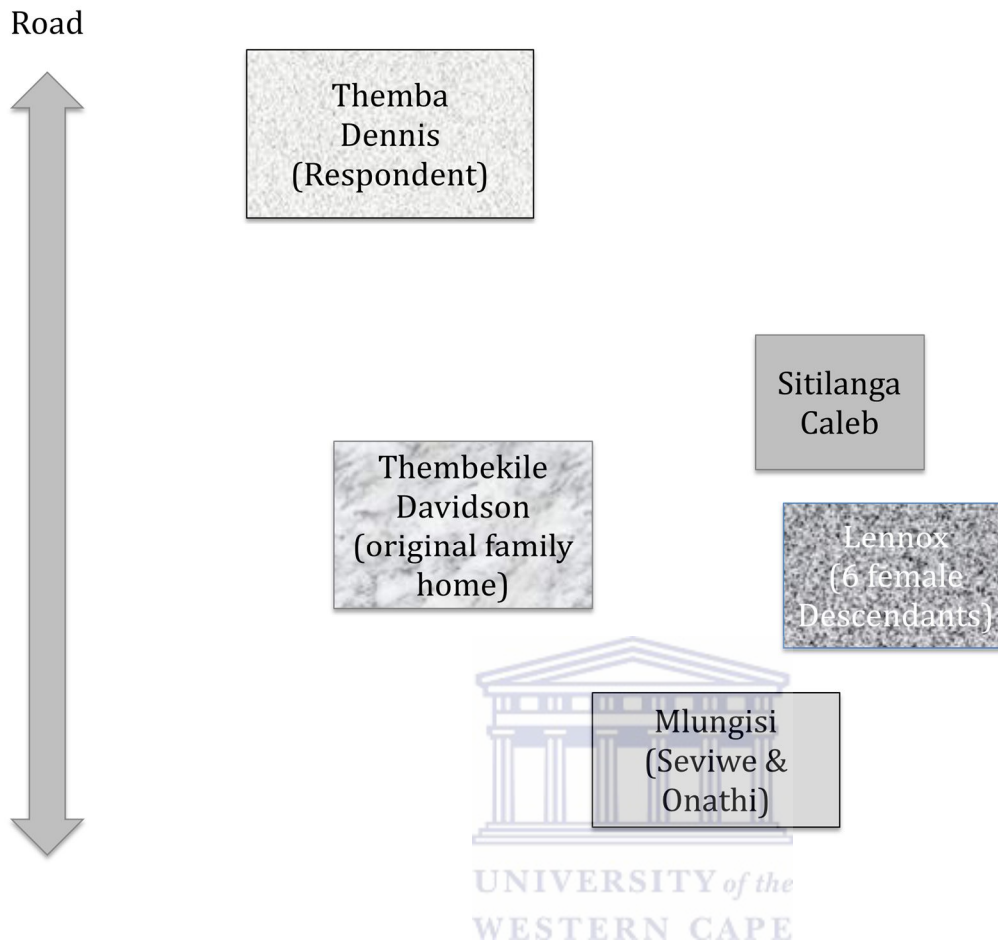


Figure 3: Lay-out of homesteads on Farm 1416: ancestral home of Mangala branch of the Jara lineage, the “House of Mangala”

6.5.2 Analysis

Some of the themes in the first story are replicated in Jara narrative, although each family history followed distinctive social trajectories. The patrilineage continues to be important and defining in the Jara family, but the norm of identifying kin through male members of the family is clearly under pressure. The pressure for change has not resulted in transformation, but rather in adaptive practices. The gender relationships conventionally associated with patrilineality are not neatly resolved, and may continue to raise dilemmas in the future. It is significant, however, that women have clear rights of access and play an important role in property management, and in this case aunts of the narrator (who are mostly non-resident) have various forms of authority over decision-making. The story also reveals the importance of sibling relationships (including classificatory siblings, known in western families as ‘cousins’), which in many respects are the relationships that link members of a present generation together in lifelong bonds.

Like the previous family, this family has also tended to follow the convention of leaving registration in the name of a common ancestor. The desire to modernise agriculture has, however, moved the debate about currency of title from the halls of native administration and court offices to the very heart of the family itself.

The story reveals some of the changing patterns of production. At the turn of the century the land market ceased to provide additional land for would-be purchasers or *notenga*. Land was effectively 'frozen' within the confines of the native reserve economies, and brought to an end the potential for a pattern of land accumulation. The properties acquired by the turn of the century are therefore to a large extent the properties owned now. The period coincided with the contraction of the agrarian economy in African areas. Lack of rural sustainability was manifested in third generation offspring commuting or migrating to work in urban areas, in many cases to sustain rural-based livelihoods, lacking the capital to intensify production and unable to acquire more land¹¹². This generation did not generate surplus from intensified production, as the previous generations had done, but raised the surpluses in wage labour and reinvested it in education. In spite of the withdrawal from agriculture, family properties remained important sources of social capital in the form of social status and a means to bind family members in reciprocal relationships.

It is not surprising that this 'modern' family is exploring legal alternatives after their frustration with bureaucracy on account of the problems with their title deeds. An option being explored is to form a family Trusts¹¹³, which is a statutory form of property and possibly the nearest equivalent in western law to the customary idea of a group that is legally separate from its individual members. Will this be the answer, or simply create other unexpected or unintended consequences?

¹¹² See Bundy (1979: 109-134) on the contraction of the agrarian economy and the effects on the peasantry. His argument was subsequently extensively critiqued as an analysis of uniform agrarian change in South Africa, but remains compelling in its general analysis of agrarian processes among the peasantry typified by the social composition of the modernising peasantry in Rabula. See Beinart 1982 for arguments about reinvestment of migrant incomes in the rural economy.

¹¹³ Another family, discussed in Chapter 7.2 below, is also exploring the possibility of forming a family Trust.



Figure 4: One title, four families.

The photograph is of the Silwana lineage property: an example of one property with one title, shared among four branches of a lineage, descended from four brothers. The circles represent each homestead.

6.6 Case 3. The Radebe family, Fingo Village: threats to family property when a wife wills family land to her own kin

6.6.1 Narrative

This story is about a large extended kinship unit with multiple individually-owned properties in Fingo Village, which are still regarded as falling within the ambit of family ownership and management. There are strict norms and local social sanctions to protect lineage rights in family land. Wives of lineage members are expected to conform to these rules at the risk of social ostracism.

The Radebe family¹¹⁴ is descended from four brothers who acquired four properties three generations ago in Fingo Village. The family regard themselves as ‘one family’, *umzi omnye*. Vusi Radebe died in 1999 leaving

¹¹⁴ Not their real surname or personal names below. The oral information was acquired during five interviews in Fingo Village. NMR 14 Jan 2008; 16 March 2010 (Albert Street); relative 24 March 2010 (A Street); five relatives 8 Sept 22 Sept 2010 (A Street). Documentary evidence from Deeds Registry.

a legacy of ambiguity and tension regarding the ownership of two of the properties, No 2 and No 3 Albert Road. The other two are in A Street nearby.¹¹⁵

Vusi was descended from one of the original brothers, Charles Goodman Radebe, owner of No 2 Albert Road. Vusi and wife Nomtunsi Maureen (hereinafter referred to as NMR) resided at No 2, drawing rents from tenants in No 3. This arrangement remained in place after Vusi's death, his wife NMR continuing to live at No 2 and in charge of the tenants and rental at No 3. No 2, where they resided, was, however, registered in his younger brother, Siyabulela's name. Siyabulela lived with his family in Port Elizabeth. It had previously passed from Charles to his wife (the brothers' mother), and after Siyabulela's death in 1990 to his wife, Jane Nompumelelo, in terms of intestate succession. It is still registered in her name. Although living in Port Elizabeth, the family maintained regular contact with the Fingo Village family.

Vusi and NMR had no children. They had not been on good terms with Vusi's extended family. The stand-off worsened after his death, flamed by uncertainty regarding succession. As mentioned, NMR continued to live in No 2 Albert Road. During their lifetimes, she and Vusi had claimed the property as their own, and now she claimed it for herself. In two interviews she told me the property belonged to her in spite of evidence to the contrary. This interpretation was strongly contested by the extended family, who regard Jane's family in Port Elizabeth as the legitimate owners. According to the family, Charles had selected his younger son, Siyabulela, and not Vusi to succeed him.

Although the family did not trust her, an uneasy truce prevailed during her lifetime. According to the family, NMR was unwilling to involve herself in Radebe family matters, seldom visiting the A Street homes. Another non-family resident described her as reclusive and difficult. In July 2010 NMR died, igniting the simmering tensions into open conflict. Her death has enabled the family to reclaim the property, and Jane, the registered owner, wants her son to move there.¹¹⁶

What remains of the decades-long tension is an intractable disagreement regarding ownership of the long tenanted No 3 Albert Road. Meshack, Vusi's uncle, was the original owner, succeeded by his wife, then son, Holdane, who had no children. He was a miner in Johannesburg, returning later, ill with tuberculosis. According to the family, Vusi and NMR did not care for him¹¹⁷. On account of the tensions, Holdane drew up a 'will' which the family insist he gave to neighbours for safe-keeping, indicating it was not a registered will. The will stated that he desired the property to be administered by his aunts in A Street. Five years after Holdane's death in 1984, however, it was registered in Vusi and NMR's names jointly as an award by a Titles Commissioner. In 1989 a Substituted Deed of Grant was issued in terms of the legalities established in terms of section 7 of the Native Administration Act of 1927 to put the Fingo Village properties in order (see

¹¹⁵Not the real street names.

¹¹⁶Interview, 22 September 2010.

¹¹⁷Interview, 22 September 2010.

Chapter 5.13 above). It is still registered in Vusi and NMR's names¹¹⁸. As stated, the couple never lived there. It has been tenanted for many years. The family maintain that Vusi tore up Holdane's will.¹¹⁹

The extended family maintains that Vusi and NMR 'stole' No 3. They moreover maintain that the couple were never formally married. Their death certificates respectively state 'never married' but the Substituted Deed of Grant indicates marriage in community of property.¹²⁰ She maintained, for her part, that Siyabulela stole No 2. While Vusi was on Robben Island on ANC related charges, she alleges Siyabulela paid the balance of R10 remaining on a bond from a building society, and in her eyes had fraudulently acquired the family property¹²¹. There is indeed some indication on the Deed that the property was purchased rather than inherited.

The immediate spark for the dispute was the revelation of NMR's will. Unbeknown to the family, she had, towards the end of her life, consulted lawyers and drawn up a will, leaving No 3 to her own sister's daughter, her niece¹²². An attorney confirmed to me that he assisted NMR draw up a will, stating she had the right in terms of the law to leave the property to her niece. The attorney told me the niece had been 'adopted' by NMR¹²³. The Master of the Supreme Court is currently overseeing the administration of NMR's estate. The extended family contests the appointment of the deceased's niece as executor, and her claim to being heir of No 3. The family lodged a dispute with the Master, and was later summoned to put forward their case. They maintain that NMR's niece pretended to be NMR's daughter for the purposes of succeeding to her two investment policies as well as the property.

In terms of family custom the family expect No 3 to remain in the Radebe name. They had already decided on succession in terms of family norms. They regarded Vusi and NMR as custodians of the property, not owners.

6.6.2 Analysis

The story is broadly about competing conceptions of affiliation and the implications for property. Unilineal modalities, with criteria of descent, compete with criteria of marriage and conjugality when claims are made to family property. Social sanctions are applied when wives of lineage members interpret their claims as independent rights, which they may dispose. It is an anathema to the concept of lineage property for wives to act outside of the framework of kinship relationships. While no individual is sanctioned to act in this way,

¹¹⁸ Deeds Registry information as of 2010.

¹¹⁹ Interview, extended family members, A Street, Fingo Village, 22 September 2010.

¹²⁰ NMR gave me two different dates of their marriage during two interviews.

¹²¹ Interviews, NMR, Fingo Village, 14 January 2008; 16 March 2010.

¹²² In an earlier interview with me, NMR mentioned she wanted to leave No 2 (where she lived) to another niece, who lives in Queenstown. She emphatically repeated this throughout the interview. When I asked her how she intended transmitting a property that was not registered in her name, she asserted repeatedly that it was hers by right, that her brother-in-law had acquired it fraudulently. Interview, NMR, Fingo Village, 16 March 2010.

¹²³ Email, R. Laing (Wheeldon, Rushmere & Cole, Grahamstown) to R. Kingwill, 14 September 2010

the consequences when the individual concerned is not a member of the property holding descent group carry added weight, since it is not only the property that is threatened, but the integrity of the group itself. The degree of ‘abnormality’ from normative pattern places the threat in the realm, not just of the immoral, but of the malevolent.

Social recrimination is mobilised not only within the family, but the community. The detail of the story illustrates that the judgements were formed in the context of the whole trajectory of the couple’s attitude to the family, culminating in the wife’s attempts to actually appropriate family property as individual property. It is not just the ‘event’ itself that triggers denunciation, but the history of the wife’s disregard for family values over a long period of time. The couple’s disdain for the interests of the family as a whole, seen in their lack of participation in caring for family members, is taken into account in the strength of their outrage.

6.7 Case 4. Tshezi family, Fingo Village: tensions generated by the sale of land outside the lineage

6.7.1 Narrative

This case illustrates that conflicts can be generated, and recrimination sustained, over a long period of time when family land is alienated to non-lineage members.

Mabel Guza¹²⁴ bought a second plot next to her main residence in 1999. The purchase went through the formal processes and the title deed is currently in her name. Babalwa Tshezi, the granddaughter of the original owner, attempted to reclaim the land on the grounds that the seller had no right to dispose of family property. Tshezi¹²⁵ said she and her siblings grew up “believing that Wood Street was [their grandfather] Elijah’s family’s property Mrs [Guza] had no right to Wood Street”. Tshezi made representations to various authorities (the municipality, the magistrate’s court and the township administration) to reverse the sale. She claimed to have been ‘researching’ the matter for several years. She also sought legal assistance from the Legal Aid Clinic and arbitration from the township administration. On each of these occasions, Guza was summonsed. Mrs Guza in turn claimed that the arbitrators at the township administration refused to accept that her title deed was valid, of particular irony, given that it is one of the few title deeds that *is* current.

What appears to have happened is that Elijah Tshezi ceded the property to former tenants who had looked after him in his old age. The tenants, originally from Peddie, were well respected people in Fingo Village. When they later returned to Peddie and King William’s Town respectively, they sold the property to Guza,

¹²⁴ Interview, Fingo Village, 15 March 2006.

¹²⁵ Interview, Fingo Village, 9 May 2006.

who had been their neighbour and long-time acquaintance. Lawyers acting for the sellers assured Guza that the property was legally hers, but she was nevertheless anxious about the granddaughter's claims and threats.

6.7.2 Analysis

This case illustrates the perception that people have of permanent ties by kin to family property, and the associated inability to accept the sale of family land. On the other hand, the story also reveals that descent can be tempered by contingencies like care-giving and ties of affection in defining rights to land. In this case a family member evoked the idiom of 'caring' as sufficient ground for overriding rights defined by descent, and redirecting property to a 'surrogate' family. The disposal of the property to non-lineage members, however, resulted in a feud.

A senior male in the family passed family property to a family not connected through descent, but through ties of affection and responsibility. Descent alone is like a roadmap for identifying family members with claims to land, but is not a blueprint for defining rights to the land. Descent as a criterion of rights of access to land is malleable and adaptable and can take into account changes in families' affective ties with each other, and can into account character, events, affection, behaviour, and so on. Anthropologists call such relationships by the term 'fictive kinship', which means that relationships are modelled on kinship, but created by customary convention rather than the circumstances of birth (Keesing 1975: 149).

6.8 Case 5. Kate/Xhayimpi family, Fingo Village: intra-family tensions when family land is threatened by alienation

6.8.1 Narrative

The Kate/Xhayimpi story reveals another striking contrast between western law's view of ownership and customary norms in Fingo Village. The former provides for alienation by and to a legally recognised heir or heirs, the latter for property to be held in perpetuity by the family group, under the care of a family representative on behalf of the family. The theme replicates the theme in the Ncanywa case in Rabula, where the notion of an 'heir' delivered by common law conflicts with customary norms of custodianship, a concept that permeates people's understanding of how family property is held. The Kate-Xhayimpi family property was almost sold by an heir who could legally identify himself to lawyers as the son of the present registered 'owner'.

Lilian Kate¹²⁶ (family name Xhayimpi) is regarded as the custodian of the family property. In terms of the common law, her nephew, Archibald Xhayimpi, was destined to inherit the property from his mother,

¹²⁶ Interview, Fingo Village, 8 August 2006.

Nontusi, Lilian's sister, who died without a will. Nontusi was the oldest adult in the family and the title was registered in her name. The family was relieved to learn that the title was still in her name, as Archibald had insinuated that the property had been transferred into his name. Prior to that, it was registered in the name of David, the sisters' uncle; and after him, his wife, whereafter it passed to Nontusi.

Deeds research revealed that these registrations were not performed by the family, but had come about through adjudication by Titles Commissioners who applied common law principles of intestate succession. The registration of Archibald's mother's name was therefore an anomaly in itself, since it did not reflect the family norms of ownership. As we have seen, the processes of titles adjustment required the adjudication of 'an owner' for purposes of currency of title deeds. If there was some ambiguity, the family was asked to put forward a name. Nontusi had been selected, and was regarded as the custodian, and not the owner.

The family expected in terms of custom that after Nontusi's death, the responsibility for the property would fall on Lilian, the next youngest sister. The family claims this was discussed with Nontusi and agreed to prior to her death. Lilian is therefore regarded as the present custodian of the property. She is seen as the 'responsible person' who manages the household affairs, including the bills.

Archibald, who did not live on the property, but had his own house elsewhere, realised his power in terms of the common law and went to lawyers who confirmed his status as heir to Nontusi after her death. An eviction notice was served on the Xhayimpi family and they were notified that they had to vacate the property within a month. The legal notice referred to the occupiers, the family, as 'tenants'. The family had long felt vulnerable and had earlier consulted the Legal Resources Centre (LRC). The family suspected that Archibald intended to sell the property, and indeed he later made these intentions clear. In terms of the Intestate Succession Act 81 of 1987, Archibald, as the son of the registered owner, had a clear right to inherit the property of his mother. The LRC notified Archibald's lawyers that the family intended contesting the case with their assistance. However, in the subsequent months Archibald died and the threat of eviction was removed.

6.8.2 Analysis

This story replicates numerous others in Fingo Village where males who realise their power to dispose of property attempt to do so at the expense of the rights of their kin who are resident in the property. In this story, the common-law heir tried to sell the family property from under the feet of the family occupiers — his aunts and cousins. He based his claims to the property on the grounds that his deceased mother had been the owner, as her name was registered on the title deed. The family contested his claim, maintaining, in line with family practice, that she was the recognised custodian, but not the owner.

The family was rescued by inconclusive legal interventions, which helped to delay the sale. The motive of 'heirs' who sell family property is frequently to settle debts to local money-lenders, rather than to obtain the property for themselves. These cases result in conflict and emotional confrontations between family members. This family was fortunate, but others are less fortunate, the results viewed as family tragedies. Those threatened by eviction invariably seek legal assistance thinking the law is on their side, which it is not. Cases such as these provoke legal dilemmas, since there is no 'law' that lawyers can draw from to stay these sales, and they are unfamiliar with the strength and meaning of local norms.

6.9 Lineage land: Umzi ngowabo bonke¹²⁷

These stories, and countless others, reveal that the central principle, or hub, around which customary norms have adapted to western title is the idea of family property, to which all family members have rights of access, managed by a family representative. In their stories about what it means to have title to their land, people articulate ownership in terms of 'family property'. In English, narrators use the term 'family property', but there is no collective noun for 'property' in isiXhosa. When speaking in isiXhosa people refer to the literal items of property, e.g. 'this is our land', or 'this plot belongs to our family' or 'our family has title to this land'. Moveable property is similarly named.

'Family property helps to keep the family together,' according to Letitia Siziwe Mnyamana of Fingo Village,¹²⁸ who is a vehement upholder of the importance of family entitlement to the property. She says, in words resonant across Fingo Village, she would transmit the property to her children:

... because this is their home, bought by their fathers who passed away. They were born here and grew up here We call it family property because sometimes someone is disabled or unemployed. They can come back to that home, if a son or daughter [falls on hard times] you will take them in, even my grandchildren'

Siphiwo Baninzi's story was similar:¹²⁹

[I]n terms of our life we have what is called, the extended family. You may have somebody that we do not know who is related to this home. Maybe he went to the mines and worked there for years, or for ages, then when he comes back if we sell this place he will ... have nowhere to stay So that thing is of assistance If my father for example by chance has another child that we do not know, and as the time goes, we pick up that he does have this child, then it means, if he or she has nowhere to go, this is also his home or her home where he can be accommodated here. If he's got to be buried, then this property, we would use it for making preparations. ... So that is the value of keeping the home. Because, if you don't keep it, then it means such people would have nowhere to go, nowhere to be buried, and so on.

¹²⁷ "The home belongs to all of them". Interview, Adelaide Maduna Makuzeni, Rabula, 15 May 2008. She meant by this that 'we are all one family', even though there are several lineage branches with different properties, see Makuzeni family case in Chapter 7.2 below.

¹²⁸ Interview, 9 June 2006.

¹²⁹ Interview, 9 March 2010.

The language of family tenure is captured by the idea of 'belonging'. People *belong* to the extended family (their own lineage); property *belongs* to the whole family; and family members *belong* to the family land. Title functions to maintain family bonds, promote interaction and protect the family. Pauline Peters has also identified the importance of the customary idea of 'belonging'. With new concentrations of property in Africa, she argues that the older customary idea of people belonging to property is moving towards property belonging to people. As land in certain situations becomes "a property or a commodity", there is a shift "from someone belonging to a place to a property belonging to someone; in short a shift from inclusion to exclusion" (Peters 2004: 305). The changing discourse of belonging indicates a growing class differentiation and tendency to exclude. The Rabula and Fingo Village narratives interweave the sense of belonging as both inclusive and exclusive; moving between the poles of inclusion of lineage members, and exclusion of non-lineage members. The line is drawn at the margins of open-ended inclusivity on the one extreme, and commoditisation on the other.

We have established that the most important principle informing property relationships between owners and the outside world is 'family property'. Family property defines who is included and who is excluded. Who constitutes the 'family'? Rights in family property are associated with where and how one fits into the descent group, which I refer by the term 'lineage' (see discussion in Chapter 3.4 above). The ideational notion of the family is constructed by all the narrators in the study sites in terms of kinship relationships traced through the male line of descent. Forefathers form crucial links in the chain of descent. Extended even further beyond the immediate forebears who are traced to the title, apical ancestors associated with clan affiliation continue to be important in the descent line, and are a crucial symbols of social identity. Where the land is associated with property relations, descent linkages are traced to a forebear who acquired the property, and the property forms a crucial symbol of family unity. Thus, the 'first man' who acquired the property becomes the apical ascendant for purposes of property relations, while genealogies for ritual and spiritual purposes go much deeper. In the latter situation, it is not crucial for names to be remembered, since the concept is one of belonging and identity.

I refer to the family line, or patrilineage, as the 'lineage'¹³⁰, in spite of the fact that the title holders themselves have no such name, since the lineage is not a corporate group or identifiable collective of individuals that can be identified by the names of its members. They quite logically use the word 'family' which is the most accurate, since it conveys the idea of a category of related people who are eligible for culturally defined processes, including access to property. As such, the group is not a closed group, tightly bounded by identification with the names of specified individuals. If pressed, narrators speaking isiXhosa will refer to either the idea of a genealogy or 'family tree' or the idea of significant forebears. Generally speaking, however, the idea of 'family' represents the way in which they think of the relationships involved. Narrators speak of the family in terms of relationships, past and present, rather than in terms of a defined

¹³⁰ Wilson et al (1952: 46 – 51) also use the term 'lineage' to describe family ownership in Rabula and the other villages in Keiskammahoek district.

collective. All descendants of a common ancestor are included, dead, living and still to be born. In western law, individuals are regarded as legal entities with individual claims to property, and are identifiable as individuals, even within a corporate group. This is the case even with private group ownership: the individuals form a defined group with clear boundaries.

As mentioned, people use the word 'family' rather than anthropological words such as 'descent group', 'lineage', etc. because, in common with any cultural group, including the western family, descent is an ideology that validates particular family forms as being the normal and natural order, varying from culture to culture. It is true of any society that people regard their 'way' of defining who is their relative, and how they are related, and the implications for access to, and control over property, as 'normal', and others as alien or strange. My respondents thus did not construct their stories around any particular explanation or theory about what they meant by the term 'family'. In much the same way, a nuclear 'western' or westernised family would not feel the necessity of constructing an explanation for how their relatives are whom they are.

The use of the word 'lineage' in this thesis, is, however, important for analysis since it distinguishes the concepts of 'family' used by the freeholders, in contrast to the western notion of family, which is also the notion that is used in law. The word is used to express the means by which people trace, and organise, their relationships¹³¹. The distinctions become important, since kinship relationships establish which category of family members qualify for the purposes of ownership, use and inheritance of property, which are different among social groups since the relationships are "modelled on culturally recognised connections" between parents, children, siblings and through parents to more distant relatives (Keesing 1975:150).

Patrilineal descent, moreover, has significant implications for property and gender relationships. The relevance of patrilineal relationships for property relations is that the principles that inform the devolution of property are drawn from the descent group ideology. The implications are of great magnitude, since it means that the important lifelong bonds that are considered culturally important for the conceptualisation of the kinship unit, and thus the culturally recognised connections between parents and children, and extended to siblings and more distant relatives, are not drawn from the affinal relationships of marriage (such as the case in western constructs of kindred), but are genealogically constructed according to the male-to-male line of succession. This includes both male and female descendants of the common forebear (see Chapter 3.6). This conceptualisation of the family draws sharp distinctions between 'in laws' and relatives by birth, and the latter are further distinguished by their links through the male line, rather than the biological links to the conjugal couple.

¹³¹ Wilson et al (1952: 47) discuss lineage branching in Keiskammahok localities. These are anthropological signifiers to distinguish different lineage formations such as 'lineage segments' or lineage 'remnants'. In this discussion the specific detail is unnecessary as the analysis presupposes the constant 'doing and undoing' of lineage structures in response to pressures of various kinds. For this reason I use the term 'lineage' to mean the current family descent line identified by the family in respect of property, irrespective of the variations with which a more detailed ethnography would engage. Hammond-Tooke suggests that the distinguishing features of 'segments' or 'remnants' are superfluous given the un-corporatised nature of lineages, an argument he uses in support of his theory that anthropological emphasis on lineages are misplaced (Hammond-Tooke 1984: 80, 84).

I briefly recapitulate the method of establishing patrilineal descent because of the centrality and normalcy of this principle among the families in the research sites. As discussed in Chapter 3.4, it is common in Africa to trace one's relationship to family members through either the male line, or the female line, rather than bilaterally through both parents. This mode of tracing descent through either males or females is referred to as 'unilinear descent' as previously discussed. In the case of patrilineal descent, people are related if they can trace descent through males to the same male ancestor. Both males and females inherit a patrilineal family membership but only males can pass it on to their descendants. A patrilineage is, therefore, a multi-generational group (as opposed to a corporate group) of relatives who are related by patrilineal descent. Patrilineages in modern contexts can consist of a number of spatially separated families that resemble the nuclear variety, but they are linked by identification with an apical ancestor. As we have seen, the apical ancestor for calculating entitlement to land is the forebear who acquired title, called the 'first man'.

By contrast, cognatic descent systems construct the kinship group according to the biological links traced through both parents, which is the system Europeans regard as the normal state of affairs for calculating property relationships. Cognatic descent has numerous variations, but the most common is where every biological ancestor and descendant is a socially recognized relative, known as 'bilateral descent'. A family member is a member of both his or her father's and mother's families. These patterns have developed over a long period of time. Although bilateral descent is common among Europeans, it cannot be said to have been uniformly the case historically, and there remain many exceptions (see Chapter 3.7). This should not detain us here, except to point out that descent patterns have implications for how property devolves according to the legal norms embraced by the common law. In the African colonies, the European system was imposed when land became legally recognised as 'property' under title. This concept was later adjusted when customary law rules, drawn up by the native administration, contrived to build an alternative system of succession. The customary law version went in the direction of rigidity following pre-colonial African norms, which stressed the status of the eldest adult male as head of the (polygamous) family, who was also in control of the distribution of (moveable) property. The extension of this idea to inheritance of land was a novel adaptation under new conditions of colonial sovereignty. Neither of these approaches in law match the practices narrated in the stories above.

In Fingo Village and Rabula, there is a consistency in people's narratives in how they identify familial relationships according to the principles outlined earlier. This is important, as the property is defined as much by its powers to include, as by its powers to exclude. We have already seen that the principles of patrilineality govern rules of inclusion and exclusion, and by extension, who can make claims on the property. Family members, male and females, are affiliated through the male line. Homesteads are patrilocal, meaning that women customarily move to their husband's household, and the children are identified by their

paternal kinship group or patrilineage. The women themselves retain their original lineage or clan identity (Wilson et al 1952: 48-49).

The patrilineal and patrilocal social arrangements combine to create a pattern in determining how land is transmitted, since it passes through the landholding lineage as a whole, rather than through individuals. This model contrasts with property passing through legally identified individuals (called in law 'legal persons') by virtue of their relationship to the conjugal couple, as in the western family.

The descent system endures in its framing of family organisation and property despite the changing social, economic and political dynamics that impinge on property and gendered relationships profoundly. The kindred group who trace their relationships to each other through males to a common ancestor, identify the common ancestor as the 'progenitor'¹³² of the family line. In an interesting derivation of customary modes of identifying the 'original' ancestor, the freeholders invariably identify the progenitor as the first family member to have procured the original title. The descent line for property purposes begins with an identified person, who may be remembered symbolically, or through particular nomenclature, or simply as grandfather, *utat'omkhulu* (who may in fact be a great-great-grandfather). Also used is the term *indlunkhulu* which means 'first man', or *ukhokho-wokhokho*, original ascendant. A common ancestor is of central importance, as it represents the mainspring from which the entire family relate themselves in the living world. Actual historical details are less important than knowledge of the links in the chain. The forebear who is the apical ancestor for the purposes of entitlement to land is not necessarily, or even usually, the ancestor associated with deeper ancestral chains that run through clans. Clans are important for framing broad customary rituals and marriage rules, while the lineage determines rights of access to property. Respondents all stressed the continued importance of family property for performing ceremonies and rituals associated with the lineage or clan, while the expression 'ancestors' is associated with ritual and spiritual functions which bring together clans or clusters of lineages. These trends appear to be reinforcing mechanisms of belonging in circumstances of economic and political uncertainties at present.

There have been shifts in internal power relations over the years, particularly regarding women's rights. Nevertheless, the practical examples in people's stories attest to the strength of the continued relevance of families identifying their close relatives through their patrilineage, and by extension, a cluster of patrilineages forming their clan (see Wilson et al 1952: 47, 49). These practices can easily blur into patriarchal property relations, but they are not synonymous.

This construction of lineage property rights does not accord powers to the registered owner to divide or dispose of the property. Freeholders view ownership in terms of customary claims based on culturally

¹³² A term used by MJ, interview, Grahamstown, 14 October 2010.

constructed kinship relations developed over time: ownership is a process, rather than an event. Newly acquired land attracts these relationships that adhere over time. No individual has control of the property to the extent of having powers to dispose of it, or to identify particular heirs to the exclusion of others, except in some limited situations such as children born out of wedlock who are not recognised in the patrilineage.

These principles, while consistent, are not a blueprint. There are signs of change, but the basic principles are entrenched and persistent. We have already mentioned the central importance of a common ancestor who is, ironically, reinforced in the context of African title on account of the fact already mentioned that the first member of the family to have been granted the title (always males in this case) is regarded as the common ancestor through whom all subsequent descendants are traced. In this way the *idea* of title merges with the *idea* of ancestry, and it is difficult to distinguish them. Only disasters extinguish the link between the common ancestor and the physical property. Even then, e.g. in cases such as forced removals or evictions, the descent links remains strongly imprinted in family memory and claims might linger.

The overtones of immutability associated with social identity traced by descent are tempered by historical contingency. The interaction between family membership and family property perpetuates, and is perpetuated by, an accepted version of the family lineage.

Since the genealogy is invariably orally transmitted, 'as far as memory goes', the version accepted in the present is relatively adaptable to circumstance, but not absolutely so. The relatively fluid nature of these relationships means that there are always tensions that have to be balanced. Since these tensions are not generally governed by the impersonal and objective face of the 'law', the tensions are manifested in ongoing processes of social reproduction and through generational cycles. Tensions can escalate into serious conflicts that cannot be resolved by negotiation, and litigation of various kinds is always a potential sanction if social sanctions fail.

In spite of the theoretical position of individuals in a family lineage, which should assure their place in the family body, in practice family membership is not a 'given'. Relationships, like any relationships, must be kept alive. There is a large informal unspoken repertoire of family norms from which people draw to constantly legitimate their relationships. The most visible is active participation in family affairs, events and ceremonies. The corollary is that you threaten your rights to family membership, and therefore also to property, if you are physically and socially removed from the family.

Descent can, therefore, be manipulated to accommodate realities. People can be adopted into the family as 'fictive kin' even if their descent lines are not strictly traceable through 'blood', providing they behave within the repertoire of family norms. In contrast to the western notion of heirs, who can be completely removed in time, space and manner, rights in family property are related to participation.

Respondents' articulation of property as essentially 'family property', combining two *concepts* rather than legal entities, has profound implications for titling. In family tenure regimes, people with rights, claims and obligations form a *category* of rights holders in contrast to named, identifiable people who acquire rights of dominion. The category may be conceptualised, as Berry framed it, as a 'bundle of rights holders' (Berry 1993: 41; see Chapter 3.1. above). Although the principles are becoming more nuanced as family forms change, as municipal services and state housing become more widely available and as market forces begin to penetrate, property still tends towards family ownership. A first purchaser may be relatively free to behave as a proprietor, but once property passes to the next generation it becomes subject to family obligations and moves towards family property or 'lineage land'. This is widely considered to be a non-marketable asset.

6.10 Ugcina ekhaya

We have established three fundamental principles of property so far. First, property is 'family property'. Second, 'family' refers to a category of related kin who trace their relationships through the patrilineage to a common ancestor, who in this case is the forebear who acquired the first title. Third, no individual in the family has the right to alienate the land.

We have also seen, moreover, that these are not 'fixed' in stone, and are subject to contingencies and variations. Deviations do not mean that the overall structure of family property as described here is collapsing or fundamentally transforming. Rules and norms, including law, are observed as much in their breaking as in their heeding. The way of structuring relationships, that is the way in which categories of eligibility are perceived, would seem to be remarkably resilient, and still firmly in place. Respondents were generally at pains to point out that each family has its own way of managing property and its transmission, saying the matter was 'private' and not openly discussed or compared. Many narrators said that 'families differ' in the details of management. Variation in detail, such as the composition of the living social group ("the warm-blooded human beings" in the words of Keesing 1975: 10), individual characters and behaviour, wealth and poverty, age, employment, education, permanent residence, particular events, including accidents or good fortune affect families differently, and lead to different outcomes. There are innumerable contingencies that make each family's circumstances unique. Yet in spite thereof, the manner in which kinship relationships are defined in relation to the family property, as well as spiritual matters that are deeply affected by these relationships, are consistently represented throughout people's narratives across both research sites. Their approach is corroborated by the patterns that emerge from the documentary evidence.

How are these principles integrated into the day-to-day practicalities of life in these areas? How are concepts and categories of people and property applied to fixed parcels of land?

The stories reveal that properties are managed by chosen individuals. These identified individuals are custodians of the property on behalf of their families. The custodian is no longer identified by the customary position of eldest son or *indlalifa*, who also had rights of control and disposal of (moveable) property. The inclusion of land as a heritable asset renders the older position of *indlalifa* particularly threatening to the tenure security of family members, and has become something of an unspoken taboo in the language. The idea of ‘custodianship’ permeates people’s understanding of how family property is held.

The closest approximation of an identified individual associated with ownership is ‘responsible person’, a concept that permeates people’s articulation of property management rather than property ownership. A responsible person is usually chosen by mutual agreement and according to the contingency of the situation to manage the property on behalf of the recognised family members. To isolate a single individual as an owner with powers to transact would flout this basic principle of conjoined ownership.

A responsible person is required to act in the interests of the entire family and does not have *proprietal* rights to exclude family members from the property and is validated by family consent rather than title deed. ‘One person is the responsible person. That doesn’t mean they can sell. Property belongs to the whole family who decide.’¹³³ When pressed for a Xhosa word to capture the meaning of this concept, Gertrude Kade¹³⁴ used *ugcina*, a noun derived from the word *umgcini*, meaning ‘keeper’ (some respondents used ‘housekeeper’). This was the word most frequently used in isiXhosa, but is not without its critics (see below). To say that “I am the keeper of this house” does not clash with the concept of “I am the owner; this is my property It is the custom that even though this is my property, I do not have the right to sell it.” (ibid)

Terms such as ‘keeper’, ‘caretaker’, someone who ‘looks after’ the property and in some cases ‘representative’ are widely used. No particular word has replaced customary concepts, though in English ‘responsible person’ is the most common. The notion is one of custodianship, and I have used the word ‘custodian’ which seems closest to the Xhosa terminology. The idea of a guardian of the property is at odds with an owner, who is free to dispose of the property at will (or through wills). The conventional Western approach of identifying heirs *before* an owner dies (in wills) is turned on its head. It is the surviving family members who make decisions about property management when a custodian dies.

Ncanywa from Rabula referred to the position as “*umgcini ititile*”¹³⁵, the keeper of the title, which I discuss in the following chapter.

In Fingo Village custodians are increasingly women, while in Rabula custodians are still predominantly men. In the more conservative discourses of rural families, widows may be caretakers on behalf of the sons, which

¹³³ Interview, Bulelwa Cintso, Fingo Village, 9 May 2006.

¹³⁴ Interview, Fingo Village, 9 June 2006.

¹³⁵ Interview, Rabula, 1 April 2008.

has somewhat different connotations. Custodianship carries connotations of authority over the property, borrowed from the older idea of male authority over the family as a whole.

Mlungisi Makuzeni from Rabula explained in words resonant across Fingo Village and Rabula:

“The person written in the title deed doesn’t mean they can do anything they want. In terms the law they can, but in terms of our custom (*isithetho*¹³⁶) ... it goes into the family pool”¹³⁷

“It doesn’t mean the property belongs to him, he just sits on top ...”¹³⁸

Selection of custodians is not prescribed by rules. Decisions are the culmination of discussion, negotiation and, ideally, consensus. ‘Single events’ such as a death do not determine outcomes as dramatically as in the proprietary model, because property management follows processes of ongoing family reproduction and domestic cycles. The language of ‘management’ accords somewhat with the language of executors of deceased estates, who are appointed by the family to steer the property through the transition from one state to another. The difference in this case is that the arrangement is not transitional, but fits the customary idea of stewardship. This point becomes relevant when we discuss inheritance and succession, because it represents a good example of the intersection between western and customary principles of property.

6.11 Conclusion: “The title does not belong to him, it is a family affair”¹³⁹”

The chapter has shown how African freeholders have re-arranged the ‘bundle of rights’ associated with title in a particular way to accommodate their culturally constructed concept of the family, usefully captured by the term ‘bundle of rights holders’ coined by Berry.

Access to, and control over property is thought of in terms of ‘belonging’ — family members belong to the property and property belongs to the family. The core principle that unites the African kinship nexus with property is non-alienability of property under the protection of a custodian, who is at the same time responsible for the health and social reproduction of the entire lineage, past and present. In this way, title performs functions that give effect to the rights they wish to exercise.

Although respondents do not categorise their mode of tracing familial relationships by terms such as ‘patrilineal’, this is demonstrably the cultural convention in Rabula and Fingo Village. The fact that their language has no name for it is a reflection of the normalcy of the convention, something so ordinary that it does not require a special lexicon. Naming a concept is often necessary to contrast a condition with another.

¹³⁶ *Isithethe* means ‘traditional custom’ in isiXhosa.

¹³⁷ Interview, Mlungisi Makuzeni, King William’s Town, 4 April 2008.

¹³⁸ Interview, M. & S. Makuzeni, Quzini King William’s Town, 11 July 2008.

¹³⁹ Interview, Nimrod Ncanywa, Rabula, 1 April 2008.

The narrators for the most part did not consider it necessary to contrast their 'way' with another 'way', since it is uniformly practiced and understood, and the meaning is clear. The authors of the Keiskammahoeek Rural Survey, moreover, considered the patrilineal framework as the norm in Keiskammahoeek district as a whole in the mid-twentieth century, not restricted to any particular type of tenure (Mills & Wilson 1952: Wilson et al 1952: 46-48). As discussed in Chapter 3.4 above, there is strong evidence suggesting the practice remains widespread among many people of African descent in South Africa, particularly along the eastern seaboard among people who speak the Nguni languages (Preston-Whyte 1974: 178).

Managing family property is a delicate balancing act. There are always tensions and claims resulting from changing social values in the society at large, e.g. increasing assertiveness by women for independent rights, and the 'thin edge of the wedge' of commoditisation. The potential tension caused by a family property system guided by patrilineal descent is defused to some extent by the device of custodianship, which allows for evolution of female control over property.

Through the diverse family circumstances recounted by landowners in Rabula and Fingo Village, threads a core set of shared norms and customs, clearly at odds with state law. The state assumes that once registered, property will be regulated by the formal legal procedures, and, moreover, will follow the laws of the market when it comes to asset accumulation and alienability. These assumptions are not supported by the evidence, though there are individual examples of both. People's narratives collectively painted a picture of disjuncture between norms and law, but nevertheless, there is some interpenetration of state law and customary practice. The registers are bureaucratic perceptions of reality, like local property maps, that provide a means to traverse the land from the impersonal vantage point of government offices (and now, from computers), but these maps produce a version of reality that diverge significantly from that of the title holders. There is nevertheless interaction and inter-penetration, as shown by the fact that titles can be adapted to customary African social structures.

The experiences of landowners in Fingo Village and Rabula have emerged through unique historical circumstances, but there is strong reason to believe that their narratives of land ownership have wider and contemporary significance in the country as a whole. Their stories resonate with anecdotal evidence surfacing in a range of other formalising contexts where titling is being applied, e.g. state-subsidised urban housing settlements. The evidence suggests there is a shadow side to the legal exterior of the South African registration of deeds system, where it is the very accuracy, precision and predictability of the legal procedures followed that gives it its world-class reputation. The extension of the titling system in its present form is therefore a cause for concern.

The following themes have been illustrated so far, which are further elaborated in the chapters that follow.

- Legal dualism creates stark binaries that do not match the realities. These are shaped by norms that differ from legal rules. There is some intermixing and interpenetration of legal and normative orders, but culturally constructed familial relationships are important building blocks for property relations, and these clash with western-law principles of ownership and inheritance.
- The principles that African freeholders have adapted over time could be thought of as ‘living law’, a modern version of ‘customary’ law.
- The stories about property represent good examples of ‘socially embedded’ property relationships.
- Misunderstandings of local transmission practices by officials lead to extreme paradoxes in the length to which officials went — and still go, using state resources, to adjudicate ‘heirs’ among the freeholders, when the freeholders themselves interpret inheritance quite differently.
- The Rabula stories reveal that when land was available for purchase, African families who could afford to buy more land, did so, showing evidence of early land accumulation, which, however, could not be sustained in light of land constraints imposed by segregation and apartheid policies.
- Rural families branched during the second generation in cases where additional land was acquired. The process shows the close correspondence between the land titles and the way families think of, and constitute their familial relationships. The latter are referenced to both the land and the descent group, which is an evolution of older customary principles where land was not a fixed spatial reference point.
- Family property is not, in the ideology of the owners, alienable by any of its members acting individually.
- Influence over the affairs of the property is exercised by all family members, but differentiated by status based on relationships of marriage or birth, and according to seniority and gender.
- Gender as a criterion is becoming more diffuse than in the past, when gender was a firm differentiating label. Nevertheless, the descent group is structured along highly gendered lines.
- Gendered relationships in patrilineal systems create tensions and potentially complex dilemmas in social and policy discourse (see Chapter 8 below).
- No single person has powers of control, but the position of overall responsibility and authority is placed in an individual in the form of a position of authority I have named ‘custodian’, referred to in English as ‘responsible person’ by the narrators. Women may be custodians. Widows are generally considered caretakers on behalf of their sons, without the authority over property implied by the notion of custodianship, though in Fingo Village there are examples of the two overlapping.
- Rights of access are not transmitted through people as individuals. Both daughters and sons have rights of access. There are strict rules preventing married women (wives or sisters) inheriting or transmitting rights on their own account, as this would potentially introduce non-lineage relatives to the family property, and threaten both the lineage itself as well as lineage ‘territorial’ control over the properties.
- Women maintain strong ties with their own lineages, even after marriage and relocation to their husband’s family home. Women maintain close links with their old family land and may return to it.

- The narratives in this chapter show the paradox of title, which is supposed to eliminate ambiguity and introduce the idea of individual ownership. On the contrary, title has not destroyed or replaced the social-relational basis upon which people base their access to land, though it has changed it. In this respect the scholarship on titling in the other parts of Africa (see Chapter 3.2) has been by and large replicated in South Africa.



CHAPTER 7 MAKING ANOMALIES WORK: CONTINUITY AND CHANGE IN PROPERTY RELATIONSHIPS

7.1 Introduction

We have briefly discussed some of the key principles of family property and how family membership and claims to property are intertwined. The family is multi-generational and includes ancestors and people not yet born. The temporal dimension to property suggests a process of devolution¹⁴⁰ *over time*, in contrast to a single event *in time*. The inter-generational property-owning families, in keeping with lineages, trace their descent from a common ancestor. Interestingly, the genealogies are traced from the forefather who acquired the title to the property. This is an example of an adaptation of African family values and structures to a western concept of landownership.

A custodian is appointed to protect family ownership, but how does the property devolve from one generation to the next? In other words, how is this concept of ownership without powers of alienation adjusted to take into account movement in time: births, deaths and infirmity? What happens when a custodian dies? How are rights of access passed on over time?

In the early years, the native administration actively intervened in land administration in both research sites, influencing the transmission of land according to legal principles of inheritance. The case of the servitude for the furrow in the previous chapter (see 6.2.1) shows how neither bodies of official law (the common law and official customary law) captured the conceptualisation of lineage land, and how it was transmitted in practice. The social complex of kinship relationships defined in terms of the family title defies a neat formulation of inheritance, since that would imply inheritance by specified individuals (legal persons) in contrast to the idea of category of eligible people. Thus, when left to their own devices, the families followed normative patterns that precluded the nomination of individuals as the registered owner or heir, falling foul of the legal conditions of registration.

Okoth-Ogendo's conceptualisation in many key respects accords with freeholders' conception of a nexus of kinship relationships which define variable rights of access to and/or control over property, the dimensions of which change according to specific conditions. These dimensions have been adapted to accommodate title, in spite of Okoth-Ogendo's insistence that title is an anathema to African property relations (Okoth-Ogendo 1989, see Chapter 2.5). The incidence of title fixes the spatial element in so far as the outside boundaries are concerned, but as the case material in this thesis demonstrates, the social relationships among family members continue to exert a powerful influence over how property is held and transmitted. These are

¹⁴⁰ I define devolution in Chapter 8 below. Briefly, it refers to the broad processes of reproduction of property relations over time, as seen in the way property 'descends' as a whole.

in turn status-related. Access to, and control over family land is dependent on a number of variables, principle of which are identities related to ties of kinship and affiliation traced by descent, combined with socially constructed identities, such as gender and seniority, as well as material and other contingencies such as employment, assets or place of residence. Since most people have multiple identities, such as wage employment, urban residence, ownership of other properties, etc, and family members are dispersed, a critical factor in focusing the family identities around family property is the degree to which family members participate in family matters and invest in social relations associated with the property. There can be strong divisions in terms of wealth and status within families.

In this chapter I discuss the devolution of property in more detail to illustrate how the process unfolds *over time*, using particular case material. Social and property relations are revealed in the process of transmission of land. One of the difficulties associated with concepts of ownership, and particularly the transmission of property, is that language sometimes lags behind adaptation of old institutions to new. Language struggles to match cultural patterns of thinking and doing to social and political change. In situations where western and customary law have interpenetrated, the language of both can become ambiguous and vulnerable to mistranslation.

I reflect on the struggles people have to apply new concepts to older lexicon, and how the language attempts to accommodate these new forms of ownership and custodianship. The problem is compounded by the fact that kinship concepts and terminology are linguistic categories that denote kinds of relatives according to cultural concepts thereof, which we have seen depend on a range of variables in any society. In the previous chapter, we saw how the word 'family' has different cultural meanings, depending on family forms which define the relatives that are viewed as culturally significant. The concepts of 'mother', 'son', 'daughter', 'sister', 'brother' or 'cousin' are not the same for all societies. They may be narrowly conceived as relating to direct descendants (biological mothers and their offspring), or they may be more widely conceived as relating to lineage group, such as a patrilineage or a patriclan. From the point of view of property, the range of the circle of relatives is usually accorded special cultural recognition (Keesing 1975: 150). The variance between western cultural concepts of these linguistic categories and those described so far for the African freeholders, exacerbates the problems of translation.

I discuss confusions that arise when there is insufficient understanding of the practical and conceptual distinctions between rules of succession on the one hand, and inheritance of land on the other. The first two family cases below show how processes of transmission are conditioned and shaped by a normative complex that adapts to particular events. Transmission of property, since it involves passage of property, is associated with how people conceive of their kindred, that takes us back to the discussion in the previous chapter, which defines kindred in terms of a category of eligible people, rather than by their identities in the social group.

7.2 Case 1. Makuzeni lineage land, Rabula: inheritance and succession of family land¹⁴¹

7.2.1 *The dynamics of lineage land*

“Registering is just a formality. Underneath the formality, the family works out its own arrangements. The land will never get sold. That’s the convention. There is no way one of them could sell” — Bongani Makuzeni

“We don’t do it according to the law, we just do it alone” — Mandla Makuzeni

Three branches (sub-lineages) of the prominent Makuzeni family own prime agricultural land in Upper Rabula. The family is regarded as being among the most prosperous and influential *notengas*. The Makuzeni family plots adjoin each other in a block of surveyed parcels in the river valley below the main residential settlements, before it winds through the more distant hamlets. It is the largest valley in Rabula, an amphitheatre surrounded by patchworks of private land and commonage grading upwards towards the higher ridges along which some of the denser settlements have spread. The river snakes westwards through the valley, from the forested altitudes in the east towards the Keiskamma River basin in the west. Its course is accentuated by a green tinge of riverine vegetation with a border of neat rows of surveyed arable plots along its banks. At Rabula’s elevated western border the Rabula River bears the freehold allotments around a sharp bend, from where it twists through several smaller hamlets before coursing through the irrigated allotments of neighbouring Zanyokwe village and into the Keiskamma River. These were among the first batch of plots to be surveyed in Rabula — following the contours of the river according to the European land surveyor’s eye for irrigable potential.

Though highly prized by their present-day owners, the location of the family land in the river valley was not the first choice of the Makuzeni ‘first man’ or *ukhokho*, Jim Makuzeni, who acquired the first title in Rabula, whom his descendants recall as Macwele. According to the family’s somewhat dim recollection, their forefather preferred to reside on the elevated slopes of the mountains to the north-east, near the forests. Archival records confirm that some of the early land claimants chose to settle around the forests on Rabula’s north-eastern slopes. It would appear that the wealthier settlers placed more value on their cattle as property than the irrigable land in the river valleys. Over the course of time, much of the forested land along Rabula’s eastern borders was appropriated by the state for state forests, leading to protracted conflicts between some of the freeholders and the authorities (see 5.8 above). The Makuzeni family was eventually forced to relocate. The Makuzeni family still holds an abiding resentment towards the state authorities regarding the process whereby the pioneering settlers lost their most valuable asset: sweet grazing land for their cattle in the undergrowth of the forested slopes on Rabula’s eastern edges. Today one of the Makuzeni descendants is prominent in negotiations to wrest control of the forests from the state, in order to channel the resources to

¹⁴¹ The case is compiled from oral interviews with five family members: Patricia, Rabula, 14 July 2006; Bongani, Rabula, 14 July 2006; Mlungisi, King William’s Town, 4 April 2008; Adelaide ‘Maduna’, Rabula, 15 May 2008; Mandla, Rabula, 15 May 2008; Mlungisi, Rubual, 16 May 2008; Mlungisi & Rev Siphon, Quzini, King William’s Town, 11 July 2008; Deeds records, King William’s Town Deeds Registry; archival records.

the Rabula landholders¹⁴². The forested slopes and ravines of the Amathole mountains, with their ancient indigenous forests, including majestic Yellowwood, White Stinkwood and Cape Chestnut trees, are complemented by the ubiquitous colonial pine plantations.

The progenitor of the three Makuzeni sub-lineages was a prominent landowner. He was brother of Gubesa, whose son Nebuchan was one of the first headmen of Rabula¹⁴³. The present generation has very little knowledge of the details of that period. A reconstruction from the Deeds records shows that Jim Makuzeni, spelled 'Makussani', acquired two properties in freehold in 1866 — a smallish 4 ha plot, and a large allotment of 20 ha (farm no's 1319 and 1321, see map below). The larger family plot was regarded as the main property, held, in accordance with custom, for the eldest son. These two plots were curiously separated by another large 20 ha property (no 1320), which was only formally acquired thirty years later, in 1895. The acquisition in title may have been a formality to legalise *de facto* use, or perhaps the family leased this land before acquiring title. This property was registered in quitrent title¹⁴⁴ in the name of Makuzeni's second son, Mtuyedwa.

The present family recalls that there was a major family dispute that led to a lasting change in both how the properties are formally divided, and how the families relate to each other today. The main outlines of the story reveal that the conflict arose over succession to the main family plot acquired by Jim in 1866, farm number 1321, 20 ha in extent. Oral recollections, supported by official Deeds records point to a major conflict involving the property and some of Jim's sons (or grandsons), which occasioned a new division of property and permanent branching of the original family.

With hindsight it does not seem surprising that problems cropped up when one man had four sons and only two properties. There were several incidents related to the dispute, though the sequence is unclear. From the Deeds records it is clear that the main family property (no. 1321), the object of the dispute, was subdivided in 1908 on Jim's death. As we saw in the previous chapters, formal subdivision was, and is, extremely rare among African title-holders, pointing to the probability that the subdivision was a legal solution the family conflict; or it may have caused it. This plot had been destined for the first-born, Mnyakatha, but he died young, presumably predeceasing the subdivision.

Jim's second oldest son acquired the other large property, formalised in 1895, i.e. farm no 1320. His third-born son, George, left Rabula and settled near Mthatha, where his extended family still resides. The family does not know why he left, but the KRS v 4 mentions a pattern of migration by second generation Rabulans to the Transkei, where land was thought to be more plentiful (Mills & Wilson 1952: 47). The conflict therefore involved the descendants of the oldest son, and the youngest son of Jim.

¹⁴² Interview, M. Makuzeni, Quzini, King William's Town, 11 July 2008.

¹⁴³ NTS 6942 187/321.

¹⁴⁴ See Chapter 5.10 above, where I explain the process of granting second generation titles in quitrent tenure, and no longer freehold.

Following his death, all of Jim's properties devolved on his wife, Notasi, in 1908, the same year of the subdivision. That would point to the probability that the couple were married by Christian rites in 'community of property', which was an automatic consequence of a western marriage, i.e. the spouse was recognised as a co-owner. She thus formally inherited the properties in terms of Cape's intestate succession law, which later changed¹⁴⁵. She inherited both portions of the subdivision along with smaller plot. On her death in 1914, the main portion (1231/1), as well as the smaller property (1319) were formally inherited by her *youngest son*, Reuben¹⁴⁶. The records reveal the subdivided portion (1321/1) is today regarded as the original family property, and it is still registered in Reuben's name. It is occupied by his descendants.

The remaining extent (1231/rem) stayed in the name of Jim's wife, Notasi, until it was formally awarded by a Commissioner, according to the deeds records, to eldest son, Mnyakatha's, descendant, Kaiser as late as the 1960's, pointing to the successful claim to part of the family property by the family of the eldest son. The family remember this branch by the name of Albert, Mnyakatha's son, but Albert himself was never registered. It stayed in their grandmother's name until Kaiser was formally registered as owner of the plot in 1962. Thus, registration skipped a generation until the appearance of the titles Commissioner. His descendants remember that Kaiser was chosen by the family to be registered as the family "representative" on the title deed when a Commissioner adjudicated title in the 1960s¹⁴⁷. The middle property, 1320, owned by second-born Mntuyedwa's descendants in quitrent title, was similarly 'awarded' to one of his descendants, Bartlett in 1962 and is currently occupied by his descendants.

One can only speculate why and how the events unfolded. A possible reconstruction of the events points to the likelihood that, following eldest son Mnyakatha's death, the tenure of his wife and children became insecure, possibly provoked by claims to the family property by the youngest son, Reuben. One of my interviewees, Rev Sipho Makuzeni, who is associated with Mnyakatha's branch of the family (the 'Albert branch'), remembers that his mother, whom he referred to as 'the 'old lady', the wife of Mnyakatha, complained to her husband's brothers that she had no place to plough, and had lost land due to "crooked means". The family recalls a court case, and though the details are not clear, it is likely the subdivision was the result of litigation to recognise the rights of the deceased's eldest son's family. The title deeds and oral tradition together paint a picture of Mnyakatha's wife and children having felt threatened by loss of tenure

¹⁴⁵ Section 7.4.2 below, and chapters 9 & 11 discuss the legal consequences of marriage for property rights. In 1908, the common law recognised 'community of property' for partners of a Christian or civil marriage. This changed in 1927, when, in terms of the Native Administration Act, 'community of property' no longer automatically applied to property of couples married by Christian or civil rights, unless an ante-nuptial agreement had been drawn up to that effect. The couple would need to be sufficiently aware of the law to draw up a contract to hold property in common. Community of property between husband and wife ran counter to the norms of property held by the kinship group, and hence it was not a norm to which men readily capitulated (cf Chanock 2001: 280).

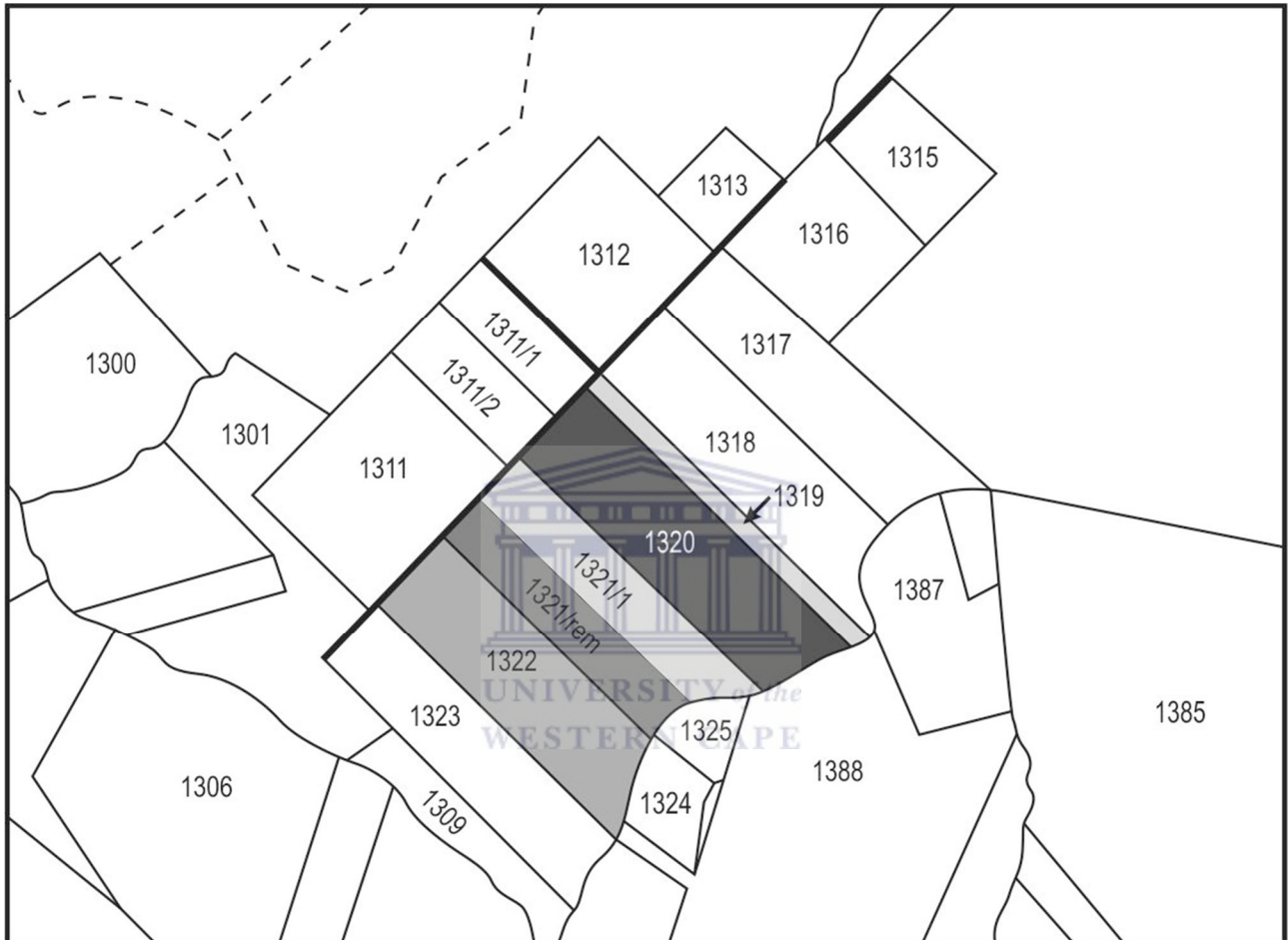
¹⁴⁶ Mills & Wilson (1952: 18; n.51) mention that traditionally, in terms of older customary law, women had the rights to the cultivable land rather than men, and the norm was for her youngest son to inherit her property. See Chapter 8 below.

¹⁴⁷ As mentioned in the previous chapter, the official records reveal that the government appointed a Commissioner in terms of the Native Administration Act of 1927, section 8, to update title deeds in Rabula in the 1960's, resulting in properties being 'awarded' to officially recognised 'heirs'.

when Mnyakatha died. This version would accord with the insecurity of wives to family land when customary values were translated into laws of inheritance of land.

Figure 5: Makuzeni plots by lineage branches

Farm no's 1319, 1320, 1321 (subdivided into 1321/1 & 1321/rem) & 1322



Key:

1319 1321/1	Lineage land: Reuben branch. 1319 and 1321 acquired by original ascendant, Jim in 1866. Reuben (youngest son) formally acquired subdivision 1321/1 after first registered in mother's name in 1908. It is regarded as original family home. Current descendants interviewed: Mandla.
1320	Lineage land: Bartlett branch. Descendants of Mntuyedwa, second son of Jim. Acquired in quitrent title in 1895. Awarded to descendant, Bartlett, 1960s. Current descendants interviewed: Bongani, Patricia/Maduna.
1321/rem	Lineage land: Albert branch. Descendants of eldest son Mnyakatha. Subdivision 1321/rem acquired 1908. Awarded to Kaiser in 1960s. Current descendants interviewed: Mlungisi, Rev Sipho.
1322	Private land: Registered in name of Mlungisi 2003. Acquired by his father in 1989.

Source: Adapted from Topographical Survey Sheet No 3227. CQ-5CD. 1958. Office of the Surveyor General, Cape Town

The most memorable consequence of the conflict in the family oral memoirs, however, is not so much the detail of the history, but that the dispute occasioned the splitting into three branches of the large original family. It is not unusual for oral tradition to confuse the sequence of events and genealogical order of their ascendants. The conflict resulted in the family branching into three, and correspondingly, the properties were split into three titles, the sub-division bringing about the third. The fourth small property tends to be discounted in the family narratives, but there were hints that it was historically set aside for daughters. If this

is so, this is significant, and would accord with the general pattern in Rabula that daughters' rights in family land were and are recognised, providing the family name of the patrilineage is retained. Mention has already been made that there are strict deterrents among freeholders to the diffusion of different surnames associated with family property, e.g. through a daughter's husband or her children.

The narrative and reconstruction of family records provide some insight into how the ongoing 'normal' processes of succession are intertwined with particular family events and administrative actions, during the course of which lineages could branch or consolidate. In this case, particular events brought about an altered spatial set up which influenced, and was influenced by, the way the lineages branched. The changing variables were therefore space and control. Three lineages controlled three properties from the time of the split and the subdivision. The combined lineages nevertheless continue to calculate kinship patterns through the common forefather who acquired title. Rights of access by all members of the patrilineage continue to adhere, but are controlled through new lines of access. Thus the conceptual structure of the family is not changed, but the physical unit, as well as the lines of authority may change.

Technical interventions were more likely in the earlier years when the native administration was more involved in the local administration of rural villages. In Rabula, native administrators intervened directly in settling freehold family estates and administering transfers. The case above is typical of the kind of interventions that were on the menu, e.g. formal subdivision and formal devolution to heirs according to rigid legal interpretations. The legal formula was, firstly to register the estate in the name of the wife of the original title holder when he died, and secondly, to subdivide the property when conflicts between families surfaced. In the Makuzeni case, a wife became heir to the original estate, followed by her youngest son as the officially pronounced heir. After the conflict had been resolved, the estates split into three separate estates, made possible by subdivision. As a result, each heir secured a title to land. Some fifty years after the conflict, the administration acknowledged ownership by the separate branches of the family by awarding the titles to two senior males adjudicated to be the rightful successor in title respectively. The third property is still registered in the name of the youngest son who inherited that property in 1914. This model was the official interpretation, wearing the officials' lenses.

If the vernacular interpretation is applied to the same situation, a very different picture emerges. The *de facto* situation was that three branches of the family (i.e. not individuals) resumed claims to three properties. They all acknowledged the source of the original lineage (the first title holder, or 'first man'), but now each property was directly linked to a successor in the next generation. The composition of the family remained the same, and access by all family members was guaranteed, with no individuals having rights of ownership, which meant the three estates succeeded as a whole, not according to transfers to individuals through inheritance. The *lines*, or channels, of access and control changed, but the cultural values remained in tact.

The registration of individuals was irrelevant to this model, but since it guaranteed title, the family found ways of accommodating the legal requirements as a necessary evil.

“We still stick precisely to the three families”, said the Rev Siphon Makuzeni¹⁴⁸. Today each family traces their ascent according to the originator of each branch for property purposes, rather than from their forefather, Jim; though for symbolic and ritual purposes, he continues to be revered as the founder of the family. Each of the sub-lineages is associated with clearly defined ‘family property’, and each family conduct family ceremonies and other events, including Christmas, separately. They nevertheless still regard themselves as belonging to ‘one family’. The block of land is collectively referred to locally as the ‘place of Makuzeni’, or *kwaMakuzeni*. The wider family come together for big family events and ritual purposes where lineage or clan affiliation is indicative, e.g. weddings. This pattern accords with similar observances among other large families that branched, such as the Ncanywa and Jara families discussed under 6.4 and 6.5 above.

There are different ways of referring to the three properties and family branches linguistically. When the context is the inter-generational landowning lineage, recalling that there is no word in isiXhosa for lineage, the word used is ‘house’. Alternatively, the physical property may be referred to by ‘place’. In the case of the Makuzeni’s, their houses (isiXhosa: *iindlu*) are identified by the names of their customary successors: *indlu ka Reuben*, *indlu ka Mntuyedwa* and *indlu ka Albert*. The properties may also be known by ‘place names’, which are linked to the names of present living representatives. The Makuzeni’s properties are thus known as *kwaThemba*, *kwakuloMlungisi* and *kwakuloBongani* respectively. The ‘*kulo*’ prefix is used when the son’s mother is still alive. *KwakuloMlungisi* is also known by the name of his mother who is still alive: *kwaMaduna*. ‘Maduna’ is her own clan name, invoked only as a place name, not conferring property. Themba, older brother of Mandla, died in recent years, and *kwaThemba* is now in the care of his widow, Mamyra, and is also referred to as *kwaMamyra*. The words for lineage, house, family, property and physical land are somewhat interchangeable, but the choice of expression is influenced by the specific context, e.g. whether it is the social relationships, social events or the ‘address’ that are being referred to¹⁴⁹.

The narrative reveals how issues of broader family solidarity give way to lineage fragmentation, which has a pragmatic association with physical space and property when families grow and the land is divided. The terminology to describe family property combines elements of place with elements of lineage identity. In earlier years the family oscillated between formal and informal procedures of succession, invoking both African norms and western law. Over the last fifty years there has been very little formal intervention, and in the case of the main family property, it is still registered in the name of Jim’s youngest son, Reuben, dating back to 1914.

¹⁴⁸ Interview, Quzini, King William’s Town, 11 July 2008.

¹⁴⁹ Interview, Mlungisi & Rev Siphon Makuzeni, Quzini, King William’s Town 11 July 2008.

Since the initial conflict, the three branches of the family have co-existed harmoniously. The family properties have not been able to expand according to the principle of each son acquiring a plot. Each property is associated a branch of the family, each of which is regarded as the collective owner. The families still appoint a male as the responsible person over each property. Bongani is the representative of the Bartlett branch. He is a principal at a school in Middledrift, and lives in Dimbaza. His mother Patricia occupies the main home, which he visits regularly, complaining bitterly that his children are urbanised and ‘soft’, and he is hoping to teach them rural values, and to work with their hands. Mandla, descendant of Reuben, youngest son of the original grantee, lives in the original dwelling of the old family property, which is, somewhat ironically, in poor repair. His brother Themba¹⁵⁰ was the family representative who died recently. He was a relatively prosperous member of the family, living with his wife in the modern brick house nearby, purportedly the ‘house’ of a second wife of his father, Isaiah. Mlungisi, eldest son of Christopher Moto, son of Albert, is the most active member of the family with regard to re-stimulating agriculture, but he indicated that he would nominate his uncle Rev Siphso Makuzeni to be registered as the title holder of the ‘House of Albert’ if a fresh round of titles adjustment proceeds. There have been official intimations of another round of titles adjudication to update titles in Rabula. I follow his story below.

The careers of some of the living members reveal that the Makuzeni family as a whole has continued to maintain its relatively high socio-economic status in Rabula, though the properties also support some members who are unemployed and less prosperous, in keeping with the customary norms of ‘taking care’ of family members who fall on hard times. Mlungisi represents a new generation of improving farmers who wish to invest in agricultural expansion. He has been involved in numerous court cases involving a dispute between freeholders and Trust rights holders. The dispute involves the delineation of commonage boundaries in the locality surrounding his families’ properties. He is also challenging the old colonial boundaries that separated the forests from the Rabula commonage in the north-east, as well as the loss of commonage to the south, which resulted from the feud between freeholders and the neighbouring settlements discussed in Chapter 5.8 above.

The two largest properties acquired by the Trust from whites (one of which was the original grant to the leader of the Rabula party, Chief Ngudle, see Chapter 5.6 — 5.9) was reserved as grazing land for the Trust landholders in the vicinity of the Makuzeni land. The neighbouring freeholders dispute their exclusive access to the grazing. This dispute reveals the changing dynamics of power and land control that can follow from state intervention. In this example, the formerly locally powerful freeholders found their access diminished by state recognition of the rights of the non-titled, diluting rather than affirming the economic power of title.

¹⁵⁰ Themba was regarded as a repository of local and family history, and I anticipated my interview with him with great enthusiasm. The first appointment was postponed due to heavy rains. Shortly after that, he died suddenly of a heart attack. He may have filled in the holes in the family narratives, and also provided an historical perspective on land ownership in Rabula. Interview, Mandla Makuzeni, Rabula, 15 May 2008.

Mlungisi Makuzeni represents one of a handful of farmers in Rabula who has visions of investing in agrarian production using both the family property and his own individual assets and energies as a springboard to accumulation. I now turn to his story.

7.2.2 Individual accumulation by individual purchaser and heir

Mlungisi's aspiration to expand agricultural activity has its roots in his father's efforts to accumulate land. Even though the lineage properties cannot be claimed as individual rights, it is possible for individuals to acquire land by purchase, and to retain and transmit the property as an individual. In 1961, Mlungisi's father, Christopher Moto, son of Albert, purchased a property that had at one time been declared legally 'derelict'¹⁵¹ in the Mcumeni area, close the forests in the east of Rabula, so beloved of his forebear. When a property adjoining their family property subsequently came up for sale, he purchased it, and sold the property in Mcumeni. The former property became available on account of the owners' lineage having produced no successors, i.e. there were no family claimants to the land of the Mafuna lineage. This phenomenon is rare in Rabula, but is the only avenue for land acquisition. The property devolved to Mlungisi through intestate succession law when his father's estate was wound up, and it was registered in his name in 2003. As individual heir to this property, eldest son Mlungisi owns it without the strings of lineage claims. It is one of the few properties in Rabula reflecting current registration status.

Table 12: Abridgement of Makuzeni properties and their associated families

Properties associated with three branches of the Makuzeni lineage			
Lineage ownership	Dates registered	Property farm no.	Approx Extent (ha)
<i>indlu ka Reuben</i> Descendants of Reuben, youngest (fourth) son of Jim. Inherited by Reuben, still registered in his name. Present generation interviewed: Mandla Makuzeni, Son of Isaiah	1866 (freehold) 1908 ('inherited') 1914 ('inherited')	1319; 1321/1	4 9
<i>indlu ka Mntuyedwa</i> Descendants of Mntuyedwa, second son of Jim. Awarded to Bartlett 1960's. Present generation interviewed: Bongani; Patricia (or Maduna, her clan name)	1895 (quitrent) 1962 (adjudication)	1320	20
<i>indlu ka Mnyakaza</i> Descendants of Albert, son of Mnyakatha, eldest son of Jim. Awarded to Kaiser, father of present generation. Present generation interviewed: Mlungisi; Rev Siphoh	1908 (subdivided, 'inherited') 1962 (adjudication: Kaiser)	1321/RE	11
Farm acquired by individuals: non-lineage land			
Christopher Moto, son of Albert, acquired property No. 1322 adjoining his lineage land from S. M. Mafuna in 1989, who had in turn had acquired it from the Plaatje family. Mlungisi, Christopher's son, inherited it in 2003. This registration is up to date. In the same year that he purchased No. 1322, Christopher Moto sold a property No. 1347, which he had acquired in 1961 in a different block.	1870. 1st grant Booy Plaatje. 1962: Mafuna (adjudication) 1989 C. Makuzeni (purchase) 2003 M. Mlungisi (inherited)	1322	17

Source: Oral interviews and Title Deeds information, Deeds Registry, King William's Town

¹⁵¹ Title Deed information, Deeds Registry, King William's Town. The meaning of derelict is there are no traceable owners.

Mlungisi Makuzeni is a senior official in the Dept of Agriculture, based in Mthatha at the time of the interviews, where he has been reunited with his great-uncle George's family who left Rabula in the second generation. His own home is in Dimbaza, and his mother occupies the main family home in Rabula. He is an active farmer in Rabula, utilising tractors to plough, and hiring a massive combine harvester from a white farmer in a neighbouring district to harvest his wheat crops. He is an active member of the Rabula Farmer's Association. He is supported in these efforts by his uncle, the Rev Siphon Makuzeni, who is a prominent Methodist minister living in a large home in *kwaQuzini*, on the outskirts of Kingwilliamstown. Mlungisi proposes to elect him as the representative of the lineage property of the 'House of Albert' should another round of titles adjustment require individual nomination, as discussed above.

Mlungisi is keen to purchase, in his own right, another neighbouring property that may become available due to absence of family claimants. The present owner is, however, according to him, not keen to sell to him, since local land accumulation is conventionally regarded as socially deviant. Though there are no legal sanctions against individual acquisition, there are local social sanctions in the form of disapproval and suspicion. The withdrawal of local support has consequences, since local social networks are important in maintaining and expanding one's influence and defending claims. Mlungisi describes the local resistance to individual accumulation as 'jealousy'.

Mlungisi's vision for future expansion includes exploring the idea of establishing a family Trust, ideally among all three branches of the family, failing which, his own branch of the family. His aspiration to reconsolidate the family unity, and to use statutory law to find a fit between the concept of 'lineage' ownership and legal formulations of ownership may be viewed as a 'diagnostic event' pointing to a possible replication in Rabula in future (Moore 1987: 730, 735; see discussion in Chapter 3.10 above). We may remember that the Jara family also raised the idea of registering family property in a family Trust, see Chapter 6.5 above.

7.2.3 Analysis

This case demonstrates the following practices that resonate with other Rabula freeholders:

(a) The acquisition of additional land to pass on to the families of second generation sons. In this case, two properties had to be split between three resident sons, provoking a family conflict and resulting in the rare application of formal subdivision. Although generally avoided, formal subdivision by survey was more

common in earlier times¹⁵². Families divide land informally among the living members, more akin to usufruct rights, which were not heritable in the legal sense.

(b) The acquisition of additional land occasioned the branching of the lineages (in this case into three). Lineage branches have remained stable over the course of a century, since new land was seldom acquired for descendants.

(c) Lineage branches work out their own arrangements for the distribution and control of rights, despite the intervention by the administration in registering heirs to a deceased estate, or adjudicating property in the name of heirs identified by common law. A Titles Commissioner, active in Rabula in the 1960s, awarded a large proportion of Rabula properties (in this case, two) to individuals identified by the administration as the rightful owners, despite local norms of rights held collectively by the family.

(d) Families trace their genealogies according the branches of the family that acquired the property, identified in terms of male-to-male succession, or patrilineal affiliation. This indicates the fluid nature of lineages, which are not corporate structures, but provide the means by which families trace their social relations for the purposes of property.

(e) Individuals, including women, cannot transmit land, but are eligible for use rights to specified informal subdivisions of the family plot.

(f) Family properties are managed by a 'responsible person' or custodian. In the case above, the role has always been filled by men. These figures are usually elected for registration on the title deed when the administration requires a name for the register.

(g) Women are not without authority regarding land. As wives they hold land in trust for their sons (which I have called 'caretakers'). Although not relevant to the case above, as sisters they may become significant figures of management as advisers or custodians (the latter rare in Rabula).

(h) Women inherited land formally in the past, when the law recognised 'community of property'. In the case above, the wife of the 'first man' to acquire title inherited the intestate estate of her husband, as a result of the application of the formal law, and she was registered as the owner on the title deed. As we have seen, the vernacular interpretation resists individual inheritance, most strongly countered in the case of wives. Though some estates devolved to wives in terms of the common law in this way, as in the case above, the outcome was not interpreted by the family to mean ownership.

(i) Individuals may purchase property in their own names, without the strings of lineage attachments. In these circumstances, property may devolve, according to the formal law, to nominated heirs following the laws of inheritance. The Makuzeni case demonstrates the distinction between 'inheritance', which applies to individuals, and 'succession' which applies to inter-generational processes of family transmission.

(j) The majority of members of the landowning families reported the continued importance of clan identities (reported also in Fingo Village), some of which are traced to origins beyond the Eastern Cape. Social

¹⁵² We shall see in Part 3 that white-owned farm sub-division became so pervasive that new policies were brought to bear to discourage, and later ban, sub-division (the law is still on the statute books). The concern was that the small properties were becoming 'uneconomic' and contributing to the 'poor white problem', and conversely, the poor white problem was contributing to farms getting smaller and smaller

identities based on lineage and clan complexes are reportedly gaining significance in the present day as referents for cultural, spiritual and ritual practices.¹⁵³

The case reveals the interplay between the common law and local customary norms. The properties have been registered according to different legal and normative principles over time. The case shows clearly that the formal administration intervened directly in estates administration and adjudication during the first hundred years, the role of local officials decreasing over the years.

7.3 Case 2. The Xhayimpi family, Fingo Village: inheritance as the thin edge of the wedge

7.3.1 Turning the tables on inheritance

This Fingo Village story was discussed in Chapter 6.8 above under the theme of custodianship. We return to the story here to look more closely at the notion of an ‘heir’ delivered by common law, and the normative idea of succession that permeates people’s understanding of how family property is passed on. This story is also interesting in that a member of the family was registered as the ‘owner’ in recent years.

As we saw, Nontusi Xhayimpi was the registered custodian of a property in Fingo Village, occupied by several generations of the extended family. As the oldest adult in the family, the title was registered in her name as a result of the administration’s insistence on the nomination of an owner. When Nontusi died, Lilian Kate¹⁵⁴ (family name Xhayimpi) was chosen to take over this responsibility, and had actually done so. The family regarded her as the custodian of the family property. The property had been registered in the name of the sisters’ uncle, David until his death. When he died his wife ‘inherited’ the title on account of intestate succession law that named her as successor, in the similar vein as Notasi in the rural case above. The family nevertheless regarded the property as belonging to David’s nieces and their grandchildren. Nontusi took over when David’s wife died, returning the custodianship to the care of a sister in the agnatic line of descent.

The family told me that they had discussed a succession plan after Nontusi’s death, and that Lilian had been elected by the family to take over the role of custodian. The family claims this was actually discussed with Nontusi and agreed to prior to her death. Lilian is therefore the ‘responsible person’ who manages the household affairs, including the bills.

Meanwhile, Archibald Xhayimpi, only son of Nontusi who had died, had realised that he was the legal successor to his mother under the common law. She had died without leaving a will, which meant that, in

¹⁵³ Interview, N. Gysman, Grahamstown 29 August 2013.

¹⁵⁴ Interview, Fingo Village 8 August 2006

terms of the law of intestate succession, he would automatically be named the heir to the property¹⁵⁵. He had consulted a local law firm with the relevant documentation, and they had confirmed his status as heir and intended to convey the property into his name¹⁵⁶. The lawyers served an eviction notice on the remaining family, in terms of which they were identified as ‘tenants’ and given one month to vacate the property¹⁵⁷. Archibald himself did not live on the property, and had his own property elsewhere. He intended to sell the property to offset his own debts. We do not know what the outcome might have been had Archie not died, but by consulting legal aid advisors the family managed to avert being evicted.

When I interviewed the family after their eviction notice,¹⁵⁸ they were extremely anxious. All age groups were represented in the family gathering in the lounge of their home to relate their story. An older teenage boy translated the conversation into English when I was unable to follow the vernacular. There were several related cousins, aunts and siblings present, with expressions that revealed something close to incomprehension at what they regarded as an unfolding family catastrophe. They were unable to grasp how an injustice of such magnitude could be sanctioned by ‘the law’.

A check with the Deeds register revealed, to the family’s enormous relief, that the property was still registered in the name of Nontusi, not, as Archibald had informed them, in his name. The family maintained that Lilian had “unsuspectingly” given the paper title deed to Archibald, and the family believed, as is widely believed in Fingo Village, that this was evidence of transfer. In discussions with conveyancing attorneys, I described the local practices in terms of which it was understood that the property was owned by the whole family, and although Archibald appeared to be the owner, his status did not reflect the actual situation on the ground. This presented a dilemma for the lawyer, since he was following the letter of the law. A researcher¹⁵⁹ from the national office of the Legal Resources Centre (LRC), whom I consulted, suggested the case be argued along constitutional grounds as an example of principles of ‘living customary law’. The lawyer agreed to postpone the transfer until a solution could be found. After discussing strategies with the LRC, the latter notified the law firm representing Archibald that the family intended contesting the case. This intervention had the effect of stalling the pending eviction. Before the law could run its course, however, Archibald died in the subsequent months, and the threat of eviction was removed. The family (with their own set of tenants) still continue to occupy the home as they did in the past, and manage the property according to family norms.

¹⁵⁵ Intestate Succession Act 81 of 1987, Archibald, as the son of the registered owner, had a clear right to inherit the property of his mother.

¹⁵⁶ Interview, conveyancer at Whitesides Attorneys, 7 August 2006.

¹⁵⁷ Whitesides Attorneys to C.L. Kate, 25 July 2006.

¹⁵⁸ Interview, Fingo Village 7 August 2006.

¹⁵⁹ Dr Aninka Claassens, now senior researcher at the Centre for Law and Society, Law Faculty, University of Cape Town.

7.3.2 Analysis

The case illustrates clearly the distinction between ‘inheritance’ and ‘succession’. Two of the previously registered ‘owners’ were identified as ‘heirs’, but the families viewed the registration of these so-called ‘heirs’ as merely a formality to update their titles, and did not regard their registration as signifying their proprietorship in any way. The family looked upon these individuals as the custodians of the property.

I now reflect on the factors that come into play in distinguishing between these two concepts before moving on to some local views on the matter of customary succession.

7.4 Tipping the scales: changing customary principles of succession and inheritance

The ambiguities and nuances discussed so far show how the application of ownership and inheritance to immovable property presents a number of problems and anomalies. I argue below that there was a concept of customary inheritance, but it was not a concept applied to immovables but to moveables such as cattle. In examining how the native administration applied ‘inheritance’ to land, I argue that inheritance and succession were confused. I compare these concepts with ‘inheritance’ in western law. I conclude by putting the two together and suggest the points of disjuncture. I deviate somewhat from the narratives of the land owners to discuss these concepts, since the nuances in interpretation inform the conclusions in this chapter, and the discussion in the succeeding chapter.

7.4.1 Customary inheritance

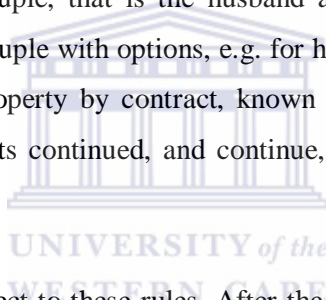
The customary terms for property and family arrangements indicate that there was a customary concept of individual ownership of property, but this did not extend to individual powers and control over land. Okoth-Ogendo’s theory, discussed in Chapter 2.5 above, makes a similar point regarding transmission of land. Rules about disposal of land to individual heirs was absent in older Xhosa lexicon. Property expressed as cattle, on the other hand, carried connotations of heritability and divisibility. Xhosa terminology was therefore appropriate to a property regime that did not involve division of land so much as division and distribution of cattle. At least theoretically when someone died, the land went back into the common pool. The chief arguably held ultimate authority over land, even if he did not personally allocate or redistribute it. Heritability of land was thus not pertinent to older customary law.

Xhosa terminology recalls an era when the concept of inheritance of wealth represented by moveable property, mainly cattle, was closer to the European concept. Individual heirship to cattle, under the circumstances of joint access to land, is viable in society where property is expressed in cattle and not land. Access to land was not an economic constraint, and lack of agricultural surpluses meant that it was not

necessary to have mechanisms whereby families retained the land. Cattle, on the other hand, were individually accumulated, and moreover, are easy to divide up. The division of cattle frequently took place during the lifetime of the owner. The customary heir was empowered to absorb the property of a deceased, mostly expressed in terms of cattle. The customary heir succeeded to this position through male-to-male succession. His role as heir incorporated responsibility for the family's assets as well as the spiritual and material wellbeing of the family as a whole. He was identified by his biological status in the family, invariably the first-born son in Xhosa society. The term for the customary heir was *indlalifa*, the one who consumes what is left over from the dead person, from the word in isiXhosa for 'eat' — *ilifa*.

7.4.2 Inheritance under western law

Under western law, if an owner dies without making a will, his or her estate devolves by laws governing intestate property. The rules of 'succession' are based on people's relationships to each other, calculated in western systems around the construct of marriage. Your status vis-à-vis property is determined by your position in relation to the conjugal couple, that is the husband and wife and their children. Over time, additional rules provided the married couple with options, e.g. for holding their property in common, termed 'in community', or separating their property by contract, known as an 'ante-nuptial contract' or 'ANC'. Under the common law, women's rights continued, and continue, to evolve towards parity in status over property.



Africans freeholders were initially subject to these rules. After the enactment of the Native Administration Act in 1927, however, the provision for community of property was no longer automatic for black civil or Christian marriages — it had to be invoked by contract, as with separation of property. Alternatively, the property of a married black couple by customary marriage was made subject to 'native law'. For these purposes, the native administration devised a system of inheritance of land according to the customary system of succession, which was based, not on marriage or conjugality, but on patrilineal descent. There is evidence that male elders, feeling the threat from the encroaching colonial systems of administration, put pressure on officials to incorporate these principles in the new corpus of official customary law (see Chapter 9).

7.4.3 Succession

Succession is the common law term for identifying heirs for purposes of devolution of intestate property. It is also the English term for processes of succession to positions of office. There are strict rules that identify who qualifies to 'succeed' into the shoes of the owner. If the owner does not make a will, there are rules of 'intestate succession' in law. In western law, the concepts of succession and inheritance have therefore become intertwined. Succession refers to the way heirs are calculated for purposes of inheritance of property.

African succession was, and is, associated with calculations of eligibility to positions of office. These rules were relevant to inheritance of moveables such as cattle, as mentioned above. The application of the rules to land under the Native Administration Act of 1927 created a novel situation, one which had not existed in pre-colonial society. White legal officials, supported by African elders, collapsed the customary concept for 'heir' and 'position', labelling it by the western term 'male primogeniture', meaning the eldest adult son inherits both position and property.

Freeholders could escape these customary law rules if they married by civil law, but the 'native laws of succession' were made universally applicable to all land held under quitrent title, regardless of marriage. I now turn to the details of these adaptations.

7.4.4 Inheritance and Succession applied by the native administration to official customary law

The new rules governing African succession and inheritance were cemented into law, mostly by way of administrative proclamation, by the native administration during first decades of the twentieth century, almost tantamount to codification.¹⁶⁰ The system established an order of male-to-male succession laid down in the so-called Tables of Succession, promulgated in terms of the Native Administration Act. The system established an order wherey land was inherited by a man's senior son and then in turn passed to his senior son, and so on. Failing direct male heirs, it passed to collateral male kinsmen, i.e. brothers or uncles, to keep succession in line with male-to-male succession. In this way, older English ideas about primogeniture as a principle of inheritance of land, was adapted to African succession, reinforcing the notion of *indlalifa*.

The application of *indlalifa* to primogeniture in land muddied the waters of the inheritance of land. As mentioned, land as a legal entity called in a law a 'thing', was not inherited in the past. Inheritance of land as a rule-bound legal concept was introduced by colonial governments whose 'legal experts' thought they had found a simple match between customary concepts of inheritance and western ideas of inheritance of land. The 'official customary law' developed by the colonial land administration linked the inheritance of immovable property to the traditional succession system with its stress on status and gender differentiation, as well as carrying connotations of responsibility. These features were not unfamiliar to European succession concepts, but there were two differences:

(a) Western succession does not follow principles of passage through one gender only, i.e. male-to-male or female-to-female, such as the case in large parts of Africa. This is because western law bases succession and inheritance on relationships formed by marriage, and are generally traced bilaterally through both parents.

¹⁶⁰ In KwaZulu-Natal there was a code.

Marriage is thus the basis for descent rules, kinship relationships and by extension, rules about distribution of property.

(b) Common law has evolved over time towards increasingly equitable and contractual principles, giving women and men similar powers, and away from socially constructed roles based on gender, seniority, etc.

By way of contrast, the Native Administration Act, which matched rules of marriage and succession to inheritance, froze principles of customary law into a fixed package that could not adapt to changing circumstances, such as increasing economic independence of women and earlier ages of access by family members to wage labour, education and professional statuses.

Even worse, a package of proclamations that accompanied these succession laws had the combined effect of potentially dispossessing women and children from rights to family land. There was a happy coincidence of interests between those African who supported these changes, and the administrative rationale. While the motives of African elders can be traced to attempts to shore up their fast disappearing authority under colonial administration, the official motives were to limit the number of Africans with formal claims to legal title. Children not identified as the heir of quitrent plots, or simply because most plots were small and insufficient to support an extended family, the non-heirs were forced to find land through communal allocation, in line with the dominant system. This had the effect of breaking up extended families. In Rabula and Fingo Village we see the opposing tendency: plots were sufficiently large to support extended families, and the rules of access remained inclusive for all family members. Families did not tend to break up, and in fact lineage solidarity appears to have been reinforced under conditions of land constraint. Local norms of access and control bypassed both bodies of official law.

7.4.5 Succession and inheritance in Fingo Village and Rabula

The families in the research sites in general followed neither of the official bodies of law. In practice, we see a pattern of inter-generational succession. Respondents in Fingo Village and Rabula almost unanimously explained that their convention is for the “living and not the dead to decide” on succession. The present generation is given the responsibility to work out the domestic property arrangements, including its management and distribution. This responsibility includes protecting the rights of family members to retain access and use of the property if they follow family norms.

The process of distributing rights to family members is not an ‘event’, such as it is with legal inheritance. The process involves processes of automatic readjustment when people die or are born. In Rabula, there were ceremonial events on occasions when arable land was informally subdivided among individuals, discussed in more detail below. These are lifetime rights analogous to usufruct in western law, which generally does not

confer rights of alienation or heritability. Unlike ‘inheritance’, which is a direct bequeathment to an individual, or set of individuals, the transmission of family rights is closer to a process of succession to particular rights of access and control, differentiated according to individuals’ status and contribution.

In the absence of a word in isiXhosa for this process of family transmission, freeholders tend to use the word ‘inheritance’ but the meaning is different from that in the legally prescriptive sense.

We now turn attention to the way in which these concepts were articulated by landowners in the research sites.

7.5 The new indlalifa

The observed family practices discussed so far show the contingent nature of property arrangements. A responsible person both maintains the property and ensures the continuity of the family, thus ensuring family reproduction and protection of the property for future generations. If he or she does not live up to the task, the family is free to appoint another regarded as more responsible. As captured in Winston Mabusela’s aphorism, “the law cannot produce a person to represent the home”.¹⁶¹

The idea captures both the physical keeping of the house (‘someone [who] is looking after the house, and repairs and maintains it on behalf of the family’) and the responsibility for caring for the young and aged, and for ensuring that bills are paid so that services can be delivered. Edith Mpande¹⁶² said the title of responsible person was “earned”.

Baninzi¹⁶³, a school principal, provided some insight into current thinking:

[Our arrangement after my mother died]¹⁶⁴ was that this would remain a family property; and **Baninzi** should appear; and that no one of us could actually sell it We chose the youngest [as successor]; ... we felt it would be better to have the youngest, because the older ones should actually get married, and live in their own homesteads, and then he should actually be looking after the home. ... I have no Xhosa word, because ... it’s not like he’s heir to the property, but anything that has to be done in terms of documents, the payment of rates to the Municipality – it cannot be under three or four people, it has got to be one person; so that’s why we chose him ... so I don’t have a Xhosa word for that.

When pressed he said:

¹⁶¹ Interview, Fingo Village, 15 March 2006.

¹⁶² Interview, Fingo Village, 4 May 2006.

¹⁶³ Interview, Fingo Village, 9 March 2010.

¹⁶⁴ A deeds search revealed it is still registered in her name.

I would use 'representative'. ... *umeli*. ... No, he is not the owner! ... There's the family members, the sons ... We will discuss [the custodian]. I mean, if for example, the youngest son decides that ... I [sic] want to live and stay elsewhere with my family, and I want my sons or my children to inherit my property there, then the two of us might decide, all right, if I have a son then he will remain here. It will be a matter of discussion and agreement within the remaining family. ... So far there are no conflicts [in our family].

When asked how generalisable these principles of succession are in Fingo Village, Baninzi stressed the idea of contingency rather than uniformity:

Families differ... In terms of our family, this is how we do things ... Other families, they will say automatically the eldest son will inherit the property; other families will say automatically the youngest will inherit. So, it differs from family to family. And in some cases they look at the contribution of the children – if they feel maybe the eldest ... – I don't want to use the term 'useless' – but doesn't assist in terms of building the family, maintaining the house and all that; they may choose another one, who they know has made a huge contribution in terms of the property and in terms of even sustaining and assisting the parents. But what I do know, in the past, it was the eldest, but somehow that's beginning to change.

On being asked if he would use the word '*ugcina*' to explain the role of custodian:

In terms of terminology I wouldn't have a specific word for that... that word *gcina* ... is a **verb**, so you cannot just use it in isolation, but it's a person who keeps the home ... *ugcina ekhaya* ... which means 'looks after the home'; *ugcina bazali* – supports the parents ... then they decide, okay, let this person inherit the property because maybe if it is given to another one, they might sell it, and the family might not have a place where they can do their rituals, and all that ... so the safest would be to take that one who has been looking after the home, looking after the parents.

On being asked if *indlalifa* still has currency:

I am not an expert in terms of language. *Indlalifa* to me is a person who **automatically** inherits, there is nothing attached to that. If for example the family says *indlalifa* is the eldest son, no matter what, that is the person who will inherit. But now if you add and say, provided you do A-B-C, then, to me, it cannot be *indlalifa*. *Indlalifa* was used in the olden days to say *indlalifa* is the eldest and that is that. Whether the others have worked or what, if they want something here, they have got to consult the *indlalifa*.

... I can't say ... for all the families, but here we don't use that at our home; we don't have *indlalifa* here. If ... the family says [the person] who inherits is the eldest, then that is *indlalifa*. But now if you attach other things, you cannot say that is *indlalifa*. You can explain and use one of the words used, like *ugcina ekhaya* ... *ugcina bazali* [supports the home ... supports the parents]. But if that person, for example, had not looked after the parents, had not looked after sustaining the home, that person would not inherit that property, therefore you cannot call that person *indlalifa*. He inherits because of A-B-C. But *indlalifa* is just static ... the eldest ... if it is the eldest.

Mlungisi Makuzeni mirrored these opinions in Rabula when he said: “Traditionally it used to be the eldest, but now we say anyone is responsible because it does not mean the property belongs to him, he just sits on top. We don’t want to use the word *indlalifa*, but there is no new word to replace it. Perhaps *inkulu*”¹⁶⁵.

Dorothy Mabusela from Fingo Village, a school teacher and from a family of lawyers and academics, inverted Baninzi’s explanation. She rejected the use of the term *ugcina ekhaya* in relation to property ownership. She claimed she was uniquely familiar with both Xhosa customs and Western property forms:

That’s why I can tell you there is no such thing as *ugcina*. ... [T]his *gcina*, I don’t know ... I’ve never heard of it. Yes, you look after the home, you are a home keeper but ... its sort of subservient, it means you are like a servant who looks after the home ... who runs the home like the servant ... you suggest servitude. No! we are the **owners** ... *mnikazi ikhaya* I am the owner, and if it’s a man, *mnini ikhaya*. ... When it’s *indlalifa*, it means the legitimate heir. It’s generally used ... when there are legal connotations [as to] who is the inheritor of this home ... in terms of Xhosa legal identification of the legitimate owner ... *indlalifa* is anyone who can own, by rights, the legal possession of a property ... irrespective of male or [female]. All the legal inheritors are called, *utwa iindlalifa*. ... [W]hen my brothers and sisters were alive, [we] were all *iindlalifa*. ... Yes, [there can be several], not just one person.¹⁶⁶

She conceded that customarily *indlalifa* favoured men, but that was ‘unjust’ and no longer appropriate, which is why she herself favours “Westernised” standards of “settling the rights, it shouldn’t be because you are a man, what if the man is irresponsible [like my brother]”. The idea of converting ‘*indlalifa*’ into ‘heir’ in the Western individualised sense (and particularly to immovable property) is unusual and legal experts of customary law would probably disagree. Interestingly, the idea of multiple *iindlalifa* in the sense of co-heirs also occurred — infrequently — in Rabula. More common is the rejection of *indlalifa* in favour of new terms, no single replacement having yet emerged. *Indlalifa* as concept has persisted to some degree in the rural site, but is reserved for a ‘semi-honorary’ position of respect for the eldest, without connotations of property distribution or decision-making.

7.6 Succession and custodianship: “People are unique and we don’t strictly follow the old sequence”¹⁶⁷

With transmission short of individual inheritance, the position of the custodian becomes critically important. There is great emphasis therefore on trustworthiness: *thembekileyo*¹⁶⁸. African owners have a keen sense of title as something precious and rare in South Africa, and what is more, the knowledge that Africans lost their land through indebtedness in the early years of African titling is still remembered with dread. The question of mortgage in Rabula is out of the question. The active recruitment of creditors by money lenders in Fingo Village has made property owners with title particularly vulnerable targets. A spate of recent dispossessions

¹⁶⁵ isiXhosa for ‘great’ or ‘big’. Interview, Mlungisi Makuzeni, Quzini, King William’s Town, 11 July 2008.

¹⁶⁶ Interview, Fingo Village, 4 March 2010.

¹⁶⁷ Interview, Nimrod Ncanywa, Rabula, 16 July 2008.

¹⁶⁸ From *ukuthembeka*: to trust. The expression means a person who has proved him/herself trustworthy.

as a result of indebtedness where the property has been used as security, sometimes without the knowledge of the family, has made residents anxious, and extremely wary about whom they appoint as custodians. Many complain about irresponsible family members, invariably males. There is an increasing tendency for families to appoint women as custodians in Fingo Village. The criterion of trustworthiness and character has further eroded strict rules about the position and status of the custodian, the stress moving increasingly in the direction of individual character.

Nimrod Ncanywa, from Rabula, stated the new concerns thus:

People are unique and we don't strictly follow the old sequence. If the eldest is not here, we appoint the next one. He must be in front of us, round about, so that we can meet and discuss everything, what to do and not to do¹⁶⁹

A corresponding idea to “keeper of the home” is “keeper of the title”, *umgcini ititile*. This expression was used frequently in Rabula. This term implies not only that a responsible person symbolises the unity and integrity of the family by taking care of the home and the property, but is also the guardian of the actual paper title deed. In spite of the avoidance of registration, titles, both in their symbolism and in their physical manifestations, are much revered. The title deeds — the “papers” — are usually seen as embodying ownership and are valued in themselves, like precious objects. Conveyancing is generally poorly understood among title-holders and there is a common misconception that it is the physical form of the title deed that confers ownership rather than the registration in the Deeds Registry. This perception is expressed when exchanges are contested, the person holding the paper title thinking that he or she is thereby conferred ownership. Buyers and sellers emphasise the importance of ‘handing over the title deed’ as a ceremonial, witnessed performance sanctioning the sale and legitimating the new owner¹⁷⁰. This raises many interesting and significant qualities about freeholders’ perception of titles and why custodians occupy a pivotal position. The fear of loss of the title deed adds to the importance of the trustworthiness of the ‘keeper of the title’ and the emphasis on personal qualities of integrity over birth status.

A custodian is therefore a successor who ‘represents’ the family (past, present and future) and does not ‘own’ property in his own right. By way of example, Nimrod Ncanywa, when asked who owned the property, answered by way of a rough family tree, saying that the title “belongs to” the following family members: his [deceased] grandfather (*tat'omkhulu*); his [deceased] grandfather's brother; his [deceased] grandfather's three sons and a daughter; the offspring of his great-uncle; and now the present generation. The ‘first man’, whom the family think of as *ukhokho* (great-grandfather), was the original grantee, Ncanywa, whom we met in Chapter 6.4 above¹⁷¹. “We don't have a new title. The only title we are having is in

¹⁶⁹ Interview, Nimrod Ncanywa, Rabula, 16 July 2008.

¹⁷⁰ It also explains why fraud is frequently reported in township housing developments, the fraudster is able to reproduce counterfeit title deeds and ‘hand them over’ and the person assumes that is all that is involved.

¹⁷¹ Spelt ‘Canywa’ in the title deeds, he is the same forefather of the Ncanywa family whom we met in the previous chapter in the first case (see 6.4 above). Nimrod is from the other branch of this family.

Ncanywa's name".¹⁷² What is interesting about this statement is that strictly speaking, these titles are no longer in "Canywa's" name, they have since been re-registered, unlike other cases in Rabula where the progenitor's name has never been replaced. What this tells us is that even when the titles are updated to names in the succeeding generation, the owners in present generation still conceive of the title in terms of the progenitor of the title, clearly revealing the indissoluble link between the property and the forefather associated with its acquisition.

Nimrod Ncanywa is the descendent of the second branch of Ncanywa family, the first of whom we met in Chapter 6.4. He is descended from Ncanywa's other sons, Enoch and Eneb (the latter known also as Magala) who jointly inherited two properties situated on the other side of the valley from the main family property. Nimrod is the present custodian of these properties. As discussed in Chapter 6.4, this family, like so many others described here, branched into sub-lineages when additional properties were acquired. The two properties are farmed as one, and occupied by a large number of descendants, some living in modest houses below the plush family home.

Nimrod talked about how the family nominates the best candidate ...

... irrespective if I am older ... the eldest can be a very useless somebody. The person who is keeping the title for the family must be a very responsible person, not ... a drunkard, for example. Therefore it needn't be the eldest because nomination is done by the family. We don't use *indlalifa*, which means the eldest son in the family.¹⁷³

As a result of legal intervention by the administration, the properties over which Nimrod is presently the custodian were registered in 1962 in the name of Reginald, who was not the eldest son of Gilbert, but "Reginald was elected by the family". This was the first time an owner's name was registered in nearly a hundred years to replace that of their forefather, Ncanywa. Nimrod maintained that government officials were once again exhorting families to update their titles, saying a Commissioner would be appointed, as the "titles must be transferred to a living person", but "nothing has happened ...". Nimrod Ncanywa was sceptical of the proposal saying:

Papers are important governmentally, but people here know that it's a family affair".¹⁷⁴

¹⁷² Interview, Rabula, 1 April 2008

¹⁷³ Interview, Rabula, 1 April 2008.

¹⁷⁴ Interview, Rabula, 1 April 2008.



Figure 6: Lay-out of Ncanywa lineage land (Enoch & Magala branch): Farm 68

The photograph shows several family residents on land under one title after the original lineage of forefather Ncanywa branched into two lines. The main homestead is the complex above, occupied by the family of the ‘responsible person’: Nimrod in the present generation. Below are many other smaller, more modest homes of other relatives. The ridge from which photograph was taken is the location of the property of the other branch of the Ncanywa lineage, descended from John, discussed in case study 6.4 above. A section of Hoho Mountain can be seen in the background.

Respondents in Fingo Village similarly endorsed the idea that custodians no longer succeed according to pre-determined rules of birth or gender. A young (female) member of the Radebe family said that families “make their own arrangements”:

Families always have their reasons ... Every family ... see[s] how their children grow up. A younger brother can take over if the family agrees. Its not always that the firstborn [who] takes the property ... if the family agrees that the last one must take the property, the last one will take the property, so it depends on all the family.¹⁷⁵

¹⁷⁵ Interview, Fingo Village, 22 September 2010.

7.7 Disposition of land through wills

African freeholders were always at liberty to draw up wills, regardless of marriage. Contrary to the idea that a will is an entirely western construct, Prof Alistair Kerr, a former customary law expert at Rhodes University, has argued that wills were known and used in customary law, though they were verbal. It was acceptable to make ‘deathbed’ dispositions, or in some cases during the testators’ lifetime. The customary wills, however, were almost always about distribution of cattle. Kerr maintained that although the principle of the right of disposition through oral testament was known, this was not a ‘complete freedom’ of testation (see Kerr, 2006: 1-2; Bennett 2004: 351-2).

According to historian Jeff Peires, wills are easily contested in an oral society, “what is given easily can easily be revoked”. He agrees that oral disposition was a familiar concept but it was, and is “open-ended and susceptible to change, since enforcement is problematic. As a result, there is lack of consistency in its application”. Since it is so difficult to finalise, the concept tended to have limited use other than among chiefly lines, where oral disposition were indeed invoked when a problem around *post-mortem* distribution of property was anticipated¹⁷⁶.

The application of formal written wills to land throws up similar anomalies and problems as formal subdivision. In the context of land, wills contradict the notion of lineage land in a very fundamental way. Similar to formal subdivision, which splinters property into different parcels under different owners with proprietary rights to dispose of the property, so a will potentially threatens to splinter the family unity, as it identifies individual heirs selectively.

The metaphor, *indlalifa*, as discussed, meaning ‘to consume the inheritance’, derives from the idea that the surviving successor absorbs what remains of the estate, in other words, consumes the remainder of the deceased estate that was not consumed by its earlier owner, a concept that had significance in the pre-colonial cattle economy.

Disposition of land through wills, like formal subdivision, is therefore the very antithesis of lineage control of land. A system of automatic succession, such as I outline above, cannot trust wills. Wills could become devices for spreading inequality and conferring arbitrary powers on those who are registered as the owners. The implications of personal selections are that remaining family members are dispossessed.

Although some properties have devolved through wills, most respondents in both field sites were uncomfortable with this notion. A story recounted in KRS v 4 provides a stark pointer to the counter-normative weight of wills in Rabula. The field research during 1949-1950 found only two cases where land

¹⁷⁶ Interview, Grahamstown, 10 August 2012.

had been disposed by will. In one, the disinherited son was instigating proceedings for an official investigation:

In one a man had passed over his eldest son and left all his land to his younger son. The authenticity of the will was doubted by the disinherited son, who was instigating proceedings for an investigation by the Administration. In some instances the disinherited sons are allowed by the heir to continue living on the land as though there had never been a will. It is felt that “to eat the inheritance alone” is not just, no matter what the circumstances, and anyone who insists on his rights is scorned by the members of the village. The younger brother in the instance quoted above was constantly criticised by others in the village for refusing his elder brother a place to live. When the elder brother nearly died of blood poisoning, the younger brother was accused of having tried to kill him by witchcraft. ... Thus though the right of disposal by will, and the right of primogeniture, are established in law they are limited by public opinion in the village. (Mills & Wilson 1952: 51)

When families describe processes of devolution, they generally translate the concept into the English word ‘inheritance’, and the KRS uses this word indiscriminately. When examined in the context of social practice, and in terms of the meaning conveyed by ownership by the descent group discussed in the previous chapter, it becomes clear that there are profound mismatches between the term ‘inheritance’ (which has legal consequences for property distribution) and the processes that families engage in when land devolves.

Narrators explained that ‘inheritance’ was something to be resolved by the living, not the dead: “The children will decide whose name it must be registered in. The parents mustn’t decide”, said Mr Qenge of Fingo Village.¹⁷⁷ A colleague who recently purchased property for his family in Fingo Village said he doubted his parents would leave a will, and that it would be uncomfortable to discuss succession within the family. “My siblings are female and they might get married and move into their own places. But whoever chooses to stay will become the custodian”.¹⁷⁸ In other words, it is impossible to predict the circumstances that might arise or change in the next generation.

The insecurity that many of the urban freeholders in Fingo Village feel in the new climate of market intrusion has meant that the idea of a will is becoming increasingly attractive. Some respondents said they would like to write a will as a result of the local publicity of recent cases where men have succeeded or attempted to assert their rights of ownership in terms of the common law, in some cases resulting in eviction of family members and sale of the family property. Officials and conveyancers are encouraging people to write wills in order to defuse the conflicts and ambiguities that arise when property does change hands. Some owners are therefore expressing their desire to leave their property in written wills to all their children and grandchildren in order to prevent unscrupulous (male) members of the family, who have managed to get registered, from dispossessing the non-registered members. Nofele Gumanda¹⁷⁹ of Fingo Village voiced the

¹⁷⁷ Interview, Khuza Qenge, Fingo Village, 9 March 2006.

¹⁷⁸ Interview, Seti family, Fingo Village, 18 April 2006.

¹⁷⁹ Interview, 10 May 2006.

concerns of many others when she said that wants to leave her property to all seven of her children in a legally drawn-up will, but the oldest, a daughter, will be appointed the responsible person.

This is another example of active embracement of western legal concepts, paradoxically to protect and defend family property, rather than to expose it to the proprietorial principles inherent in freehold title. They are neither adhering to the traditional norms of the older customary law, nor strictly to the norms of modern western law. They are attempting to cross-pollinate suitable elements from both.

Wills are, however, profoundly antithetical to the processes of ownership and transmission so far discussed. Wills are a double-edged sword. On the one hand, wills resist the traditional *automatic* succession of the eldest male, which is a comfort to family members who want the law to protect their collective rights to property. On the other hand, wills encourage the western convention of appointing a delimited number of heirs, which become subject to precisely the same anomalies as registration of a single owner or heir. Despite the attractiveness of the idea of listing or registering multiple claimants, in practice, multiple owners complicate the terrain even further than the nomination of single heirs. These multiple heirs (owners) do not die at the same time and the register inevitably loses its currency quite fast. Names of deceased ‘owners’ remain on the register, and new family members who are born are not registered. Listing names is therefore a temporary holding measure only, attractive when viewed in the short-term as a cautious path between the twin threats to property of market and registration of a (male) heir.

I came across only one case where a will had been used in a manner that was congruent with western common-law principles, though still infused with the language of ‘caring’. Edith Mpande¹⁸⁰ from Fingo Village is leaving her and her former husband’s property, which they purchased,¹⁸¹ to their adopted daughter in a will that has been formally drawn up. Mpande does not want other family members, whom she believes did not care for her, to “interfere with my [daughter’s property] People now look after the person who cared for them.” The will states:

In the event of one of us predeceasing the other, the first dying of us bequeaths his/her entire Estate ... to the survivor, provided that upon the death of the survivor of us, the entire Estate of such surviving spouse shall devolve upon our adopted child, Joy Phumeza Mpande. We direct that our Joint Estate bequeathed to ... Joy ... shall be free of her husband’s marital power and shall be exclusive property with which she may deal freely in the event of her marriage.

This case is unusual in several respects: (a) the presence of a will and the clear identification of an heir with legal power of alienation; (b) the inheritance by a woman in her own right. Mpande, the surviving owner who is originally from Kimberley, has been at pains to prevent her relatives, who have maintained limited contact with her, from making claims; but also a potential future son-in-law. What seems to be counter-

¹⁸⁰ A school teacher. Interview, 4 May 2006.

¹⁸¹ Ironically, to escape the impediments of her husband’s entitlement to family property elsewhere in Fingo Village.

normative behaviour is still consonant in some respects with the normative discourse. Despite the wording of the will, Mpande's intentions are to keep the property in her husband's family line. As first generation owners, however, they feel they have the freedom of testation without fear of social sanction.

7.8 Divisibility of space in Rabula

The rural freeholders in Rabula live on the edges of their plots, which were conceived at the time of survey as 'arable land'. As families grew, these plots were internally and informally subdivided into separate fields for the sole use of individual allocatees. These plots have always been regarded as informally divisible. It is therefore here that land changes hands between family members and where family conflicts may emerge.

KRS v 4 graphically describes how families effected subdivision of arable land through local ceremonies (*iteko* in the singular) (Mills & Wilson 1952: 57). Though not formal in terms of legal prescripts, subdivisions were locally formalised during the course of ceremonial events, where the new ownership arrangements were witnessed locally. Headmen often acted as masters of ceremonies, and various forms of markers were used to denote the new boundaries, for example, white flags, furrows, trees or grass verges. Although these ritualistic practices have waned in more recent decades, the convention of allotting fields to individual family members has continued, even in cases where families farm them as a whole. This is yet another example of the intersection and cross-pollination of western ideas of ownership and customary concepts of land and authority.

In this example, African freeholders apply the customary principle of individual allocations (which was well established pre-colonially with regard to the use of cultivable land), to freehold ownership. In order to maintain the principle of family lineage ownership, however, the divisibility does not translate into formal subdivision with heritable rights, which would have the effect of breaking up the family title. The divisions are conducted within the normative prescripts of lineage ownership. The land does not therefore splinter into legal parcels. The rights are only held during the lifetime of the individual and then revert back to the patrilineage.

As discussed in Chapter 3.3 above, the Keiskammahoek Rural Survey likened this practice of individual allocation to 'inheritance', which confusingly associates genealogies with the inherited parcels; and misleadingly attributes some of these bequests as having been transmitted through women, conceptualised as matrilineal inheritance, a double anomaly (Mills & Wilson 1952: 50-55). The explanation lies in the likely use of structured questionnaires, the responses to which were quantified without interrogating the local meaning of these concepts.

In Chapter 5 we saw that formal subdivision occurred in only a handful of cases in earlier times, consonant with the active intervention of the local native administration.

The important principle is that land was/is not divisible in the legal sense, and individual family members are not separable as legal entities. The group has an identity that is larger than the living members, while the land itself is only divisible among family members during their lifetime, and these divisions may be endorsed or changed by each new generation. Sub-divisions are therefore seldom effected through legal survey of new land parcels.

7.9 Language

In the previous chapter we saw how nuances in language provide insight into how owners grapple with finding a practical fit between local contemporary practices and older versions of customary law, or with the common law, from which they diverge. The anomalies are apparent in the language people use to express their practices. The shifts and accommodations over time can be seen in semantic changes expressed in people's linguistic phraseology about land ownership and its associated features, such as family, authority and rights. The modern property lexicon reveals some of the changing dynamics and adjustments to new circumstances.

Since the old indigenous Xhosa vocabulary for family headship, the ownership, succession and inheritance were conceived under different circumstances, we see ambivalence in the vocabulary people use. While the older terminology has been undermined, no longer capturing present ideas and practices precisely, it has not been entirely replaced. When traditional concepts are used, they tend to be used with circumspection, and suggest a property regime that is shifting and contingent.

We also saw how rules about disposal of land, or devolution to individual heirs, were absent in older Xhosa lexicon. Property expressed as cattle, on the other hand, carried connotations of heritability and divisibility. Xhosa terminology was therefore appropriate to a property regime that did not involve division of land so much as division and distribution of cattle.

As a result of the accommodations to new circumstances over time, there are many inflections to the concept of family headship. The lexicon is fluid and evolving, with many nuances of articulation to express related concepts. New expressions do not entirely obliterate or replace old ones. We saw how the idea of 'keeper' has been adapted to the idea of custodianship, the pivotal position in reproducing the family property. A favoured expression is '*ugcina ekhaya*', keeper of the home. *Ikhaya* refers to the home, rather than the physical structure. Some respondents in both Fingo Village and Rabula referred to the responsible person as *usokhaya*, meaning 'father of the home' or 'head of family'. This is by implication a male position.

However, some people qualify this usage to mean the person who represents the family in ceremonial events, and is therefore reserved for the context of ‘hosting’. The term *inkulu* previously captured family headship in an unambiguous way. *Inkulu*, that literally means ‘the big one’, and which in earlier times traditionally *always* referred to the eldest son or ‘first born’, can now be used to indicate the strongest person in the family, the responsible person, the important person with the capacity to keep the home.

People alternate between various related expressions, in both field sites also sometimes referring to headship by the expression for ‘head of house’, translated as *umnini-mzi* (from the Xhosa word *umzi* meaning homestead), hence the head is responsible for the welfare of its occupants, not merely the physical premises. The physical structure is *indlu*, a house. *Umnini* does have connotations of ownership, but not in the western law sense. Another word for the headship is literally the word for ‘head’, *intlolo*, also used for positions in state or civil institutions, such as ‘president’. Mandla Makuzeni¹⁸² expressed the older concept: “*Jeukukuba uyase amaXhosa abeka inkulu ibe intlolo*” literally translated “as it was done among the Xhosas, they would put in the oldest son that he should be the head”. We see thus that some of the customary terms, such as those for the head of the family or house, have been found to be sufficiently malleable to adapt to a new context, if somewhat imprecisely. We have seen how the concept of the customary heir, *indlalifa*, associated with position and gender by birth (i.e. the eldest adult male, calculated through male collaterals), has been virtually abandoned.

One respondent referred to the subtle distinction between the terms for ‘home’ and ‘house’. The family ‘home’ is associated with one’s lineage, i.e. the linked ideas of birthplace, family and line of forebears, and hence the place where ceremonies are performed, and rituals observed. ‘House’ on the other hand has no necessary familial, historical and spiritual associations, hence it is possible to acquire a ‘house’ that is regarded as individually owned and can be sold without obligations to kin, particularly in the urban context.

The distinction between ‘home’ and ‘house’ is also intimately associated with kinship relationships. The lineage ‘home’ is translated as ‘*ikhaya*’, which is the home of the members of the lineage. A wife who has moved to the patrilocal residence does not refer to that home as her home, hers being that of her own lineage. She calls the home to which she has moved as her ‘place of marriage’, not referred to as *ikhaya*. For her children, with her husband’s surname, the patrilocal residence is their home, *ikhaya*. The word ‘home’ is associated with the physical place as well as the lineage, the *umnombo*: one’s descendants who are connected to one’s roots and origins. Family and family property are really one thing, and could be described by the English word, provenance¹⁸³.

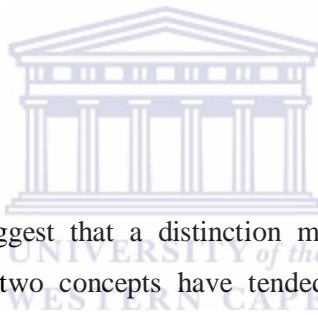
We have seen that the expression for the position of ‘responsible person’ or custodian has many local variations. In Fingo Village it has become widely referred to *umgcini ekhaya* “keeper of the home”, or, in

¹⁸² Interview, Rabula, 15 May 2008.

¹⁸³ M. Jara, email correspondence, 21 February 2013.

Rabula, *umgcini ititile*, ‘keeper of the title’. We saw in Rabula that Mlungisi Makuzeni inherited a plot of land his father had bought, and which he regards as free of family strictures, and to which he applied western terminology unambiguously.

Through deep familiarity with these terms, the subtleties and inflections are locally understood depending on the context in which they are used, though people do find it hard to contextualise property-talk in the present. This does not mean people are confused. As in any language, there are numerous idiomatic shades to express the same idea in different contexts. The shading of expression show that people are not necessarily talking about ‘customary’ as it may have been prior colonisation, though they continue to adhere to the older terminology for want of new. What we are seeing in the new context of landownership is a blending of customary and modern ideas, using old vocabulary. People are in a sense stuck with the older vocabulary, which does not precisely fit the new realities. The language suggests that the new realities are not yet sufficiently clearly defined to produce a new vocabulary. The idea of ‘keeping’, not owning, land is one adaptation to the new circumstances, as people struggle to express the idea of ownership using indigenous terminology.



7.10 Conclusions

The case material and testimonies suggest that a distinction must be drawn between the concepts of ‘inheritance’ and ‘succession’. These two concepts have tended to become ‘compounded’ due to the legalities of identifying ‘successors’ to intestate property in the common law, and the confusion between the two in official customary law. The result is that the two concepts are in some cases treated as interchangeable. Mixing the two concepts has led to serious misconceptions about how families transmit property in practice.

The difficulties of translation result from the way property is embedded in the structure of the family, which does not translate neatly to the western idea of inheritance of land as a one-to-one transmission. The mere fact of survey, while it alters the spatial aspect, does not extinguish the continued importance of the kinship nexus. As Lund (2013) argues, there is an interplay between space, time, territory and property. The registration of title confirms property, but there continues to be a concept of ‘lineage territory’ over the property. Access is inclusive of all kin identified by social norms of descent, which at the same time exclude those outside the social group. The varying scale of inclusiveness—exclusiveness is characteristic of property relationships in any society, in this case revolving around principles of lineage composition, and its reproduction.

As mentioned in Chapter 3.4 above, there is no word in isiXhosa for ‘lineage’, and words such as *imilibo*, forebears, take on an added significance when associated with land long held, merging into the concept of

umnombo, family tree or descendants connected to the place of origin, representing the family roots and branches. All their descendants have rights to their respective properties, including in most cases children born out of wedlock. In practice, the strength of rights correspond to the manner in which the family members have participated in family affairs and matters concerning property, in line with local conventions.

Ownership of property by the lineage rather than the individual has been demonstrated in this chapter as having implications for registration of owners, and for inheritance. It is impossible to pin-point a single owner for purposes of registration or inheritance. The clash between the principles of family property and registration of an individual owner, as espoused by the law, has significant consequences for inheritance of property. The western norm identifies an owner of land (labelled in law as ‘immovable property’) precisely to empower the registered person or persons to dispose of the property. The registered owner may use the property as a marketable asset, capable of generating capital, sell it or identify an heir or heirs. The new owners, including heirs, are in turn registered as individuals.

The principles that guide the protection of family property suggest a more nuanced understanding of the role of representation than older customary systems, where historically the position and gender of the person who assumed responsibility for the homestead were crucial. Norms regarding family headship have changed. Age, gender, birth status, wealth, education or position in the family are not in themselves criteria to represent the family, but rather commitment and capacity. Personal attributes such as degree and quality of involvement, permanent domicile, sobriety and stability count. Youngest over oldest, female over male or the children of siblings might be chosen.

Against the background of individual testimonies and documentary evidence presented in this chapter, failure to register transfers, identify heirs and write wills should be more comprehensible. Owners try to find a suitable fit between maintaining the registers and maintaining family ownership, but there is no legal fit. Owners argue that ‘everyone knows who owns what land, even when the titles are in the ‘wrong’ name or an ancestors’ name’. This idea of a locally recognised ownership is precisely one of the principles that legal ownership seeks to supersede by minimising ambiguity and recognising the rights ‘against the world at large’ (i.e. not just locally).

We have seen that the implications of African titles are well understood locally; the vernacular an adequate expression in the day-to-day context of freeholders’ lives, although the language struggles to adapt new concepts to old lexicon. The difficulties arise at the interface between the local situation and the wider world, i.e. when family property comes up against the concerns of the country ‘system’, and enters the terrain of administrators, officials, land professionals, researchers such as myself, and most of all, with conveyancers of property and the Deeds Registry. People who represent a bigger, national context (‘the wider world’) use expressions about property that are of wider application.

At times, particularly in the urban areas, the kinship links in the chain of the patrilineage loosen and lose their robustness and rigor, and it is here that western property law can penetrate with ease. In the Xhayimpi case the family no longer operates as an unbroken lineage that stretches way back in time. The lineage chain has missing links, but still continues to assert the claims of all family members who need access to the property, mainly women and children. The family continues to use a normative framework of 'family property' to resist the claims of some family members who begin to define themselves out of the family unit and embrace a western-law version of property when it serves their financial interests to do so. The cases show how precarious the family property concept is in the face of intersecting social and market interests in land. The conflicts that can arise reveal that in some situations the kinship unit struggles to operate as an extended, inter-generational family unit in defending family property.

In rural areas like Rabula where many family members have other properties elsewhere, the lineage land is proving more robust in defending family property as the exemplar of the lineage that extends back in time and includes members yet to be born. The defence of property relationships that conjoin family members with property involves fending off an active land market, since that is the critical entry point of proprietary interests in property: the weak link in the chain, as it were. There is no legal framework currently that meets the social goals of a protective family property regime. Local custom, however, has evolved a response in the form of the concept of custodianship, which has moved beyond the heritable male position of headship in pre-colonial customary society, and resists the idea of inheritance by individuals. The chapter raised the importance of making finer distinctions between the concepts of inheritance and succession cross-culturally. This theme is returned to in the next chapter, which discusses these concepts with reference to the gendered organisation of the African freehold family.

CHAPTER 8 KINSHIP, GENDER AND THE DEVOLUTION OF LAND

8.1 Introduction

So far we have seen that freeholders emphasise the continued importance of kinship bonds as the bedrock of African familial life, and their stories show how individual family members continue to invest in the reproduction of these relationships, which the literature suggests extends outwards to broader social networks (Berry 1993: 159-180).

The previous chapters discussed the way that freeholders have adapted familial relationships defined in terms of kinship to ownership of specific parcels of land by the family group. We saw how the 'family group' is not a closed corporate structure with named individuals, but a category of eligible members who are related to each other by way of patrilineal descent. I have named these structures 'lineages', but emphasised that the African freeholders do not themselves use this term, but simply refer to their domestic group by the universal term 'family'. I pointed out that the term 'lineage' is used for purposes of analysis in order to distinguish the way in which the families arrange their familial relations, which is different from the western variant. This is important for the thesis in that the two models have different consequences for defining eligibility for property. Although the emphasis in the thesis is on property relations, lineages are building blocks of clans, which are also important in defining personal and spiritual identities and sense of 'belonging'. Kinship is therefore conceived in the sense Peters expressed the concept as "less a determining structure of groups as a way of representing relations" (1997: 128, see Chapter 3.6).

In the earlier chapters I have emphasised the importance of the broader context. The changes and continuities reflected in the adaptations freeholders have made to land ownership must be considered in the context of the wider political economy, since African property relations were subordinated to the dominant interests of white society, which made all forms of African tenure uncertain and vulnerable. How much of the freeholders' responses were an organic adaptation of African cultural concepts of family to new constraints in land; and, alternatively, to what degree were these responses a form of defence against fear of dispossession, not only of land, but of access to resources in general, as suggested in Li's analysis of land relations in South East Asia? (Li 2010, see Chapter 2.8). It may not be possible to arrive at any definite conclusions, since these processes are dynamic and inter-related. Suffice to say for present purposes, social and cultural constructs of kinship relationships are resilient, as they are in any society. In Africa, as elsewhere, the way in which social relations are defined influence the specific outcomes of land tenure. Okoth-Ogendo's theory of African property relations resonates with many key dimensions of 'African freehold' (Okoth-Ogendo 1989, see Chapter 2.5).

Moore reminds us that processes of change and continuity involve a constant dialectic between 'regularisation' (attempts to make durable and predicable rules and institutions) and 'situational adjustment', which are the immediate adaptations to particular circumstances, and which involve elements of indeterminacy and unpredictability. The freeholders in the research sites represent their property as inalienable land, owned by descent groups and controlled by rules of unilineal transmission. In reality, there is tension between norms and principles, on the one hand, and ongoing social pressures which result in adaptations and sometimes manipulation and evasion of these rules (Moore 1978, see Chapter 2.10).

We have also seen how the landholding kinship group adapted previous shifting territorial concepts of space, to fixed parcels of land, showing the saliency of Bohannan's conceptualisation of the adaptability of social to spatial units according to different systems of production, which in turn influence the form of land tenure (Bohannan 1963, see Chapter 2.4). We saw in the previous chapters how the identification of lineages with the ownership of fixed parcels of land when title was issued generated new imperatives for defining principles of transmission of land, which were previously absent.

The freehold mode of transmitting land became embedded in the kinship network of the family group, structured by principles of unilineal descent. This involved some correlation between devolution of property and principles of succession, as is the case in any society where land is heritable. In the case of the African freeholders discussed in this thesis, the outcome did not translate to the idea of a simple 'one-to-one' transmission implied by the common-law legal concept of inheritance. The colonial administration applied legal formulae for determining 'inheritance' of land that mistranslated actual property relations, which were embedded in the lineage system that structured the overall reproduction of social units. As Goody (1976a: 1) points out,

... *mortis causa* is not the only means by which the reproduction of the social system is carried out (in so far as that system is linked to property, including the ownership of the means by which man [sic] obtains his livelihood); it is also the way in which interpersonal relationships are structured.

In this chapter I focus on the significance of family property, with its close association with kinship relationships, for gendered concepts of property relations, which is in turn influenced by, and influences, the way land is transmitted. These concepts are all tightly inter-connected. We have seen intimations of the saliency of gender in defining social and property relations among the freeholders. In this chapter I look more closely at some of the implications thereof.

Gendered norms with respect to land tenure and property distribution stand out as the most vexed and obdurate aspect of the 'living customary law'. The social pressures and policy objectives of gender equity represent the greatest challenges for law reform in relation to land tenure. The dilemma for policy lies in the

tension between modern constitutional values of gender equity, on the one hand, and the primacy of gendered norms that continue to define the structuring of the unilineal family group for purposes of succession and property on the other. In the contemporary politics of gender, how can recognition of the social relations underlying succession and inheritance, be balanced against the objective of promoting gender equality in property-holding? Here I argue that to address this dilemma in policy, the specific relationships that underlie the ‘structural’ tensions should be addressed more explicitly. Policy-engaged scholarship needs to move beyond justifications for validation of rights to land by women in the present by looking for examples of such rights (or their absence) in pre-colonial society, to a more frank appraisal of the nature of the problem in the context of contemporary political economy. The past provides but a scanty road-map for reordering property relations in the present. In a different vein, the scholarship that stresses the overarching problem of gender inequality purely in terms of African ‘patriarchal’ relationships needs to be more focussed on specific underlying relationships and tensions, which my thesis on ‘African freehold’ suggests are not the same in all land tenure relationships. The evidence confirms Peters’ suggestion that the concept of ‘patriarchy’ glosses the particular nature of oppression within families, and sometimes misdepicts it (see Peters 1983: 101). The evidence found among African freehold families in the two research sites nevertheless confirms the general conclusions of feminist scholarship that rights within families are highly differentially structured according to gendered criteria, and these have the great potential to spread inequality between men and women (Razavi 2003; Whitehead and Tsikata 2003).

In the stories recounted below, I look more carefully at the agency of, and implications for the role of women in the transmission of freehold land in the context of their continued adherence to the way in which kinship relationships are structured in families. I look at some of the key social and jural characteristics that set the processes of transmission of African freehold land outside of the scrutiny of official law. This involves a closer examination of the specific implications of the application of terms like ‘inheritance’ and ‘succession’ (already raised and discussed in the previous chapter) to the transmission of land. It is useful to bear in mind the broader idea of ‘devolution’ of property as a prism through which to view kinship and gender relations with respect to rights of access to property and its distribution. The idea of ‘devolution’ emphasises the importance of seeing the process seen as a whole: “the wider process by which property relations are reproduced over time (and sometimes changed in so doing)” may be called devolution. (Goody 1976a: 1-2, see Chapter 3.7).

Goody defines inheritance as the specific “way by which property is transmitted between the living and the dead, especially between generations” (Goody 1976a: 1). The way property is divided and passed from one generation to the next can occur either through *pre-mortem* transfers, that is property passes when the property holder is still alive, for example, dowries and *lobola*¹⁸⁴; and also through *post-mortem* transfers

¹⁸⁴Whereas dowries are inter-generational transfers between generations, bridewealth exchanges are transfers between groups of the same generation.

(Goody: 1976b: 14-15; Goody 1976c: 23). Succession involves replacement of roles for the purposes of holding office or positions, in this case in families for the purpose of determining rights of access to, and control over property. In the sense in which I use the term, individual members of the family hold positions relating to the headship of lineages, with important responsibilities of trusteeship over property, which I have referred to as 'custodianship'. Distinguishing between particular dimensions of inheritance and succession, in the context of the broader process of devolution, helps to diagnose more precisely some of the disjunctions between official law and social practice and at the same time puts the spotlight on the gendered structuring of families, on which these processes rest.

8.2 Lineage land: custodianship, succession and inheritance

It is clear that the land so far described as the 'property' of the freeholders of Fingo Village and Rabula is not 'inherited' in the conventional sense, and most particularly, individuals do not inherit family land. The property, on the other hand, could be considered 'heritable', more broadly, as it devolves over generations by virtue of the identification of ownership of land parcels with the landholding group. By fixing title to delineated plots of land, owners were faced with new imperatives of transmission of land. This concept was previously irrelevant when land was not a heritable asset, and is only weakly developed under modern forms of 'communal tenure', where the individual units of land under colonial rules of 'customary law' were not legally heritable. By adapting the descent group concept to fixed spatial units, the process of transmission that evolved with 'African freehold' turned the western concept of succession on its head. While the land unit remained the 'constant', the group of people who succeeded to the property remained fluid. The rules that defined the 'family group' recognised a category of eligible people, rather than named and identified individuals as the case in the common-law concept of family succession. People belong to the property, rather than the property belonging to the people. We have seen that this notion of belonging is under pressure to change as a result of market forces and new imperatives of accumulation, but has nevertheless persisted.

One of the reasons for the adaptability of family concepts to fixed property is the fact that unilineal descent group ideology results in a perpetual family group that is separate from the identify of its individual members, and it is this group that families recognise as the landholding entity. Among the family, individuals are appointed to succeed to the 'office' of custodianship of the lineage property. The lineage is thus a landholding entity that stays constant even as its members change. As anthropologists have observed, the cultural rationale for unilineal descent groups lies in the ability of the group as a whole to reproduce over time, the continuity of which is based on a concept of the group outliving its individual members in the present.

Unlike the western notion of ‘group ownership’, descent groups as landholding entities are not fixed in time, nor identifiable by named individuals, but stretch to take into account both past and future members. Thus the ‘group’ is a representational device, rather than a formally constituted entity or corporation with fixed members. In the context of the patrilineal family, the group consists of all the agnatically related men and women¹⁸⁵, past and future, defined by rules based on normative principles. Rules are themselves not fixed, but indicative, and may at times be manipulated to take into account particular circumstances and contingencies. In terms of the normative ideal, people retain the identities of their descent groups, which emphasise bonds of siblings which are considered lifelong, and which are distinct from their identities acquired through marriage. This view of the family does not in itself diminish the importance of strong social and affective ties of marriage or life partnerships, but distinguishes between them for purposes of property and social identity. This distinction is the device by which the group is perpetuated in time, rather than being diffused through marriage (see discussion of these concepts in Chapter 3.4 above).

The portrayal of lineage groups as ‘corporate’, whether these be patrilineal or matrilineal in character, has been rightly criticised. This conception is problematic, in that, as I argue in Chapter 3.4 and the previous two chapters, lineages among the Nguni-speaking people of Southern Africa are representations of social categories for defining group membership, rather than reflections of actual membership in the modern sense of closed, corporate groups. Descent groups are culturally constructed according to family genealogies, and for the purposes of the present discourse, provide the means for defining who has rights of access to and control of family property. It is not considered important to remember every name in the family ‘line’; what is important is the identification of belonging by virtue of the pattern of tracing descent. The ‘family line’, from a conceptual and symbolic point of view, is perpetual. It is not fixed in time and space, but can coalesce around fixed spatial units of property in the form of smaller units of the descent group, which I have called lineages.

Organisationally, the lineages of the freehold families in the research sites have been shown to be adaptable to the exigencies of property, branching and reconsolidating according to particular circumstances, such as acquisition or loss of land, such as illustrated in various case histories in Chapters 6 and 7. While these relationships may change (i.e. the association of specific branches of the family with specific properties), the way in which identity is constructed according to longer lines of descent provides a constant point of social reference. A key anchoring mechanism in this structure is the gendered differentiation of family identities. In this chapter I focus on the specific implications of these patterned aspects of social relationships for the gendered division of property. As mentioned, it is difficult to separate these dimensions, since the ‘patterned aspects of social relations’ are themselves gendered.

¹⁸⁵ In matrilineal systems the group comprises all *enatically* related men and women.

The evidence presented so far in this thesis suggests that the descent group structure of the freeholders, along with its inbuilt structuring around gender relationships, has, in some senses merged with the idea of the property itself, and is mirrored in the title deed, where the title has come to *represent* a particular lineage that is associated with the property. This interpretation and use of title differs in fundamental respects from the legal meaning of freehold title. Some freeholders have discovered that there are approximations between western law concepts and their folk concept of title, such as the idea of property ownership by legal trusts, which, like descent groups, have a legal identity that outlives the identity of its membership in the present (see cases in Chapter 6.5 and 7.2 above). It remains to be seen whether or not legal adaptations might prove useful in matching law with social reality, or whether it might further complicate the terrain of family ownership.

The continued control of access to land by descent groups in my research sites has meant that individual inheritance, as implied in the legal regulation of title, is largely ignored, if not consciously so. The focus is rather on devolution 'as a whole', which reproduces the entire family nexus. This does not mean that inclusive family relationships necessarily translate into egalitarian relationships. As Berry has suggested for Africa more widely, relationships between members of descent groups are structured by relationships of authority and subordination, which in the past depended on control of women's reproduction and labour (Berry 1993: 117, 122, 173; Razavi: 2003). With the changes in agrarian production and the pursuit of independent economic activity and wage labour, these older forms of production and reproduction are under pressure. Control has tended to switch to the control and attenuation of women's rights to property. A key controlling device is the mode of differentiating the roles of women as wives, daughters and sisters, in conjunction with other socially constructed criteria.

Among the African freeholders, rights are structured and distributed along lines that differentiate between the statuses of women who are part of the landowning descent group. This mode of differentiation is accentuated by the process of agnation, that is, defining descent in terms of male-to-male succession, as previously discussed in the preceding chapters and Chapter 3.3. Berry and Mackenzie have analysed similar tendencies among title holders in Kenya (Berry 1989a: 2-3, 1993: 133, 173; Mackenzie 1989: 94-6, 1993).

These gender differentials in kinship relationships have complex implications for women's access to rights in land, both among freehold families, and also among other African families. The latter is instructive, since it helps to focus on some of the specific processes involved. There has been increasing evidence that women in South Africa are challenging local norms in families, communities and many Traditional Councils that women cannot qualify for independent rights to plots of land, citing their rights in the Constitution and policy statements of political fora (Claassens 2009, 2013; Cousins 2013). In some of this literature, the authors have not taken into account the nuances in these processes, since they generally do not analyse the processes of *transmission*, their focus being on 'acquisition' of the rights by allocation (see Claassens 2009,

2013; Mager 1992, 778-780) or inheritance (Weinberg 2010). In other words, how do you 'get' rights rather than what do you 'do' with these rights once acquired. There is abundant evidence of women claiming rights, but there is less known about their continued investment in kinship relationships for purposes of social reproduction, as defined above. The evidence from my research sites suggests that woman among the freehold families do not forsake their social networks channelled along kinship lines, but many do manipulate them.

Secondly, women's respective identities as widows, mothers, sisters, daughters or unmarried women are all critically important differentials in the modes by which women access land. The following excerpt from an interview by de Wet (1995), who refers to Mager (1992), conducted, not amongst freeholders, but Trust landholders in Rabula exposes the main line of the argument.

De Wet: *But now she [Mager] said women joined the [Trust] scheme to get free from men controlling them — but if they were widows, they didn't join on their own.*

Respondent: [an unmarried woman who got a plot via her mother, who got it from her husband, who died] *No, they were widows – it may be that she misheard.*

De Wet: *But do you think that there is something in that maybe, that women would see the Trust as a chance to have land separately from being controlled by men?*

Respondent: *No – usually a Xhosa woman, when she's got children, she goes there [to a plot] knowing that this will be taken over by her son – not for her own use. They know that the womenfolk take over, to give over to their sons, like they have done. But my mother had no sons – I'm the only child – but I have a son. Knowing that my son would grow up one day, she had to do this, knowing that my son will take over. Its not actually because they [the women on the scheme] want to have their own words. I don't think that was their aim – because they had sons and grandchildren, they wanted them to [have] these places. (de Wet 1995: 143-144, see Mager 1992: 780 for the original reference)*

These interpretive problems raise a central problematic. Land tenure has to be understood in terms of on-going social processes that reproduce the family, and continued investment in social relations that carry particular status identities, *over time*. In order to understand the specific property relations involved, it is necessary to track the particular modes of passage of property across generations.

The findings reported in the previous two chapters suggest that the *normative* importance of agnatic groups as the locally recognised units of ownership and control over land parcels among the freeholders gained *added* significance with the ownership of land. The authors of freehold titling programmes assume that customary rights will simply be displaced, and that registration will replace customary authority by providing new authoritative evidence of ownership, reflected in the names of particular individuals in the register (which in the past were usually males). Instead, title became the means by which changes in the register (required by law) could, ironically, be resisted. The title holders continue to adhere to norms, filtered

through customary lenses, that access to land, and its control, are associated with the kinship nexus that does not translate into ownership, proprietary control or inheritance by individuals, as previously discussed. We have seen in the stories in the previous chapters that the normative features of access and social control are not without their own contradictions and conflicts in the context of the pressures of modern lifestyles, reflected particularly in the tension between men and women. The norms are under stress and under constant pressure to change or adapt, and are not always adhered to.

The following discussion attempts to expand on the normative framework so far developed, by looking more closely at some of the social implications for women in the freehold families of the particular way rights of access and control of freehold land are structured.

8.3 'Home' and 'house'

Amongst the freeholders in my research sites, daughters who get married are discouraged from returning 'home', but separated, divorced or single women retain their residual rights in the descent group, and may in fact take up residence in the old family home, which is regarded as a potential refuge by the women of the group. It is not uncommon for a woman to return, and to redeem her identity in the old family home, for which purposes she must revert to, or retain, the use of the family name associated with the property. There are strong taboos against the retention of a daughter's/sibling's husband's name, or, if she is unmarried, the father's name of her child/children. In terms of this construct, women as wives have strongly circumscribed powers to transmit land (as, in fact, do all individuals in the family), but relative security of their use rights. Under conditions of land constraint, use rights can come under threat when their husbands die (as we saw in the Makuzeni case in Chapter 7) and it can no longer be assumed that these rights are guaranteed.

Reviewing the language of 'home' and 'property' among these African freeholders, the normative ideal of family property and family solidarity gives way in practice to subtle nuances in meaning depending on the circumstance in which the concept is invoked. These nuances are revealed when tensions simmer, or conflicts erupt. In isiXhosa the word *ikhaya* means 'home', evoking the idea of 'ancestral home'¹⁸⁶, which is not 'property' in the legal sense, there being no precise word in Xhosa terminology for 'property'. One respondent used his clan name (*amaMpondomise*) as the word used by the family for 'home', linking 'home' to the performance of family ceremonies which bring together all lineage members, reinforcing their family identity¹⁸⁷. An idea closely associated with the term *ikhaya* is expressed in the following phrase: *akunalithengisa ekhaya* (you cannot sell a home), which couples the concept to property as inalienable. You can however, sell a 'house', the translation of which is *umzi*, not to be confused with *umzini* or homestead. The persistence of the distinction between the family home and a residence or house acquired by purchase or

¹⁸⁶ Interview, Mr Mathamo, Beadle Street, Grahamstown, 24 January 2008.

¹⁸⁷ Interview, S.M. Mati, Rabula, 18 March 2010.

on marriage requires some explanation, as it illuminates the norms that have a bearing on family composition, intra-household rights and the transmission of those rights.

These questions require a brief recapping of the linkage between the devolution of land over time and the specific parcel, i.e. the temporal and spatial aspects of property. In pre-colonial times, clans and lineages were structured according to principles of fealty to a larger political unit (e.g. a chiefdom or kingdom), the land viewed as territory, rather than property. Clans and lineages 'territorialised' space, but did not 'own' land in the sense of retaining it and passing it to descendants (see Mackenzie 1989: 95-7, 105; Lund 2013). Clans, moreover, fissured and moved. Land was therefore not identified in terms of fixed and bounded parcels. With titling, the spatial aspect became fixed and bounded. Evidence from Rabula and Fingo Village shows that, with minor exceptions, the outer boundaries have been adhered to. As discussed in Chapters 4 and 7 below, in the early days of title, families attempted to purchase additional land for their sons. When available land dried up and individuals entered employment, family groups dispersed. The family property remaining fixed, a symbol of family unity, and a physical nexus through which family relationships are fostered and reproduced.

In Rabula, the freeholders generally subdivide their arable land informally and allocate strips to individuals (both men and women). These are not heritable parcels, but lifetime shares in the use of portions of the family estate. While not formally surveyed, the re-allocation is acknowledged as an 'event', in the past publicly witnessed. These formalities are less important today, corresponding to the decreasing emphasis on rural production. The apportionment of pieces of family land is nevertheless viewed as an event carrying jurial importance within the family. The process puts the spotlight on a generally more hidden acknowledgement of individual rights within families, in accordance with status. The estate as a whole is nevertheless seen as indivisible. Parts could not be inherited or sold off. As we have seen, and there were infrequent cases of sale and inheritance, but these tended to be deviations to the norm (see Chapter 5 above).

In the following cases the emphasis moves to the pivotal nature of gendered relationships in (a) the framing of family descent groups or lineages; (b) the way in which the lineages are reproduced over time; and (c) maintaining the kinship nexus around which family identity and family property are acknowledged. We also see that daughters/sisters have use rights in the family land, but these are contingent on their continued identification with the lineage symbolised by the family name. These factors all affect the concept of marriage and property rights fundamentally.



Figure 7: Informal subdivision of family plot into portions allotted as use rights to individuals

8.4 Case 1: The Tyini family, Fingo Village: an heir succeeds in asserting legal rights of inheritance

8.4.1 Narrative

The Tyini family was less fortunate than the Xhayimpi family whom we met in preceding chapters. The latter came face-to-face with the harsh realities of market forces, and of the proprietary powers of some members of the family, as privileged by the law. Their fate was decided not by the law, but by an act of ‘god’ that brought about the death of a rival claimant among the family members, threatening the family property. Like many other Fingo Village families, the custodianship of the Xhayimpi family property has been in the hands of successive women over the past decades, and so remains.

In the Tyini case, the family was evicted from their family home at 16 Victoria Street by a first cousin named Gladman, the son of their uncle Bertie. The eviction was seven years prior to my meeting with two family

members. According to my respondents, Gladman had not lived on the property since 1956. He owned a brick-and-cement house in another township in Grahamstown. The family property had been registered in the name of their common grandfather, Jackson. Bills continued to be made out in Jackson's name even after his death. The family assumed that the property was registered in Jackson's name, and this made them feel complacent and safe. To the family occupiers of the property, this was sufficient, in fact, definite, evidence that the property was owned by them. As we have seen in the other cases, registration in the name of an antecedent was not seen as evidence of insecure title, but rather it served, in terms of the norms and conventions of family property in Fingo Village, to confer rights on all Jackson's children and grandchildren.

The family occupants comprised mainly the family of Jackson's daughter, Maggie, i.e. Maggie's daughters Nqabisa Thelma and Gladys, and their respective children and grandchildren, including my respondent, Sindiswa. Maggie's sister left for Port Elizabeth on marriage, and an older brother died young without children (they claim he died 'in the war'). Bertie was Jackson's fourth and youngest son, father of Gladman, whom the family claim left the property in the 1950s. There were also tenants living on the property, whose rent provided a crucially important source of income to complement their otherwise modest livelihoods. The family, meanwhile, did not know that that their cousin/uncle Gladman had succeeded in selling and transferring the property to the brother of a prominent lawyer in town — that is, until a day in 1999 when a lorry pulled up alongside the house with building materials. The family was given three months to 'pack up and go'. When the family members refused to vacate their home, the new owner delivered lawyer's letters "warning us if we continue to [resist] we will be arrested".¹⁸⁸

I encountered one branch of the family, a mother and her daughter and grandchildren, who asked for my assistance. They are now renting rooms in the main black township far from the city centre. Clearly still traumatised, mother Nqabisa and daughter Sindiswa said they had repeatedly confronted Gladman, who claimed he could do as he liked with the property as he was the *mdoda* (man). Sindiswa explained:

He felt he had the authority to sell the property because of his manhood powers ... the way we were kicked out was merciless. They demolished the house and took the zincs [iron sheeting]. We are still bitter about it because now we have to pay rent and the only income is my mother's pension. We preferred to live there. Now we are moving around Grahamstown from place to place *soeking* [looking for] a place. The son [landlord of the rented rooms] might want this place at any time [Gladman] doesn't have an excuse; he is a drunkard; he doesn't care The one who bought the property is a moneylender. Gladman drinks a lot and got into debt with him so the sale was to pay for the debt, but we doubt he got much out of the sale We think [the new owner] paid R6 000 plus the arrears of R2 000.'

I subsequently located the records in the Deeds Office (on microfilm), which confirmed the worst: that Mlamleli Gladman had been registered on the Title Deed in 1987 by endorsement by the Titles

¹⁸⁸ Interview, Nqabisa and Sindiswa Tyini, Joza, 15 June 2006.

Commissioner, even though he had no greater rights than his two sisters. The family claim they were genuinely unaware of this¹⁸⁹, insisting the property had been in Jackson's name, and pointing this out when he gave them notice to leave: at which point he countered that it was his property. Clearly the family did not believe him. The official records indicate the property was indeed bought from him by a married couple, the Sandi's, as multiple owners in 1999, paying R10,000.00. The Title Deed showed further that the property had been registered in Jackson Tyini's name in January 1917, thus had been in the family for close on 85 years.

8.4.2 Analysis

This case reveals two levels at which the differential power of men and women regarding family property operate, triggered in this case by registration of an owner and dispossession of property through 'market forces' associated with credit and debt. One of the levels reveals perceptions women have of their relative powerlessness in the family; and the second is about official access to power.

The family members who suffered eviction have a clear perception that the process was prompted by a differential access to power and authority by the male member of the family. Their testimony shows that they identify loss of family land with male authority, validated in this case by the common law. Cases such as this rankle in the minds of family members for generations, since it not only threatens their physical well-being in the family homes, but it also threatens the very basis of their social identity of belonging to the broader family (i.e. the lineage).

The family member who evicted his relatives, on the other hand, had knowledge that as registered owner he had the power to alienate the property. What is of particular interest is that in law he had no greater claim to the property than his sisters, but somehow (we do not have the official correspondence) convinced the Titles Commissioner to name him on the Title Deed, either by stealth or by playing on the system's tendency to promote men both in terms of knowledge and legal power. In either event, his maleness played a role, and the female relatives were correct to see it as such. The irony is that in terms of intestate succession, his maleness did not dictate that he should *legally* succeed his grandfather, Jackson, as was the case with Archibald Xhayimpi in Chapter 7. As only son of Nontusi, the registered 'owner', the latter clearly had the right in law to succeed his mother. Gladman's success at being registered reflected both the mismatches between the law and the reality — the patently delusional nature of Titles Commissions which in some cases resulted in arbitrary decisions and tragic results, such as this one. The sisters were apparently not consulted. Even if they had been consulted, the Titles adjustment procedures insist on registering a chosen representative who may turn out to be untrustworthy. The entire official system is blind to the social

¹⁸⁹ The respondents did not have municipal bills, which is a method of cross-referencing the official view of 'ownership'.

processes behind the formal scenes, and women were exponentially more likely than men to be at the losing end of the scale.

8.5 Case 2: The Madinda sisters and the case of the Mbete surname, Fingo Village: proactive steps to protect family land

8.5.1 Narrative 1

The Madinda sisters¹⁹⁰ were anxious to prevent their family property from falling into the hands of their eldest brother, who had already squandered a property in another township. He acquired his own property with the assistance of his employer, Rhodes University. The sisters were relieved when a deeds search revealed that the family property was still registered in their deceased father's name. Four of the sisters have acquired properties elsewhere (three of which are RDP¹⁹¹ houses in a new township), but continue to live on the family property — 'to secure it' as they are worried that 'if we move now it might fall in the name of our brother'. They realise that he has some leverage in terms of both the law and older traditional notions of transmission: 'He is able to bully because he is the eldest male.' They decided to register the property in the name of their youngest sister, who is seen to be the best insurance against loss of the family property.

8.5.2 Narrative 2

I interviewed Gertrude Kadi in 2006 and 2008, and again in 2010. During that time she underwent a dramatic turn-about in her thinking about her choice of surname for registration on the title¹⁹². After her husband's death in 1970, she had been requested to return to the family home in Fingo Village, and in order to assert her rights, had reverted from her married name, Mbete, back to her family name, Kadi, reflected in her ID book as "Miss" Kadi. She had invested a great deal of her energies upgrading the property physically and caring for three generations of children and grandchildren, most of whom made no money contributions. According to the Deeds records which I retrieved in the Deeds Office, the property had devolved from her direct ascendants, Joseph Kadi (awarded the title in 1948) to Sarah (her mother) and Solomon (her brother) jointly, having been awarded the property in 1973. Her brother had his own property in Joza, and had requested Gertrude to take care of the family home.

By 2010, when the issue of updating titles was a hot concern in Fingo Village, following the appointment of consultants to look into the title deeds of all the residents, she was thinking in terms of a major change in strategy. She was afraid that by keeping the surname, Kadi, her brother's *children* might one day claim the property from under the feet of all the grandchildren she had raised in the home. She trusted her brother, but

¹⁹⁰ Interview, Margaret Madinda and siblings, Fingo Village, 10 May 2006.

¹⁹¹ The term refers to state-subsidised 'matchbox' houses, which can be seen in all urban areas today. The acronym is derived from the former Reconstruction and Development Programme established immediately following the first democratic elections in 1994. The term has stuck even following the demise of the programme, with housing undertaken by the relevant line function. See Ch 6 n5.

¹⁹² Interviews, Gertrude Dikeledi Mbete (family name: Kadi), Fingo Village, 9 June 2006, 10 January 2008, 10 March 2010.

did not trust what the future held, having witnessed cases such as the Xhayimpi and Tyini cases above. She was thus sounding out whether she might be able to register the property in the name of her *married* name, Mbete to protect the property against potential claims by collateral relatives in the Kadi name. She had no qualms about the name change on the title; her concerns all centred around defending the property for the line of children she had raised (including two tenants' children) than in defending the name of Kadi for its own sake. She was adamant that the family property should remain in the family line, and that it should not in future be registered in the name of any of her female children or grandchildren's husbands.

8.5.3 Analysis

These two examples show the sensitivity by female members of the family to the continued power by men to manipulate customary norms associated with male authority, combined with their power to access the formalities of the common law to secure individual interests that run counter to the norms of the family. As a result, families like these are increasingly selecting women as custodians, and when pressed by the authorities, put forward women's names for registration. There has been a pattern in Fingo Village of male members of the family securing loans from money lenders, using family property as security, particularly when have their own houses elsewhere in the town. The strategy of selecting women in authority positions is seen as insurance against alienation.

In the second example, we see an ironic twist in the matter of the importance of retaining the 'family name'. In this case, the custodian at first adopted the family name as reinforcement of her security of the property, and later, when seeing various examples of male offspring selling property from under the nose of family occupiers, decided it might be safer to register the home in the name of her married surname. She nevertheless adhered to the norm that properties should remain in the 'line' of children, rather than reverting to the husbands' families as a consequence of marriage. This is a good example of contingency and adaptability, rather than norms solidifying into 'first principles'.

We see also in these examples how the family property is typically distinguished from newly acquired properties (called 'houses', see 8.3 above) that are a mark of material success and mobility. Family property has significance as a symbol of family unity, and is property to which all members continue to have access providing they behave within the repertoire of family norms. The shift described here towards smaller units living in separate houses does not fragment family identity. The size of the Fingo Village properties may be a factor that influences the strategic importance of the freehold plots as a bulwark against future misfortunes, for the grandchildren, the elderly and others whom various misfortunes might visit. RDP and other township plots are a quarter of size of the freehold plots.

8.6 Case 3. The Radebe family property, Fingo Village: taboo against sister-in-law acquiring and transmitting family property

8.6.1 Narrative

In Chapter 6 we met the Radebe family, who are legally challenging legal processes of inheritance which threaten to dispossess the family of their family land. In this case, the widow of the agnatically-related family member attempted to dispose of the family property to her own kin. The story illustrates the tensions between lineage identity that is linked to land ownership and the claims of in-laws. The main outline of the story is repeated here to underline the problems that occur when lineage land is threatened with passage through a wife of one of the descendants.

In this story, the third generation of the Radebe family¹⁹³ are the descendents of four brothers who acquired four properties three generations ago. Two of the properties are close to each other in Albert Street, the other two in close proximity in A Street, No's 2 and 3¹⁹⁴. Two of the four branches of the family live in Fingo Village, the third in Port Elizabeth, and the fourth is extinct — the direct line of descendants died out. Although residing in different homes, and somewhat dispersed, the family regard themselves as 'one family', *umzi omnye* (which translates into 'one home').

Two of the four properties became subject to family tensions as a result of unforeseen events in the family. One of the second-generation descendants, Holdane, a direct descendant of one of the brothers, Meshack, was the custodian of no. 3 Albert Road, the object of the dispute. He took over the property after the death of his mother, who had been registered as the intestate successor to the property. Holdane was a miner in Johannesburg, who returned later, ill with tuberculosis as a result of contracting miners' phthisis. He died in 1984. He had no children. The house had been tenanted for a long period, and tenants continued to live there after his death.

A descendant of one of the other brothers, Vusi, succeeded in securing the rental of the property, No. 3 Albert Street, which was close to the other property, No. 2, in which he was residing with his common law wife, Nontumsi Maureen (the family dispute that they were married, though Nontumsi claimed they were). His claims to both properties were contested by the family. As a result of these tensions, Holdane had drawn up a 'will', which was not, however, officially registered, in which he requested that the property be administered by his aunts in A Street.

¹⁹³ Not their real surname or personal names below. The oral information was acquired during five interviews in Fingo Village. NMR 14 Jan 2008; 16 March 2010 (Albert Street); relative 24 March 2010 (A Street); five relatives 8 & 22 Sept 2010 (A Street). Documentary evidence from Deeds Registry.

¹⁹⁴ Not the real street names

Vusi was descended from one of the original brothers, Charles Goodman Radebe, owner of No 2 Albert Road, but his claims to custodianship (later ownership) of No. 2 were not recognised by the family, and nor were his claims to the ownership and rental of No. 3 after his uncle Holdane's death. No. 2, where he resided, was registered in his younger brother, Siyabulela's name. Siyabulela lived with his family in Port Elizabeth. No. 2 had previously passed from the original owner, Charles to his wife (through intestate succession law following the formalities of estates administration), to Siyabulela, who, according to the family, Charles had selected in preference to his older brother Vusi to succeed him¹⁹⁵. After Siyabulela's death in 1990, his wife, Jane Nompumelelo, was registered, having succeeded in terms of intestate succession law. It is still registered in her name. Although living in Port Elizabeth, the family maintained regular contact with the Fingo Village family.

Tensions continued to simmer during Vusi's lifetime, developing into an open feud when his wife, Nontumsi Maureen continued to assert ownership to both properties after his death in 1999, continuing to reside in No. 2 and draw rent from No. 3. In spite of her claims to me that her husband had been the legitimate owner of No.2, where she resided, the deeds records revealed that Siyabulela's wife, Jane Nompumelelo, who lives in Port Elizabeth, was registered as the owner, as mentioned above. The deeds records, did, however, reveal that Vusi had succeeded in having No. 3 (the tenanted house) registered in his name, despite Holdane's 'will' requesting it be managed by his aunts. The official records show that a Commissioner had adjudicated title to No. 3 in 1989 and awarded the property to Vusi and his wife, without consulting the extended family. A Substituted Deed of Grant was issued in the names of Vusi and his wife, Nontumsi Maureen, jointly. The family maintain that Vusi had 'torn up' Holdane's will, and fraudulently represented himself as the rightful owner.¹⁹⁶ When I showed Nontumsi Maureen the title deed in favour of Siyabulela, followed by his wife, she maintained that Siyabulela had 'stolen' No. 2 while Vusi was on Robben Island. She alleged that Siyabulela paid a small sum (she said R10!), being the balance owed on a bond from a building society. In her eyes, Siyabulela had fraudulently acquired the family property, which in his eyes had validated his claims to No. 3 when Holdane died¹⁹⁷.

Vusi and his wife had no children. Nontumsi Maureen had told me that she intended leaving No. 2 to her niece who lives in Queenstown. At that stage I was unaware of the extended family's case, but had asked her how she intended transmitting a property that was not registered in her name. She asserted repeatedly that it was hers by right, that her brother-in-law had acquired it fraudulently¹⁹⁸. I subsequently discovered that when she became ill in the course of 2010, the extended family had become extremely anxious, since they had

¹⁹⁵ Interview, 22 September 2010. Of added interest, another source of periodic tension arose from the extra-marital partner of Vusi's father, Charles, and their daughter born of this union. They pressured for restitution in the form of rents or property in dramatic quarrels with NMR, during which the extended family supported NMR. The daughter, a retired nurse, built her own home in Fingo Village, a conspicuously modern facebrick house. She eventually agreed to drop the matter.

¹⁹⁶ Interview, 22 September 2010.

¹⁹⁷ Interviews, 14 January 2008; 16 March 2010. There is indeed some indication on the Deed that the property was purchased rather than inherited.

¹⁹⁸ Interview, 16 March 2010.

never been on good terms with either her or Vusi. Their worst fears were confirmed when she died later that year, and the family discovered she had made a will leaving her registered property (No. 3, the tenanted house) to a niece in Grahamstown, her sister's daughter. The heir she identified was not the niece from Queenstown she had earlier mentioned.

Meanwhile the extended family managed to secure No. 2, where she had resided. We will recall that it is registered in Nompumelelo Jane's name, and she intended moving her son from Port Elizabeth to live there. The conflict thereafter centred on the potential inheritance of No. 3 by Nomtunsi's niece.

Nomtunsi's allegation that Siyabulela 'stole' No. 2 is matched in the same idiom by the extended family, who is adamant that Vusi's acquisition of no. 3 was 'theft'. They insist that they will not rest until the property is returned to the rightful family owners. The aftermath of her death has revealed many interesting facts (but uncorroborated at the time of my research) that came to light on the legalities of the extended family's fight to get back the property from the clutches of Nomtunsi's family. In consulting with the lawyer¹⁹⁹ who had, in good faith, drawn up Nomtunsi's will, it was revealed that she had claimed that her niece, i.e. the heir, who was also appointed as the executor to administer her estate, was her 'adopted daughter'. The family maintained that her niece had also pretended to be Nomtunsi's daughter for the purposes of succeeding to her two investment policies. Adding to the intrigue and ambiguity of the case, I discovered in the title deed records that Nomtunsi and Vusi's death certificates respectively state 'never married' but the Substituted Deed of Grant indicates marriage in community of property. The family allegations that Vusi and Nomtunsi Maureen were never formally married may be true, which raises serious questions about her acquisition of rights over the properties, and casts doubt on the integrity of the various claims she made, but as his common law wife, she nevertheless had some rights in law²⁰⁰.

The extended family were consulting officials in the offices of the Master of the Supreme Court, the institution overseeing the administration of Nontunsi Maureen's estate at the time of my last contact with the family in 2011. They lodged a dispute with the Master, indicating that they intended contesting the terms of appointment of the deceased's niece as executor, and her inheritance of No. 3²⁰¹. I was asked to draw up a history of the family property to be tabled with the Master's records, which I did.

8.6.2 Analysis

In the idiom of lineage property, property passing out of the lineage name, into the name of a wife's family, is regarded as flouting one of the most fundamental norms of family ownership. As discussed in the two

¹⁹⁹ Email, R. Laing (Wheeldon, Rushmere & Cole) to R. Kingwill, 14 September 2010.

²⁰⁰ Nontunsi Maureen gave me two different dates of their marriage during two interviews.

²⁰¹ Meeting between Radebe family members and official of the Master of the Supreme Court (I was present), Grahamstown, 11 March 2011.

preceding chapters, these 'rules' are subject to contingencies of circumstance, such as actual relationships and people's behaviour, participation in mutual family affairs, interest in the welfare of the extended family and people's characters. In this case, the extended family who subsequently contested the will, couched their refutation of her (and Vusi's) claims to the property in terms of the family norms of identity based on descent, in combination with allegations that Vusi and Nontumsi Maureen had misrepresented their claims and had not cared about the family welfare. Nontumsi Maureen is charged in particular with having distanced herself from the Radebe family, seldom visiting the A street homes or participating in family ceremonies and events. The relationship was clearly antagonistic. A neighbour came to the defence of the Radebe family, suggesting that Nontumsi Maureen was strange. Another signifier of some importance in the repertoire of family norms is the accusation that Vusi and Nontumsi had not "cared for" Holdane when he was ill²⁰², a particularly charged allegation given the couple had succeeded in taking over the ownership (and income from rental) of his property. As we have seen, the idiom of 'care' is a striking metaphor frequently invoked in the validation of claims to property.

The strong emotions generated by this case reveal the depth of socially sanctioned redress, even retribution, which can follow in the wake of transmission of family land perceived by the family to have followed an 'abnormal' course. In this case, the irregularity is associated with perceived 'immorality'. In terms of the law, Vusi and Nontumsi Maureen were recognised as the owners, which gave Nontumsi the right to leave the property to whomsoever she selected. The family, for their part, regard the processes by which she and her husband acquired the property as fraudulent, and her claims as going against the social norms of transmission through the lineage. The fact that the antagonist identified in this case was a wife acting against the interests of the lineage made the case particularly emotive, with connotations of 'evil' and suggestions of the work of malevolent forces.

The case demonstrates that gendered norms are embedded in both the property relations and the social identities of the lineage-owning representatives. There are strong social prohibitions against property passing through women (particularly wives) to family members considered to 'belong' to a different lineage. The property in this case is regarded as 'belonging' to the lineage, and the family as a whole to the property. The possibilities of misrepresentation by the 'antagonists' identified by the family magnify the emotiveness generated by the circumstances of this case, but this is only half the story.

²⁰² Interview 22 September 2010.

8.7 Case 4. “A cold war”: tensions generated by gendered property norms — taboo on brothers-in-law acquiring family property

8.7.1 Narrative

An analogous situation to the case above was reported in Rabula, where a daughter of the lineage, who married and lived nearby the family home with her husband, is alleged to have wittingly or unwittingly transmitting the rights to family property to her husband, who subsequently sold the land.

In this case, there are also two competing claims to family property. The property in question passed into the hands of the state during the period when the South African Development Trust bought up land for resettlement in Rabula in the 1950's (see Chapter 5.10 above). MM²⁰³ maintains that this land is still the legitimate property of his lineage, and is planning to contest the original registration in the name of the state. MM is a descendant of a large land-owning lineage with substantial plots of irrigable land on the banks of the Rabula River. Adjoining the main plot of family land is a smaller plot on the uplands, situated above the gravel road that dissects the family land. He maintains that a female member of his family (an aunt) ‘inherited’ this land before she was married. She and her husband appear to have lived near to the property. After her marriage, however, her husband is alleged to have sold the property to a white. The white owner was subsequently forced to sell the property to South African Development Trust when all white-owned land in Rabula was expropriated as described in Chapter 5.10 above.

MM maintains that his aunt did not have the right to cede the rights of the family property to her husband, nor did her husband have the right to sell the plot. MM explained that the land had to be kept in the family name, and that a wife cannot pass the land on to her husband, or her children if they bear her husband's surname. He maintained that the land was still regarded as family (i.e. lineage) land. Underlying his interpretation is the norm that rights to land are allocated to women as use rights during her lifetime only. According to local custom, the property was expected to revert to the lineage upon her death, meaning that neither she nor her husband, and nor their children, were entitled to formally inherit or sell it.

MM attributes the motive for the sale of family land by his in-law (his aunt's husband) as a deliberate attempt to block the family from reclaiming the land, and so circumvent the social encumbrances associated with family property. Several generations later, *both* families (i.e. MM's family and the family of his sister's husband) are competing to reclaim the land from the state. MM described the tension between the families as a ‘cold war’.

²⁰³ Interview, Rabula, 20 July 2006 & 17 July 2008.

Interestingly, I have been unable to verify, through documentary research of the deeds records, MMs claims that the plot had been owned by their family. There is no evidence on the title deeds that MM's lineage ever legally or formally owned the land in the first place. As the evidence in this thesis shows, however, 'paper facts' do not necessarily accurately represent social realities. The actual social history of this plot of land therefore remains a closed book until more evidence emerges.

8.7.2 Analysis

The importance of this narrative lies in the norms among landowning families that family land cannot devolve through women to their husbands or children, and thus out of the lineage name and into the name of another lineage through the husband's name. While no individual, male or female, has the power to alienate family land, women represent a threat by virtue of the possibility, through marriage, that the property will pass into another name or family line. Daughters of a lineage are allocated use rights to the family land, but are only able to continue to access family land in their adulthood if they retain the family name. If they do, they retain rights to the use of the land. Women who marry into a lineage are not permitted to transmit land to their daughters, as individuals, for similar reasons, though daughters may be allocated their mothers' portions of land informally, according to the norms described above. The norms require the land allocated to daughters to return to the family pool on her departure through marriage, or on the death of the user.

The common-law norms that give women independent rights of ownership and disposal therefore run counter to the social norms, and represent a point of extreme tension between western law and customary notions of family ownership. The case demonstrates yet again the tensions generated by the gendered norms associated with lineage identity, and the social sanctions against women transmitting family land out of the lineage. These tensions are more complex than the simple conclusion that women are discriminated against on account of their gender, since the norms of family property apply to all family members, male and female. However, the intersection between male-to-male succession rules, and the gendered structure of the family leads to actual and perceived vulnerability by female members of the family. The added complication of legal pluralism — common law, customary law and 'living law' — leads to confused attempts to solve these issues by legal means, since different actors draw on different sources of law or local norms to substantiate their claims. These multiple layers of legitimation are frequently not deliberate attempts to thwart legal processes, but simply a sign that people are prepared to draw on whichever institutions are most accessible and likely to support their claims.

8.8 Case 5. Florence Majola, Rabula: a woman successfully claims family property in her own right

8.8.1 Narrative

Florence “Flossie” Majola, a descendent of a formerly prominent Rabula family, lives in a modern, spacious, suburban home on the edges of East London’s largest black township, Mdantsane²⁰⁴. She followed a career in teaching throughout her adult life. In 2006 she committed the unthinkable: she subdivided the family property in Rabula by professional survey, and has fenced her property off from the rest of the family property. According to Deeds Registry information, her newly subdivided property comprises 8 ha out of a total of 23 ha, just over one third of the total extent of family land. The original property was one of three acquired by the original forefather (*ukhokho*) of the sub-lineage, Willem Majola, in 1866. In common with so many others, the family branched into two from the second generation onwards. The branch to which Florence belongs manages their family property independently of the other branch. Her branch is known as *indlu ka Thomas* (house of Thomas), the other as *indlu ka Charlton*. The property of her branch of the family devolved from Willem through Philip (*tat’omkhulu*), and again through Thomas, her father. The property was subsequently registered in the name of his widow Euphen, Flossie’s mother, who, according to the title deed records, formally ‘inherited’ the property by way of the ‘community of property’ provisions in the legal provisions of succession in the common law.

She justified her action of subdividing the property on the basis that subdivision was a ‘tradition’ in the family, maintaining that previous family members had also subdivided plots. There is, however, no evidence in the title deeds of any formal subdivisions having occurred before. Her assertion may therefore have been a reference to the customary practice of informal subdivision of strips of land allocated to individuals with use rights only, or perhaps another event that might have occurred when the family branched into three. She claimed that the other two sections of her branch of the family land had also been recently surveyed but not registered.

The resident members of the family in Rabula, whom I spoke to, including her sister-in-law, claimed that the family was not happy with the subdivision. They indicated that the process of subdivision was something they hoped to prevent, as it did not fit in with their view of maintaining the integrity of the family and family property²⁰⁵.

Flossie, meanwhile, maintains she now has the freedom to sell the property or to leave it to her children by way of a will, either individually or collectively, or whomsoever she chooses. “I can do whatever I like. I can

²⁰⁴ Interview, F. Majola, Mdantsane, 16 July 2008.

²⁰⁵ Interviews, Rabula, 19 July 2006; 17 July 2008.

sell it if I want to". This statement is completely novel in Rabula, and even for a man it would be regarded as a serious transgression of existing norms. In spite of her somewhat provocative challenge that she can do as she wishes with the property, she nevertheless intends to leave the property to her two children, and give them complete freedom to decide on its the future trajectory, free of family encumbrances or conditions: "they can keep one and sell one, or sell both, or sub-divide". In her challenge to family norms to free the property from family encumbrances is nevertheless a counter-thread. She herself has kept the family name, Majola, and passed it on to her children.

8.8.2 Analysis

Florence's decision to formally subdivide a portion of the land, calculated as a one-third share of the family property, is revolutionary in Rabula. I came across no other instance of this in either of the research sites, nor even intimations of it.

The case is unusual in several respects:

- the declared freedom by an individual of rights, use and alienation of a portion of family land;
- the significance of the individual (in this case a *female* family member, as a sister or sibling), staking an individual and separable claim to land, without any prospect of residual claims by members of the lineage, in other words, a woman claiming property in her own right, on her own terms;
- the highly unusual occurrence of formal subdivision of the land by survey, and its complete spatial and jural separation from the original property. As discussed in preceding chapters, land is not conventionally subdivided in this way. All families in Rabula informally subdivide the land into smaller plots allocated for individual use to males and females during their lifetime. These plots, however, revert to the lineage on death.

This case is truly exceptional. Florence Majola has crossed the invisible boundary of the family map by interpreting her share as formal 'inheritance', converted it into heritable, separable, divisible property, which she intends to leave to her children by means of a will.

This development may be a foretaste of what might happen in future. This may well be an example of what Moore called a 'diagnostic event', which signifies a significant change that may be indicative of similar patterns to come (Moore 1978: 730).

It would nevertheless be careless not to draw attention to the fact that she has been at pains to retain the family (lineage) name and pass it to her children; that is the name Majola, the name of her male forefather or

ukhokho, who founded the Majola estate. This seems to indicate that her sense of social identity and ‘belonging’ are firmly rooted in the cultural norms described so far, except that she does not regard the family property as an essential element in the family nexus. It is not yet clear whether or not her children, when married, will continue to perpetuate the Majola family name in order to retain family property for *their* children in turn. It is therefore too early to conclude just how significant or potentially subversive an event this is.

If the event proves to be a sign of a new direction, the legal interpretation would be that, since the property has been formally subdivided and is destined to be formally inherited by two individuals, this property is no longer lineage property, but held by a nuclear family, transmitted via channels consistent with western notions of ‘diverging devolution’ to direct descendants of both genders. Nevertheless, there remain tantalising indications that this seemingly nuclear family does not conform in its entirety to a western nuclear family model. Florence, the descendant of her forefather Willem Majola, is claiming the land in the name of her forefather, Majola, and not in the name of her husband or the father of her children, indicating that an important norm of family property has prevailed. She has not committed the socially irrevocable transgression of transmitting the property in the name of her children’s father’s surname, and has retained her great-great grandfather’s name on the title. As we have seen in the Radebe and MM cases above, the passage of property to the name of an ‘in-law’ falls into the realm of the unnatural, and even the malevolent. Florence’s actions have changed the nature of inheritance but have not (yet) challenged the primacy of the descent group ideology with regard to her own social identity. She has nevertheless laid the foundations for possibly more radical changes by her children.

8.9 Case 6. Virginia Ncanywa, Rabula: female sibling custodianship

8.9.1 Narrative

Whereas Florence Majola took the radical decision to splinter family property and its ownership away from the lineage of the founding forefather and devolve part of it to her direct descendants, her two children, Virginia Ncanywa, whom we first met in Chapter 6.1, is following an alternative route for asserting the authority of women²⁰⁶. She intends to fill the shoes of her brother Stewart Tatase as the custodian of the undivided family property. Like Florence, she has children of her own and has retained the original family name, Ncanywa. Unlike Florence, she identifies fully with the ethos of impartible ‘family property’ and does not see her claims in terms of separable shares, but in terms of succession to the role of overseer. Unlike Florence, her permanent home is in Rabula, making her eligible for this position. The next generation of this

²⁰⁶ Interviews, Maggie, Virginia & Ntsikelelo Ncanywa. Rabula, 31 March & 1 April 2008, 22 July 2008.

family, her children, have homes in nearby urban areas. I visited one of these, a spacious modern, suburban home in East London. The children are regular visitors to their Rabula 'home'.

The Ncyanwa land is informally subdivided into plots over which Virginia and other members have individual use rights. These rights are subordinate to the joint ownership and indivisible devolution of lineage land as a whole, in keeping with social norms in Rabula. Both men and women have rights over this land, although the family tends to cultivate all the land collectively, using seasonal labour available through 'work groups' of people from neighbouring settlements, who are remunerated in kind (food and indigenous beer). Family labour is still important in cultivation, but is not a mode of control over women in the family.

8.9.2 Analysis

The Ncyanwa example is one of lateral movement of the position of custodianship to a female sibling, deviating from the principle of succession through male collaterals. Hers was one of two cases²⁰⁷ I came across in Rabula of a women succeeding to custodianship. In this case, the succession had not been implemented, as her ailing brother was still alive, and it is therefore not possible to assess the outcome as yet.

Like the Majola case above, this case is a 'diagnostic event' – indicative of changing gendered norms in Rabula. Similarly, the case is indicative of both change and continuity. While in this case the gendered nature of custodianship has changed, in general female custodianship in Rabula is constrained by the fact that the family (the lineage) retains overall control of the property, which tends to emphasise the authority of the men. This is however, showing signs of change, since male authority is not inherent in the patrilineal concept of the descent group, though it accentuates it. Virginia, as a sibling who has retained the family name, is not threatening the normative framework of lineage land held by members of the lineage. Moreover, her children have retained the family name, ensuring that, for the next generation at least, the family name will be maintained in so far as access to, and control of the family property is concerned.

8.10 Conclusion: Change and continuity in gendered norms

The examples discussed above show that aspects of older, 'customary' values and language persist in Rabula and Fingo Village, in the face of wider processes of social change that threaten existing property relations. The cases demonstrate the ways in which property relationships are embedded in social processes validated by kinship affiliation. Nevertheless, the outside world is impacting on both ideologies and practice at the local level, and in particular in changing perceptions of women's rights to property. These tensions between

²⁰⁷ The other case was of Mortiana Jara, a separate branch of the Jara lineage from the case discussed in Chapter 6.5. She was appointed 'responsible person' of the family property, which she distinguished from the family's urban property by the expression "this title belongs to my father". She described her position as "*umama wekhaya*" (mother of the home). Interview, Mortiana Jara, Rabula, 25 April 2008.

local and wider fields manifest along many axes, and cannot be reduced to a simple binary between the common law and customary systems, in either old or new guises. Some of the tensions and stresses around ideas about property have moved into the heart of family relationships and structures. Note that African owners in these contexts do not self-identify as ‘customary’ families following ‘customary law’; rather, they see themselves as embodying modern values within an African moral economy. They do not see a clash between titles to property and norms that derive from older customary values. People distinguish their ‘way’ from others, but this is not explained in terms of customary law.

By way of example, Mr Baninzi’s explication of the process of succession, quoted in some detail in Chapter 7.5, clearly distinguishes between the ‘old’ way and the ‘new way’, but simultaneously distinguishes the ‘African way’ (by his reference to the ‘extended family’) from the western nuclear family. His understanding of ‘extended’ family is different from the conception of an extended family in the western sense where the domestic group might include multiple generations (e.g. grandparents, or grandchildren). He is clearly referring to the patrilineal descent group when he includes brothers and brothers’ children as family members; and moreover he emphasised that women’s access and authority had to be controlled by virtue of their potential to introduce ‘new names’.

Most of the families we have seen emphasise the bonds of siblings, even if the ‘idea’ is that female siblings will leave the family ‘home’ and ‘should get married’. The realities in both research sites show that women are very present and even play prominent roles in managing property. We have seen that in Fingo Village many women, as wives and sisters, play a key role in controlling, managing and maintaining family property and ‘taking care of’ family members. Evidence suggests that the Baninzi lineage has a stability that many other families do not, and has demonstrated its capacity to reproduce the patrilineage in the ‘classic’ mould envisioned by freeholders, or perhaps this was the model he wished to impart as the ideational model. This model is, however, far from the general pattern in the composition of the social groups in the two research sites, where there is a great range of different domestic forms. Baninzi did stress that ‘each family is different’. There is great variability in the composition of the social groups who live in the properties, and also in the detail of their domestic arrangements. Most are made up by an overall structure of multiple smaller units (‘nuclear families’) which are widely dispersed. What is stressed is not the family ‘form’, which is highly variable, but the persistence of familial identities through the unilineal mode of descent.

The Xhayimpi, Tyini and Madinda stories in this chapter, as well as the Tshezi, Jara and Ncanywa stories in preceding chapters, reveal the persistence of ties of siblingship. In its ‘customary’ form, the brothers of a landowning unit were seen to hold rights of access, the senior, appointed brother having the rights of overall control. Under current circumstances, unmarried, divorced or widowed women of the patrilineage, who are naturally eligible members of the family descent group, are given lifetime use rights, and have powers of decision-making even when they are not the ‘responsible’ figures.

In Fingo Village, female siblings form households with strongly feminised roles of custodianship, but their relationships are nevertheless still culturally constructed to conform to the overall framework of patrilineal descent. The family name of the male forefather continues to denote both the family property and the identities of family members. The widows of the men of the patrilineage are frequently incorporated within these households and are also accorded roles of authority, but their roles are generally perceived, particularly in Rabula, as a caretaker role on behalf of their dead husbands and their sons. They are therefore acting within the normative framework of the lineage into which they have married, but to which they themselves have no claims.

In Rabula, widows' clan names are used to denote the physical 'place' of the married home, but it must be remembered that the authority of widowhood derives from the customary concept of 'houses', where women of polygynous households were each accorded a 'house' and had authority over the house, to which property was attached. Widows must continue to act in the interests of the patrilineage into which she has married, and we have seen how there are strong social sanctions against widows' attempting to divert the property to her own relations, which is construed as theft and has connotations of the unnatural, and even 'evil'.

The Xhayimpi example, discussed in Chapters 6.8 and 7.3 above, shows how succession within that family followed a sequence where women were frequently appointed custodians in terms of custom, only to be confronted with a male heir with property rights in terms of the common law, who had the legal authority to alienate property, threatening the whole family's tenure.

The story of the Madinda sisters illustrates concerns over authority to dispose of property, as well as the gendered dimensions of family versus individual property and multiple residency. They consciously chose to register the property in the name of their youngest sister as a strategy to prevent their brother from claiming ownership based on his superior access to the law and lawyers, and registering the title in his name. They had other properties nearby, but were prepared to make sacrifices to protect their joint ownership of the family property. They saw the registration in the name of a male in their generation as a threat to property, but not the registration of female custodian chosen by them.

The Tshezi example discussed in Chapter 6.7, where a granddaughter attempted to regain property sold by tenants who had been 'adopted' by the former generation as proxy owners (which I have called 'fictive kinship'), points to the perception in families that land is held by them in perpetuity. This case reinforces the circumspection with which people allow non-family members to get too close to the family, and the growing concern for careful selection of the caretaker. "There is fear that whoever becomes custodian can easily sell

the property”, said a son who actually bought property for his parents in Fingo Village.²⁰⁸ Interestingly, Tshezi did not want the property herself but planned to sell it and use the proceeds of the sale to renovate her present house: “I wanted to sell Wood Street and fix up my house at M Street which is *vrot* [rotten] and leaking”²⁰⁹. This shows how people’s actions sometimes contradict their testimonies about the non-saleability of land. Sanctions against alienation are to do with identity and authority to dispose, rather than alienation itself.

In the Tyini case discussed in this chapter, different understandings of property rights resulted in an actual eviction. The Tyini family were evicted when the family home was sold to offset a debt by a family member whom the law regarded as the legitimate proprietor. The resentment and animosity, and most of all, sense of injustice, among the evictees is palpable more than ten years later. The strong sense of injustice is based on customary ideas of ownership. The fact that the ‘law’ justifies the transfer of the family property is not only incomprehensible, it is beyond the moral pale. In the worldview of the evicted family members, the moral compass points in the very opposite direction to the law. Registration in the name of a forebear is a strategy that is thought to validate ownership and confirm identity, and moreover, provide security against the proprietary interests of the present generation. In this case, however, these *legal* norms proved to be at the very root of their dispossession.

The Radebe family has a clear perception of the rightful source of decision-making and authority over property transmission. Succession to property should pass through agnatic relatives, the direct descendants of the four brothers who originally acquired properties. Three of the properties have been devolved in accordance with this view. The principle is under threat in the fourth case, where the property is perceived to be in danger of passage out of the Radebe name to the wife’s sister’s descendants – if the common law prevails. The family regard this as tantamount to fraud. Allegations of dishonesty, fraud and ‘evil’ are surfacing. Ordinary Fingo Village residents would concur with the Radebe family’s perception that here the process of succession has been manipulated by ‘bad’ forces. There are similar echoes in the case of MM of Rabula discussed above.

The Majola case involves an event with radical implications. The ‘triple action’ of an individual — a woman — formally subdividing land on her own authority (in fact, in contravention of the family’s wishes) signals a shift of great importance in relation to both property relations and authority, which in Rabula is still strongly male-centred. However, the retention of the family name indicates a continued adherence to the ideology of patrilineal descent. What has changed is the potential for the restructuring of property relations as a result of the fact that Florence Majola’s children are to be given the freedom to deal with the property in their own right, and not in relation to the family line.

208 Interview, Simpiwe Seti, East London, 18 April 2006.

209 Interview, Fingo Village, 9 May 2006.

The Jara case, described in Chapter 6.5, demonstrates the prominence of adult sisters (the great aunts and aunts of the respondent) in decision-making and the switch in investment from agrarian production to the education of the girls in the first half of the twentieth century when the rural economy in the black 'homeland' economy contracted. The switch from direct production to education mirrored a widespread change in investment in Rabula. In this case the emphasis was on female members of the family being enabled to earn professional incomes, while the men were expected to enter the lower-income job market. The switch in investment was not so much a withdrawal from investment in property relations as a continued investment in social relations in such a way as to encourage social and economic mobility. In this family, the women as sisters had, and continue to have, influence over property matters affecting the family property.

The story resonates with many others in Fingo Village that demonstrate the continued importance of the community of siblings, who represent lifelong bonds of kinship (often not seen in modern marriage relationships), over property holding. Male and female siblings have authority over land in a way that wives do not. Furthermore, the emphasis on 'siblingship' de-emphasises direct inheritance by the children of nuclear families. The inclusion of sisters in the intra-generational nexus of property, including in its control, may be something of an innovation in Rabula, but is increasingly the norm in Fingo Village. In the latter, women as sisters have authority over property and women as custodians are seen as a better guarantee against dispossession than men, who start to assert their proprietary powers, and realise the creditworthiness of private property when attempting to raise funds for payment of debts. The families' practices in all these examples are not only deeply at odds with the common law, which predetermines heirs and vests them with proprietary power, but also varies from those in customary law, which emphasises the authority of the eldest male.

In making sense of the stories that speak of both change and continuity, it is important to go back to the basic conceptual structuring that reinforces the resilience of gendered norms. In the phrase *ikhaya lentombi lisekwendeni*, which means a woman's married home is not *her home*, but her 'place of marriage', this central puzzle is located. She is required to relocate to the home of her husband's family group or lineage, but her social identity, in terms of birth and lineage, remains with her own family group. In the past it was regarded as a stigma for a woman to return to her natal home, which had provided her *lobola*, the payment of which assumed her to be 'out of' of her home. Under African freehold, some flexibility in these principles has been introduced.

Men and women continue to project their social identity in terms of 'belonging' to their descent group. These norms and principles are not *enunciated* as rules or made explicit in statements. Like all descent ideologies, the ideology of descent discussed here is regarded as 'normal', as a way of thinking which is both metaphorical and solid evidence of how things are, and should be, ordered. In any family system in which

any person is born and brought up, one seldom questions the underlying assumptions behind the way in which one recognises one's relatives. The patterns tend thus to be repeated.

As discussed in Chapter 3, the coincidence of the status of the non-lineal spouses, who in patrilineal systems are the wives, with the gender differential of women, puts a strain on attempts by women to overcome discriminatory practices that are based on gender. The descent group is structured along gendered lines, which makes it difficult to distinguish between differentiation based on social structure and differentiation which results in discrimination.

Many changes have occurred which means that women have other sources of social and economic identity besides that discussed above, and which create circumstances of increased independence. One of these is Christian and/or monogamous marriage, which adds a new dimension to family identity, particularly given the stress on the sanctity of marriage implied in the monogamous marriage contract, and which under western law is the basis for the division of property. Another powerful new dimension of identity is the country's 'grand map', the democratic Constitution, which enunciates principles of gender equality, leading to women becoming increasingly assertive about property rights resulting from both marriage or agnatic family identities.

It is these issues that the following chapter in Part Three turns: the interface between the new formalities and legalities of the country's Constitution, which introduces the policy imperative of gender equity, and customary social norms that frequently find uncomfortable fits with social pressures to eliminate gender discrimination.

PART THREE Parts and Parcels

STRUCTURING DIFFERENCE

Parts One and Two of this thesis focused on the conceptual, historical and social-relational aspects of tenure in relation to title. Part Three focuses on the 'legal-institutional' framework, drawing from a theoretical distinction proposed by von Benda-Beckman et al, who draw attention to the significance of distinguishing between the 'categorical' dimensions of tenure, and 'concretised' property relationships (2006: 14-25) (see Introduction and Chapter 2.1). Von Benda-Beckmann et al point out that a significant problem in property theory is the failure to distinguish between categorical and concretised property relationships. The authors point out that there is a tendency in the economic and policy discourses is to privilege state law and property rights, while non-state normative orders are neglected. This problem is exacerbated in situations of legal pluralism.

In most writings on the relationships between property and economic or ecological development, *categories* of property rights are assumed to inform behaviour and to affect resource allocation or sustainability of natural resources directly, while actual property relationships remain largely unnoticed. [...] Production *practices* and social *relationships* are shaped by principles and rules of property law, but they are not the same as those principles and rules. Property relationships are embedded in broader social relations — property interactions maintain, change or create new social relationships, which are in turn shaped by the outcomes of wider interactions" (von Benda-Beckmann et al 2006b: 25, italics in original)

These interacting factors introduce elements of indeterminacy. Distinguishing between layers of property relationships "cautions one not to draw false conclusions about 'gaps' between actual practices and a conflated ideological-legal-institutional complex" (ibid: 23).

The authors define concretised property relationships as "the layer of actual social relationships ... between property-holders with respect to concrete valuables", which are often expressed in relation to wider social networks "where property relations form one important component of multiplex relationships" (ibid: 19-20). The case studies in the previous chapters reflect this layer of social relations vis-à-vis property. Examples can be seen in the family cases where people declare they are the 'owners' in substantiating their claims to property in the context of kinship relationships. In such contexts, *legal* rules and categories that anticipate changes in social relationships (e.g. laws that transform tenure into proprietary relationships through title, or new inheritance rules) are frequently resisted. Here we must recall Moore's insistence that the law was only one of many fields by which social and symbolic orders are built and made durable (see Chapter 2.10). In bracketing 'African freehold' as a semi-autonomous social field, we saw how freehold owners were involved in numerous self-regulating arenas, in varying relationships with central law, and how in many key respects the law was evaded, but not always consciously.

In this thesis I have reversed the conventional order of prioritising the categorical elements. The layer of state law and rule-categories form the subject of Part Three of the thesis. The focus shifts to the processes of definition and ‘categorisation’, where criteria and rules are brought to bear on property relations in efforts to structure them authoritatively, and diffuse the potential ambiguities and indeterminacies. These definitions and categories do not simply ‘arrive’ unscathed from the timeless past, but are negotiated, disputed and sometimes subject to “open struggles”, in the process of which property relations change (von Benda-Beckman et al: 20). Von Benda Beckmann et al define the ‘categorical’ dimensions as the legal-institutional terrain, which provides:

... a legitimising and an organisational blueprint for property relationships, as well as the procedural and substantive repertoire to clarify problematic issues, notably disputes. Legal-institutional categories spell out the rules and procedures for the appropriation and transfer of rights [...] and include the normative expression of property rights. (von Benda-Beckmann et al, 2006b: 16).

The concretised and categorical dimensions are not cut off from the other as if in a self-contained capsule. For analytical purposes they may be dissociated from each other, but in reality, concretised property relationships are shaped by categorical criteria. Nevertheless there is theoretical utility in differentiating between them, as “they are different social phenomena and constitute different constraining and enabling elements for social interaction” (ibid: 25).

I have found the distinction between the concretised and categorical domains particularly relevant for the study of ‘African freehold’ on account of the lack of synchronicity between the social relational, or ‘concretised’, realm of property relations (people’s folk or genealogical maps as discussed in Chapter 2.4 above) on the one hand, and the layer of state laws, rules and categories on the other. Yet, it is clear that the layers cannot be examined in isolation of each other.

The focus in recent debates on the nature of the relationship between law and custom, which stresses the importance of the relationship between the concretised and categorical domains, are mirrored in similar debates about the inter-relationship between official customary law and the ‘living law’. The idea of the ‘living law’ has been invoked as a representation of normative orders that reflect current norms in African society. The argument for ‘living law’ has gained much currency on account of the wide, and widening gap between official sources of law, including customary law, and social norms and practices in post-colonial contexts. The observation among scholars and practitioners, working in a variety of contexts, of divergences between law and practice has recalibrated the balance by stressing local struggles and contests over the meaning of custom and access to material resources, i.e. the ‘concretised’ realm. It is here that new normative orders jostle with old ones. These local struggles are often invisible struggles, since they involve relationships of asymmetric power, such as between men and women, youth and powerful elders, or marginalised groups and central institutions (*cf* Mnisi 2011). The ‘living law’ discourse not only makes these

local struggles visible, but brings them into the arena of the constitution of authority. As Lund consistently emphasises, “[s]truggles over property are as much about the scope and constitution of authority as about access to resources” (Lund 2002: 14).

In the shift towards the local and relational dimensions of land and property, it is important not to lose sight of the importance of national institutions, policies and laws. Lund agrees that by themselves these institutions “establish neither effective authority nor functional property. This is done in concrete processes whereby actors negotiate the substantiation, configuration and representation of institutions, policies and law”. But he also warns that these institutions:

... matter a great deal. They constitute important reference points for action, they bolster authority of certain groups, and they provide certain – possible – avenues of legitimation of property and authority” (Lund 2002: 32).

The chapters that make up Part Three reveal some key elements in the legal-institutional field that impacted the outcomes discussed in Part Two, drawing particular attention to the tensions between law and social change. The post-assimilationist legal framework for managing freehold title was part-adaptation to social norms, part adaptation to common law notions of property, and part-transplantation of freehold title to the realm of segregation and ‘customary law’, which meant that the law pulled in contradictory directions. I look at some of the details in these tensions, which tend to be overlooked by scholarship that focuses on the interface between different ‘systems’ of property at a broader level.

WESTERN CAPE

As we saw in Part Two, the rules established by law in many important respects did not correspond with the social values and practices of the African freeholders with regard to the management of their land. The colonial authorities were well aware that there was a disconnection between the legal paradigm and the practices on the ground. They responded by establishing dual sources of law in important areas of management of African title, and the transmission of property. The development of legal pluralism, however, since it was increasingly designed for larger purposes of racial domination, racial segregation and the management of an economy based on migrant labour, failed to fill the widening gap between the values embodied in ownership by the freeholders, and the values embodied in the legal prescriptions of title. Nevertheless, the law had a powerful impact on the overall construction of power and authority in the country as a whole, as reflected in the structure of property relations in the research sites. The freeholders were not immune from the law, though they did not always respond in line with the law.

Differing concepts of the ‘family’ were fundamental to the lack of ‘fit’ between the law and ‘African freehold’, but at the official level the disconnection manifested in lack of currency of the deeds registry. Official attempts to find conformity resulted in two channels of intervention. The first was by making sharp distinctions between customary and western marriage and property rules, where western principles were

regarded as the morally dominant paradigm (Chapter 9). The second was by rendering African title more comprehensible to the state by manipulating the legal technicalities of African titles (Chapter 10).

The penetration of law into the domestic realm brings to light the most sensitive points of intersection between colonised and coloniser, as well as the most sensitive points of interaction between members of African families, and particularly between men and women. In the process, intractable problems of interpretation of rules and values come to the surface, which in turn reflect questions of whose interests were served by which interpretations of the customary rules that eventually made their way into legal texts.

Chanock argues that rules are not essences: different interpretations of custom and tradition were a consequence of conflicts of interests within and across families in a changing economy, rather than being simply a question of what was culturally validated as customary or non-customary behaviour (Chanock: 1991: 71, 77). In Chapter 9, I briefly discuss the historical basis of legally and socially differentiated regimes of family law, followed by a reflection on recent reforms initiated by judgements of the Constitutional Court, where international human rights discourses, as embodied in South Africa's Bill of Rights²¹⁰ were brought to bear on 'official customary law'. The Bill of Rights marks the South African Constitution as one of the most advanced constitutions globally in its explicit acknowledgement of the need to harmonise law with modern human rights. At the same time, the Constitution calls for a second layer of harmonisation. The Constitution allows for the 'development' by the state of customary law, interpreted by the Richtersveld judgement as follows:

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution.²¹¹

The overall affect of this interpretation is the suggestion that customary law, previously subordinated to the common law, should be elevated to that of parity between the common law and African customary law in South Africa. A third imperative in the Constitution, drawing directly from the rights discourse, is gender equality in all sources of law, including customary law. A fourth and fifth are provisions for freedom of language and choice of 'cultural life'.²¹² These constitutional injunctions are in tension with many areas of law, and come to light most significantly in the area of gender relationships. A central problematic around which these tensions coalesce is the relationship between the 'individual' and collective social units that feature in African social and property relations. Individual rights tend to be a feature of the international human rights discourse, while arguments that draw from 'custom' accentuate the social relational and cultural realm.

²¹⁰ Constitution of the Republic of South Africa, Act No 108 of 1996, Articles 7-39

²¹¹ *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) at para [51].

²¹² Constitution of the Republic of South Africa, Act No 108 of 1996, articles 9, 10, 15, 30, 31, 39(2), 211 (3).

As a result of these unresolved tensions and ongoing struggles, legal pluralism was, and is, never a simple dichotomy between customary law and common law (in spite of the state investment in dualism), but an ongoing interweaving of ‘living law’ and historical constructions of official law, which themselves intermeshed (Claassens 2013; Claassens & Mnisi 2012; Mnisi 2011; Claassens & Mnisi 2009). Recent reforms in family law attempt to address these interpretive nuances in expectation of harmonising ‘living law’ with actual norms and practices, which raises the intractable question of ‘what is customary?’ Central to all these questions is concern about gender inequality. Colonial construction of the customary law of the family artificially elevated male powers over property. The question that remains subject to debate is whether the reforms, which reflect international human rights discourses, have jettisoned cultural rights.

Concepts, arguments and debates around plural legal institutions in South Africa must be contextualised within the broader shifts and changes that were taking place in the colonial polity in the direction of increasingly segregated political institutions, which affected *all* Africans, regardless of status differentials. The original interest by colonial authorities in the Cape in adapting survey and title to African landholding patterns had fast given way to more direct control over all forms of African land allocation by institutions of the native administration, including African title. This process depended for its day-to-day regulation on the co-option by Native Commissioners of traditional positions, such as headmen and later, as segregation gave way to more indirect controls, tribal authorities and chiefs.

Chanock’s scholarship on the changing legal culture in Africa consequent on the implantation of colonial political and plural legal institutions has considerably broadened the positivist approaches to law taken by legal scholars and academics in his stress on historical context. He uses ‘discourse analysis’ to show how colonial officialdom was engaged in ongoing efforts to restructure power relationships to subordinate African society to the interests of white society and of capitalist market relations, and how the enormous weight of an assumed moral superiority resulted in the denigration of African social institutions and persons. As a result, he emphasises the powerful impact the law had in Africa, particularly South Africa, in shaping new identities and altering socio-political relationships based on the subordination of customary law to the state’s interests. His writings show convincingly that despite the increasing stress on dualistic legal channels, which divided along the lines of customary law and the common law (and statute), there remained powerful interconnections between western and African law, shaped by the interests underpinning both. His argument rests on concerns about the stress on pluralism at the expense of life lived in common between all racial groups in South Africa. This prism mirrors the debates about ‘universalism’ vs. cultural diversity (Chanock 2000b: 19). While Chanock’s analysis acknowledges the power of traditional sources of authority and family relationships to survive the impact of the formal law, he questions discourses that raise cultural institutions above their embeddedness in socio-political life, criticising this tendency as ‘cultural essentialism’²¹³.

²¹³ I was not able to incorporate Chanock’s latest work on *Constitutionalism, Democracy and Africa*. In a draft of a working paper he maintains that “... in Africa constitutions, bills of rights, and the hope of establishing the practice of constitutionalist states must rest on a proper connection with

Chanock's perspective may be counterposed by evidence that the resilience of African family law reflects values that go beyond the mere assertion of material interests by certain sections of African society, and by new legal structures validating them. An alternative perspective suggests that these relationships were not simply shaped by the 'weapons of law', but also by powerful forces in premodern African society that continue to filter the 'social philosophy', sense of worth and meaning of the people, and which, though pointedly 'man-made' and socially constructed (as is the 'human rights' law), continue in important respects to reproduce durable foundations in the shadows of the law. These cannot all be reduced to colonial 'constructs', and require more systematic contextual analysis than is currently taking place in the legal arena of constitutional reform.

Official fumbling to iron out the legal mismatches between spatial, social and property concepts in 'African freehold' (explored in the following two chapters) corresponded to the period of consolidation and centralisation of disparate branches of native administration under a radically strengthened Native Affairs Department in the first half of the twentieth century (Evans 1997; Dubow 1989). The thinking that found ultimate expression in the Native Administration Act of 1927 coalesced in the formal recognition of customary law, albeit in a subordinated status to the common law. Chanock has argued that the recognition of two distinct branches of official law in South Africa, as contained in this legislation, was a "pathological case of legal pluralism" on account of the asymmetries of power involved, and the construction of customary law in such a way as to advance colonial interests rather than those of the majority it was supposedly designed to serve (Chanock 1994: 295-6, 311).

In Chapter 2.10 I raised Moore and Chanock's argument that customary law was the 'residue' left when the more substantial concerns of colonial governance, such as crime and contract, and been subsumed under common law and statute (Moore: 1986: 317; Chanock 1994: 301). Chanock's view of this division in law is that "[b]lack were expected to assimilate to in the areas of labour contract and commercial credit and debt, but to remain inherently different in the realm of marriage and family, economically perfectable, but reproductively different" (Chanock 1994: 301). As Africans increasingly took up wage labour and became integrated into a single economy governed by laws and principles of contract, a paradox is revealed in that, when it came to economic transactions, the common law was generally applicable. In matters beyond land tenure and the domestic realm, therefore, the legal paradigm readily departed from customary law.

Long-gestating concepts around which 'customary law' were ultimately constructed were consolidated in the Act of 1927, providing codified guidelines for a more uniform platform for applying customary law across

developing African ideas and practices in relation to laws and governance, and therefore that the world of the 'customary' is a wholly necessary part of the establishing of constitutional governance. The paper suggests that rule of law, built from the bottom up, rather than a rights based constitution, handed down from above, is the key to constitutional governance. I am indebted to Dr Aninka Claassens for this reference.
<https://web.up.ac.za/sitefiles/file/47/15338/Constitutionalism%20and%20the%20Customary%20Chanock.pdf>

South Africa. Chanock has shown that the construction of customary law was not simply 'imposed' by the colonial regime, but the result of engagements between colonial officials and those Africans who derived authority from customary institutions, ranging from household heads to chiefs. These Africans, according to Chanock, had an interest shoring up what little power they still had, particularly in the realm of land administration, family relationships and property (Chanock 1991: 73, 1994: 296).

During the course of the paradigm shift towards segregation, the meaning and interpretation of what was appropriately defined in terms of the common law and the 'customary' realm became the subject and object of considerable ideological struggle between Africans and colonial administrators, and, crucially, within African society. Chanock has consistently argued that the ultimate face of official customary law was a mutual construction of an altered institutional paradigm hammered out between particular interests in the colonial government (represented by the 'native administration'), and Africans whose voices (e.g. male elders) they listened to (1991, 1994: 296; 1995: 1-68, 2001: 292).

The context was never one of symmetry of power, and customary law was subsumed as a subsidiary of state power in the context of the "dominance of state over society in Africa" (Chanock 1991: 62, 1994: 311). In line with intensified state controls over land, the emphasis in law moved towards separating African institutions from the conventional principle underlying the common law, that, in theory at least, state governance should be based on "the separation of powers and the 'rule of law'" (Chanock 1994: 313, *cf* 2001: 280).

The Governor General was given sweeping powers flowing through him to Native Commissioners to rule by decree and proclamation, that is, by executive action. For Africans, legislative, executive and administrative powers were unified; and the nature of judicial power was simultaneously manipulated as Native Commissioners' courts became administrative bodies. The Native Administration Act of 1927 was the legal expression of this administrative paradigm, ultimately drawing much of its legal and moral weight from the historical lessons of governing the Transkei by proclamation (Mears 1947; 41 68-75, Rogers 1949: 19-20). The justification for such denigration and subordination of African social control is embodied in the official view of rule by proclamation, which stressed its negotiability:

Experience showed that the system by its flexibility and elasticity made it possible for the Administration to meet rapidly the ever changing needs of a primitive people emerging from barbarism. It provided the means of meeting emergencies, of recognising or modifying Native law and custom, and of legislating the particular needs of the Natives in their own areas where they continued to live in the main under tribal conditions. (Rogers 1949: 20)

The ideology of 'retribalisation' was implicit in the enabling legal machinery, adhering to the ideology that "tribal culture [was firmly based] in hierarchical communalism" (Chanock 1994: 313), thus embracing the

tribalist legacy of colonial Natal, and firmly rejecting the Cape's earlier encounter with ideas of a common citizenship, limited as it was. That this paradigm restricted any notion of the concept of 'ownership' of land by Africans hardly needs restating.

Crucial arenas of African law were subject to rule by administration, proclamation and codified customary law (Chanock 1994), which is relevant for Part Three of the thesis in that title holders were deeply affected by these changes. The ultimate statement of the colonial state's view of land rights, according to Chanock, was a total rejection of rights existing beyond administration, a view partly validated by anthropologists. Chanock quotes the anthropologist Sheddick as having endorsed the idea that land rights boiled down to two aspects: the right to use and the right to administer, claiming: "*in this way ownership resolves itself into administration*, that is, the trusteeship, apportionment and regulation of the use of land" (Chanock 1991: 68). Chanock saw in the whittling down of African land rights and their delegation to the administrative domain as legitimated by the elevation of the idea of "cultural specificity" to which British anthropologists unwittingly contributed (1991: 67, cf 1991 76, 78; 1994: 309-310).

Evans (1997: 1) has provided a detailed account of the solidification of the domain of native administration in the early apartheid years, when "the racial order known as *segregation* (1910-1948) gave way to its sterner more notorious successor, *apartheid* (1948-1994)", where virtually all aspects of African life was controlled by bureaucratic and administrative fiat. He argues that in the earlier years the administration had relied on a degree of local autonomy and discretion, which incorporated paternalist and protectionist ideas about the role of rural administrators under the direction of Native Commissioners. In the early 1950s, the Native Affairs Department transformed into a bureaucratic machinery that began to hone its powers on systematic, bureaucratised native administration, particularly urban administration. The concept of administration, central as it was to racialised rule during the first half of the century, changed in quality from paternalism to ruthless authoritarianism, lending a certain distinctiveness to South African governance in Anglophone Africa. Rendering native policy into 'administration' involved the steady diminution of the legislature and judiciary, and the elevation of the executive arm of the native administration (Evans 1997: 26).

These developments added to the already highly ambiguous position of Africans with title, both freehold and quitrent. 'African freehold' in particular occupied an increasingly anomalous position in this changing world. With its origins in the mid-nineteenth century assimilationist thinking, and conceived as a non-racial mode land ownership, over the course of time 'African freehold' was exposed to policies rooted in segregation, which saw the future of African political life "built upon the basis of their own institutions" (Chanock 1994: 310). An assimilationist strategy was, however, obviously "impossible" under minority rule, where Africans were a "figurative minority in terms of access to state power" (ibid: 295, 297). In spite of the demonstrable differences between western and African concepts of title, freeholders themselves saw their titles as firmly rooted in a notion of common citizenship, political franchise (to which many were eligible) and common

principles of land ownership across the racial divide. In the broader polity they occupied a liminal space between competing conceptions of identity in the emerging pluralistic legal and political environment.

Chanock argues that individualist tendencies among Africans, including transactions in the commercial economy, were masked and suppressed by the legal machinery of segregation, exemplified by 'native administration' and the construction of 'customary law'. He suggests that individualism and responsiveness to the market 'offended' the growing view in white colonial society that the proper behaviour of Africans should, after all, be 'customary', and it was not considered customary to forego traditional relationships in the interests of the monetary economy and individual pursuit of wealth (1991: 63, 69-71, 1994: 298).

Chanock suggests that anthropologists contributed to the intellectual rationalisation of the positive aspects of the 'customary', which resulted in a tendency to situate the customary in a mythical pre-colonial egalitarianism, sanctimoniously innocent of the capacity of "oppression within and among the oppressed" (1994: 298, 321). African freeholders no longer fitted into this new perspective which elevated the positive attributes of a redistributive customary economy, a view clearly better suited to the needs of an economy dependent on migrant labour than a differentiated peasantry owning their land in private title. A distinguishing feature of the segregation ideology of the South African state was that it destroyed, rather than nurtured an African peasantry, which sets it apart from Anglophone rule in, for example, Kenya (Evans 1997: 23-24).

We have seen the perverse twists in policy whereby the state itself was responsible for undermining both the status differential of African freehold title, and the connotations of market transactability of title. The overriding political importance of racial segregation and 'non-ownership' of land by Africans meant that Africans with title had to compete with a paradigm that actively discouraged the features of the 'free market' that title in western social philosophy was intended to convey. Li and Chanock's observations that capitalism and individualism represented by marketable or alienable title presented a constant dilemma for colonial administrators is pertinent to this discussion (see Chapter 2.8 above) (Li 2010; Chanock 1985: 67, 1991: 66-80; 2001: 298). They raise the tantalising idea that these forces could be likened to a genie that colonial society was afraid may escape from Aladdin's lamp.

The responses by title holders should be understood in relation to the political constraints of colonial and apartheid society, where land dispossession hovered as a constant threat in all but the core reserve areas, and where 'traditional authority' units of control, rather than titling, became the safe option. Lund's distinction between 'owned space' and territory as 'jurisdiction' is helpful. There is a tendency to confuse access to, and control of land as *property*, on the one hand, and authority over land as political territory, on the other (Lund 2013: 14-17). In South Africa these distinctions were easily blurred. Use rights that were owned and territory that was governed tended to merge and interpenetrate in ways that make it difficult to differentiate

'ownership' from authority. In addition, Lund argues that spatial control adds a further dimension, since people's relations to space are multiple (Lund 2013: 16).

Under circumstances of land constraint, it is understandable that holders of title would draw in their horns and adopt defensive strategies to retain property in the family. Does this explanation account for a second paradox, i.e., the paradox of economics: that freehold title, though it provided a platform for social mobility, did not in itself result in expanding the productive capacity of the freeholders, as discussed in Berry's extensive overview of production relations in Africa? She has shown, in comparable African contexts, similar tendencies among Africans to invest in social networks and inclusivity, rather than expanded productive capacity (Berry 1993: 101-180). The legal rationale of title, which is to eliminate ambiguity, is hemmed in by social conceptions of property which constrain the emergence of clear cut one-to-one relationships to property.

In Part Two, we saw that African freeholders, though not conforming to the tenets of individualism as envisaged by the logic and law of private land ownership, readily grasped the notion of exclusiveness of property rights reinterpreted as a domain of the kindred estate. In the wider polity, as discussed above, the emphasis in law and discourse was shifting to collectivities and tribal authority units of control, as allegiances shifted from kindred to broader community relationships and the polity, including chiefly controls (Chanock 1991: 67). Africans were becoming more dependent on state allocations, and less dependent on kin for access to land. 'African freehold' conformed to some aspects this trend, e.g. the family collective, but not others, e.g. maintaining independence from chiefly allegiances regarding land allocation. Instead of dissolving kindred relationships, these were actually strengthened. 'African freehold' thus occupied a twilight zone, where individual relationships between family members moved in the direction of family controls and the corollary, families resisted absorption by traditional authorities. These dynamics paradoxically constrained a movement towards individualisation of rights, in contrast to the theory of titling. This self-constructed identity around property found no legal expression in either the common law or the emerging customary law.

The chapters that follow pursue specific facets of the broader issues which I have contextualised above in terms of the changing political economy and the advance of rigid forms of legal pluralism.

In chapter 9, I examine the adaptation of colonial ideas of inheritance of land to customary law. This involved the application of the rules of 'primogeniture' to inheritance of land via male-to-male succession, validated by customary law. These legal 'reforms' impacted on 'African freehold' in that colonial administrators attempted to force fit African title into one or other of the two legal paradigms, that is, the common law and customary law, neither of which, in reality, reflected the situation on the ground. I discuss

the post-apartheid Constitutional reforms in marriage and property in the context of gender equity, which, far from resolving the contested area of family law, has raised more questions than answers.

In Chapter 10, I discuss spatial controls and the various legal devices that were adopted by the administration to shoehorn 'African freehold' into the segregated realm of African administration, whilst at the same time striving to maintain African title within the framework of the common law. The colonial authorities also intervened in the *legalities* of African title, i.e. the way in which the law recognises property, in order to close the gap between law and local practices. These interventions resulted in technical modifications to the law in order to bring African title in line with the law. I refer to these intercessions as 'legal devices' invented by the native administrators in order to find a fit between African-held title and the dominant legal order regulating title.

The legal devices provide insight into the official thinking that foreshadowed legislative changes, and also in their expectations of the outcome of legislation, which has relevance for the official interpretation of inheritance. The thinking reveals that the native administrators expected that additional legislation regulating African title (in the form of proclamations) would bring about changed behaviour by the title holders by accommodating the observed discrepancies between their practices and the law, but at the same time emphasised the centrality of western concepts of title. These interventions also reveal that the state was willing and able to intervene in the common law in the interests of social stability and political order. I argue that these legal technicalities failed to bring about changes in the behaviour of African title holders. The interventions exemplify the 'mistranslation' between the official view of title and the 'shadow' land tenure system of 'African freehold'.

Chapter 11 considers the historical construction of freehold tenure and the national cadastre as it affected the white minority, and how 'ownership' came to be associated with white property and surveyed land parcels, which concepts also changed and adapted to local circumstances over time. The argument is that the common law follows a paradigm of 'evolution' that was not permitted of customary law, and that the evolution was largely in support of white interests. The twin concepts of the national deeds registry and the national cadastre are therefore considered together, bringing the social and spatial concepts into one frame of reference.

CHAPTER 9 THE LAW, THE FAMILY AND SOCIAL CHANGE

9.1 Introduction

African freeholders did not escape the emphasis towards administrative rule, which saw African land tenure subsumed under the lexicon of 'land administration', to distinguish the domain clearly from 'property law'. Yet the stress on administrative processes and procedures did completely cut off their access to, and use of, the common law. Formal inheritance of intestate estates via principles of wills or community of property of the conjugal couple, or partitioning of land by subdivision, were alternatives infrequently resorted to, but nevertheless represented an alternative legal repertoire. These accommodations (discussed in Part Two of the thesis) suggest an uncomfortable fit between African and western law, and demonstrate the limited options available.

African freeholders' ambiguous position between these polarities can be seen in the adaptation of title to 'family property', brought to light in Part Two. Elements of the customary family estate were blended with title, which, however, accentuated the discrepancies between their practices and the legal formalities. The authorities simplistically interpreted their approaches to managing property in terms of a discourse of deficiency. The official and administrative responses carried the implicit judgement that Africans with title displayed shortcomings in terms of social evolution, intellect or energy. As we have seen, far from demonstrating subversion, negligence or laziness, the freeholders were actively engaged in reproducing social relationships in the context of title, in so doing, strengthening ties of kinship. Nowhere was this more apparent than in the process of transmission of land.

In this chapter, I examine the first of the two forms of intervention discussed above, that is, how the field of family law was manipulated in a way that was conducive to the colonial rule. In the following chapter I examine the spatial and technical interventions by the state, and responses by freehold families, to find a fit between law and customary norms. The main strategy employed by the state to achieve these ends was the design of a body of official customary law to regulate the domestic realm of African property relations in South Africa as a whole, a development made possible on account of the spatial distinctions that set Africans apart.

In this chapter, I limit my discussion of family law to those aspects brought to light by 'African freehold'. Family law is a vast and contested political field, which overlaps with multiple layers of local struggles and negotiations over the control of resources within and across different social constructions of families and ethnic groups, the scope of which extends beyond the parameters of this thesis.

9.2 The African family and the devolution of land

As discussed in Chapter 3, the cultural distinctions between varying conceptions of the family become visible in the process of transmission of land. In Chapter 3.6 and 3.7 above I showed how the process of devolution of land as a whole can be distinguished from particular forms of transmission via *pre-mortem* or *post-mortem* acts of transmission. The latter can take the form of testation or written or oral wills, or by means of intestate succession, which means that property passes to the next generation by legal rules that prescribe the successors in property according to relationships of kin. These are culturally determined according to either consanguine (blood) relationships calculated by descent, or by means of affinal relationships according to marriage, or a combination of the two. Property can also pass through living members of the family from one generation to the next to secure property through marriage arrangements, e.g. endowments by parents in specified children (dowries), or bridewealth, where property passes between families.

Inheritance is therefore just one means by which property passes from one generation to the next, usually on the death of the property holder. We saw in Chapter 7.1 that direct inheritance was known in precolonial African society in south-east Africa, but was mainly restricted to the passage of cattle. Land was not considered heritable, not as a matter of principle, but because it was not a scarce resource that required retention. When colonisation resulted in land constraint, new strategies were required to defend land from further dispossession, and these frequently involved the invocation of inalienability, which included restrictions on inheritance. The process of transition led to the emergence of serious tensions and even bitter struggles over concepts of ownership and inheritance between men and women. Unequal relationships, or “subordinations within the subordinated system” (Chanock: 321) were exacerbated, becoming profoundly more complex by the involvement of the native administration in interpreting, defining and ruling on female inheritance. Official attitudes hardened in favour of male control of property (Chanock: 1991: 73).

Freeholders responded to these changes by adapting the inter-generational family descent group to the landholding entity. This notion clashed fundamentally with the idea that individuals within the family had proprietary powers of disposal, or were individually eligible for ‘inheritance’. The model embraced the idea of customary patterns of succession which recognised *categories* of people who were eligible for rights in property, rather than nomination of identified individuals, individuals nevertheless being important in control and management of property. Mbatha suggests that the historical principle underlying *control* of property related to matters of family custodianship.

The original purpose underlying the customary law of succession was to protect the family and the community as a whole from the burden of looking after the deceased’s dependants. Customary succession rules sought to achieve this goal by entrusting the responsibility of seeing to the welfare

of the deceased' dependants to one person, in return for the right to control family property (Mbatha 2002: 260)

Thus customary law attempted to limit or restrict powers of exclusivity and alienation, 'succession' implying status and responsibility over the whole, while the common law of property precisely and deliberately created these powers through an entirely different notion of succession to property by individuals. These countervailing normative orders led to contradictory pulls in law, and generated tension, uncertainty and administrative confusion at points of intersection, particularly when land was transmitted.

The concept of inheritance implies the direct transmission of land to a nominated heir or heirs. In the formal law, inheritance is regulated by means of wills, or in the absence of a will, by laws of intestate succession. Thus, both alienation and inheritance can be seen as two sides of the same coin. These notions clash with the concept of holding of land by the inter-generational family group. If land is not considered divisible and separable from the family group for direct exchange, it follows that it cannot be 'inherited'. Both ownership and inheritance suggest direct transmission to named individuals, threatening the customary common family estate.

In several family cases discussed in Part Two, I alluded to situations where, in earlier times, the law had dictated the passage of property via formal rules of inheritance. These formalities fell increasingly under the purview of native administration (i.e. away from common law principles) with the evolution of segregation and the application of rules embodied in the Native Administration Act of 1927. Native Commissioners and administrators frequently intervened in decisions about the administration of estates both before and after this shift.

Where the common law applied, land devolved to the spouse and subsequently the children of a deceased. The common law upheld the principle that, in theory at least, women could inherit property, either as wives or daughters. *KRS v 4* indicates that, in earlier times, some women in Rabula inherited land and pressed their claims for land (Mills & Wilson 1952: 50-54). Weinberg (2010) found in her study on gendered access to land in the Ciskei region (including Rabula), that women in title-holding families were engaged in ongoing contestation to secure their powers to 'inherit' land held.

In the next section I look more closely at the nature of contestation over rights between family members, which suggests that we need to probe the notion of 'inheritance' of land.

9.3 Inheritance of land

In this section I consider the prescriptions regarding inheritance of land or ‘immovable property’ in both sources of official law: customary law and common law. As in the previous section, I confine myself to land, and not the complex issue of moveable property, which under customary systems was associated with the division of households into ‘houses’ according to which property was apportioned and distributed (*cf* Bennett 2004: 254-263; Mbatha 2002: 261-262).

As mentioned above, the laws of inheritance were in precolonial African society restricted to moveable property, mainly in the form of cattle. Oral dispositions, sometimes called ‘deathbed wills’ were also known, but their potential un-enforceability limited their use mainly to chiefs where witnessing could ensure enforcement²¹⁴. With African title, the colonial administrators were obliged to apply formal rules of inheritance to land. Strictly speaking, the common law applied, but officials observed from a very early stage that Africans ‘preferred’ their own rules of inheritance. In 1864, for example, a special Cape law was drafted to regulate the inheritance of ‘Fingo’ property²¹⁵. The law did not specify customary rules, but enabled the application of customary rules. This ‘hands-off’ approach was the considered preference of the Cape administrators to avoid codification of customary law. In contrast, the Native Administration Act of 1927 laid down strict rules of inheritance and succession.

Marriage was the defining criterion because of the close association between marriage and property, the proprietary consequences of which diverged between African and western law. In customary systems, even when men had only one wife, the family was potentially polygamous, that is, the cultural construction of the family was built on the principle of polygyny, and in south-east Africa, on male-to-male succession. Chanock demonstrates that colonial society was obsessed with the need to distinguish between African ‘heathen’ marriage and white Christian marriage (2001: 197-200), partly to distance the latter from association with polygamy. For this reason the colonial administration legitimated customary marriages, not as ‘marriage’ but as ‘unions’, a primary motive being to legitimise children. In white society marriage was held to be a sacrosanct relationship between a man and a wife in a monogamous relationship, which in turn formed the basis for the rules for holding, controlling and dividing property.

Initially, the colonial administration did not interfere directly in the regulation of African property, which was mainly confined to moveable property — on account of the fact that most Africans were precluded from ‘owning’ land under title. Inheritance of freehold property, however, had to be regulated on account of its distinctive status as registered property. Formal inheritance of land followed common law rules with some allowance for customary ‘unions’. The Native Administration Act of 1927, in keeping with other aspects of

²¹⁴ Personal communication, J. Peires, 1 May 2013.

²¹⁵ Act 18 of 1864, the Native Successions Act (see n 106)

African life, sought to systematise rules of inheritance over immovable property in line with customary principles considered relevant. African male elders were consulted regarding the impending codification of customary law. In general, they strongly rejected the official recognition of rules that encouraged female economic independence or the restructuring of the family, which included women's capacity to own or inherit land (Chanock 1994: 319, 2001: 277-282). They recommended instead the adaptation of customary male controls over property to inheritance of land, a power they did not previously enjoy. In this way, a customary concept of male responsibility was converted into the potential for private accumulation by males, an implication entirely absent from customary law.

In terms of the new statutes, immovable property had to pass strictly according the principle of 'primogeniture' via 'Tables of Succession' that laid down prescribed rules for the progression of succession following collateral lines of male-to-male succession. This meant that property passed 'downwards' through all the men in the agnatic line, rather than 'sideways' through the nuclear family, including daughters (see Chapter 3.7 above). The codification of male succession went against the grain of the tendency in the 'living customary law' towards flexibility in succession practices, e.g. by taking into account individual character, investment and participation, and hence 'suitability' for positions of responsibility and authority. Berry uses the distinction of 'achievement' and 'ascription', observing in her research that *both* criteria were brought to bear on matters of authority and succession regarding land (Berry 1989b: 42). This interpretation suggests that positions of authority were not only an outcome of birth status, but included personal attributes, a view confirmed by the evidence in my research sites.

The application of the idea of 'male primogeniture' to the concept of inheritance of land in the name of 'customary law' was an altogether novel concept, and a good example of the colonial 'construction' of customary law. Furthermore, the construction of customary law of immovable property involved the removal of important common law principles that had applied before the codification in 1927. The most important of these was the principle of 'community of property' between husband and wife, inherent in Roman-Dutch law. Prior to the Native Administration Act, community of property was an automatic consequence of marriage by civil law or western law. The implication was that property was shared between husband and wife: on the death of a spouse, property devolved on the surviving spouse. This was one of the western law rules strongly objected to by African elders. According to Chanock, they complained that it clashed with the customary family estate (which of course it did, fundamentally). They maintained that bridewealth followed a different logic of property distribution, and they were not prepared to share property with a wife when property had already passed to her family through *labola* (Chanock 2001: 278). The customary 'family', as we saw in Part Two, was defined to specifically exclude wives from the common family estate, and to stress the common estate of the agnatically-related family. Even under circumstances of monogamous

relationships, the single estate was derived from the principle of the polygamous estates of matrilineal 'houses' presided over by wives, but under the overall authority of the male head of the lineage.

In its final form, the Native Administration Act removed community of property as an automatic feature of marriage (unless otherwise contracted). Various categories of blacks were singled out as exempt from these new 'native succession' rules, including marriage by Christian or civil rights, but couples had to explicitly state their preference for a pre-nuptial contract or community of property, the latter no longer being the 'default' in law. African landowners were not fully conversant with these nuances in the law, and the consequences tended to be driven home only when property was contested following the death of a property holding family member (Weinberg 2010: 9, 22-23, 29-32).

Quitrent title holders could not be exempted from the 'customary' rules. The Tables of Succession that accompanied the Act automatically applied to all quitrent titles, which meant that women could not inherit quitrent land. Women could only inherit freehold land if their marriage contracts allowed it. Many appear to have been unaware of the legal niceties involved (Weinberg 2010: 9).

According to *KRS v 4*, the change in the law had definite local effects in Rabula. Women became aware of their legal exclusions (i.e. the removal of community of property) when property was contested, but nevertheless "pressed their claims" (Mills & Wilson 1952: 52). Weinberg shows how the issue of freehold (and quitrent) inheritance by women was discussed in the homeland political fora of the Ciskei²¹⁶ in the 1930s in response to women's representations, showing the gathering storm around interpretation of inheritance in law (Weinberg 2010: 30).

It is, however, necessary to examine the nature of the claims women were in fact making. The ways in which women expressed their claims to rights in land need to be disaggregated to take into account the specific context in which they made them.

9.4 Inheritance and the African family

9.4.1 Succession, Inheritance and the law: freehold land

As mentioned, scholarship suggests that African women who were members of freehold (or quitrent) families contested the new terms of property distribution that followed in the wake of the Native Administration Act of 1927. On closer examination, it is doubtful that women among title holding families conformed to the full package of common law principles previously applicable to land ownership. Many of

²¹⁶ Known as the Ciskeian General Council, or "Bunga".

the contested cases appear to have involved a struggle by daughters to take over the land when the parents had no sons. The contestation may be interpreted, not as direct confrontation with customary norms of family property, but rather contestation over succession. I am suggesting that women were challenging a particular aspect of customary norms, that is, the principle that, in the absence of sons, property passes 'downwards' through the male collateral line to brothers and brothers' children, before it passed to daughters. Most of the women among the freeholder families do not appear to have challenged the norm that had developed with African titling that land was held by the lineage group. They do not appear to have been staking their claims as individuals with the right to deal independently in land, that is, that land rights (men or women's) were divisible and separable from the family estate. Rather, the empirical evidence discussed in Part Two suggests that freeholders were developing the customary norms to allow for daughters as well as sons to have rights in family property. This modification of customary norms deviated sharply from the rules of collateral succession, such as contained in the Tables of Succession, which skipped daughters and included only sons, brother's sons, and so forth.

As discussed in Part Two, freehold daughters' rights to the family land were generally locally acknowledged in various ways in the process of devolution. There is little indication, however, that daughters or wives who had succeeded to property in the formal sense, e.g. where land devolved to them through intestate succession, began to deal in land as individuals. Rather, my research indicates that most women continued to conform, by and large, to the idea of family property, altering only the norms that mitigated the access and control rights of women.

A further qualification is needed here. Even under circumstances where the traditional male heir succeeded to the position of head of family, with authority over property, his role did not include the right to own or dispose of property as an independent individual. The role involved obligations of responsibility toward the family as a whole (Mbatha 2002: 260-261, 264). These norms were adapted to land with title. We saw that, particularly in Fingo Village, the traditional male responsibility figure is beginning to adapt to allow women to be custodians, that is, some women are taking over control functions characteristically held by men.

These findings suggest that it is important to contextualise the cases where women claim rights to land. There is strong indication that women were, and are, not necessarily buying into new principles of divisible and separable property, as implied by the common law. This interpretation applies even to situations where, prior to the changes in the law in 1927, women, e.g. widows, succeeded to property on the basis of intestate succession in terms of the common law. It is important to consider women's intentions when making their claims. Empirical evidence suggests strongly that in the great majority of cases, women were not claiming the right to sell or bequeath the property they 'inherited' through the law. I came across only limited such scenarios, and even those are contingent and somewhat ambiguous.

By extension of the same argument, people were generally suspicious of wills. Few properties in Rabula and Fingo Village have passed by way of wills, though there are exceptions. A new interest in wills appears to be adding to complexity and the potential for ambiguity, rather than clarity.

In summary, the case histories in Part Two revealed that family property was/is managed by the adaptation of the customary norms of responsibility for the welfare of the family. We saw that women are beginning to take over that traditional role as custodians, more so in Fingo Village than in Rabula. The rule-change is not from family to individual powers over property, but from male responsibility to either male *or* female responsibility. This involves a true 'development' of customary 'living law' to incorporate changes in gendered relationships with regard to authority over land. However, the deeper meanings of gendered control over property, whereby women's power over land was/is restricted as *wives* of the family lineage-holding group, is not fundamentally changed or confronted among freehold families. Families continue to define their kinship relationships in terms of the unilineal descent group ideology discussed in Chapter 3.

The interpretation in various historical accounts of shifts in gendered responses to inheritance (cf Mills & Wilson 1952; Mager 1992, 1999; Weinberg 2010, Whitehead and Tsikata) do not make these distinctions. The implication of the term 'inheritance' is that heirs (including daughters or wives) have the power to subdivide, sell and bequeath, which seems to be a serious over-interpretation of what was actually happening. By careful contextual analysis, we find that women may not be claiming individual powers of control. In the case of the freeholders, where I am able to claim an empirical basis for this observation, this was patently not the case, though there are important exceptions. The interpretation of individual rights would suggest a radical departure from notions of the indivisible family estate, and a move towards common-law concepts of property, an assertion that does not follow from my own research.

I came across only two such cases (see cases in Chapter 6 and 8). In the first, social sanctions were applied to exclude the power of the wife to dispose of the family property to her own relatives in Fingo Village (cases 6.6 and 8.6). In the other, case 8.8, a woman in Rabula has subdivided the property, but retained the family name. The more general tendency has been for women to see their roles in terms of custodianship, a principle that applies as much to men as women.

An exception to the norms discussed applies to first generation purchasers. People distinguish between family property and property acquired by purchase, by men or women. In the latter case, it is regarded not as 'home' but as 'house' and property may be freely exposed.

The customary 'family', as we saw in Part Two, is held in place by rules that specifically exclude wives from the common family estate, by stressing the agnatically-related family.

9.4.2 Succession, inheritance and the law: wider context

Research in other contexts reveals similar trends to freehold families. Claassens and Mnisi (2012) and Cousins (2013) have found that women are increasingly asserting their rights to allocation of land in the 'communal areas' as single women, a norm that is slowly and unevenly beginning to replace the norm that women do not qualify for land allocations in their own right. Mbatha (2002) conducted research in 2002, prior to the *Bhe* judgement, but following the promulgation of the Recognition of Customary Marriages Act, Act no 120 of 1998, as amended, which reformed customary 'unions' into legally recognised marriage.

Whereas Claassens, Mnisi and Cousins looked at the allocation of land to women, Mbatha's research focused specifically on the changing norms of succession under customary law. She found that women were challenging the norm that women disqualify for 'inheritance' of family property. Her analysis, however, probes the nuances in women's claims to property, noting in various individual contested cases that women were challenging male control over family property, and in particular, the notion that collateral male 'heirs' qualified to take over the property of fathers or husbands in preference to wives or daughters. Customary succession practices are designed to take into account "the maintenance of the family" (Mbatha 2002: 260-261, 269). She likens these evolving norms to 'living law'. Her research findings are similar to the findings in my research sites that women challenge an aspect of customary family law, that is, collateral male succession rules, but not necessarily the idea of 'family property' and custodianship.

Mbatha makes the important point that some property 'attracts group claims' rather than individual claims, deriving from the customary distinction between family property and personal property (ibid: 282). Mbatha's point of departure is that official customary law, which laid down rules of male succession, encouraged the potential for the male 'heirs' to consume the property they 'inherited' rather than discharging their duties of responsibility and custodianship for the family, strongly held principles upon which the pre-colonial customary law of succession was predicated. The Native Administration Act had therefore distorted the values in customary law and allowed private accumulation at the expense of the family. She argues cogently "the customary law of succession fused rights and responsibilities in relation to inheritable property and entrusted these group rights to the heir" (ibid: 264).

The devolution of estates under customary law follows the male lineage, by entrusting the control and administration of family property to the heir. The heir is the person who steps into the shoes of the deceased head of the family as the *administrator* of family property (Mbatha 2002: 260-261, italics added).

Western notions of property ownership have also influenced the interpretation of the heir's property rights under codified customary law as individual and alienable. By distorting the rule that the enjoyment of inherited property belongs to the widow and other dependants, western interpretations

of customary inheritance law allow the heir to control and alienate property, without discharging his obligations to the deceased's family. (ibid: 264)

In practice, customary property rights are not held individually. The courts' approach, which construes family property as individual property, thus creates enormous social problems. (ibid: 268).

Mbatha concludes that

...codified customary law of succession in South Africa no longer serves the original purpose underlying this system. In particular, the rule that control of family property should be entrusted to a male heir with a corresponding obligation to care for the deceased's dependants has been distorted by changing socio-economic conditions. (ibid: 259).

The point of her research is to show that:

[T]he living customary law has already begun to change in order to allocate family property more equitably, and no longer bars women from controlling marital property after the death of their husbands. Recent South African case law, however, has generally not taken these developments into account, and in so doing has failed to give effect to the guarantee of equality in the 1996 Constitution (ibid).

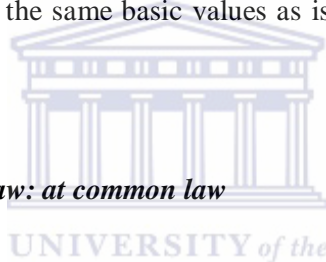
She makes several proposals for the reform of customary law that would both "close the gap between the codified and the living system and do justice to women's expectations under the Bill of Rights" (ibid).

A weakness in Mbatha's analysis is her failure to distinguish between heritable and non-heritable land 'ownership' and the fact that historically succession laws did not cover immovable property. These confusions influence her conflation of primogeniture with regard to moveables to primogeniture with regard to land, and the fact that the more severe distortions of codified customary law resulted from the application of primogeniture to land. Her research shows clearly, however, the principles that official customary law, by applying primogeniture to the *inheritance* of 'material' property, was a radical departure from the customary basis of the position of 'heir', which was not a position that was supposed to result in dispossession of females and youth of access to the family homestead and family property. Though she does distinguish between the semantic distinctions between 'succession' and 'inheritance', she does not develop the significance of this distinction in her analysis. The implication of her research is that the Courts, in assessing contested cases, did not distinguish between the male 'heir' as the consumer of property and the custodian of the family, a finding similar to my own. She calls for the reform of customary law in line with the developments on the ground.

In families without sons, parents preferred to leave their property to their daughters than to customary heirs. In families with sons and daughters, parents sought to ensure that both sons and daughters jointly qualify for the inheritance of their parents' property. The common practice is to bring children up in the belief that the residential home is family property, the use of which should be based on need rather than entitlement. Furthermore, when the heir dies, his wife and his children take over the inherited property to the detriment of the heir's siblings. [...] They want reforms to legalise a widow's control and administration of marital property. [...] Since control rather than

access is a major issue for women married under customary law, a court decision that captures and differentiates between inheritance and succession, in line with the practice of women administering property after the death of their husbands, will advance the social position of women (ibid: 269-271, 281)

Claassens and Mnisi conclude similarly that women express rights as “relative rights that prioritise basic needs” (2012: 402). They refer to a case where a woman explained the principle that, although a field belonging to an individual is secure, rights to fields are also subject to the more pressing needs of those who do not have land on which to establish a home. The woman “described this as an intrinsic indigenous value [...] the basis for the value [being] that “we want each person to live and we also want our lifestyle to continue.” (ibid: 381). Moreover, the authors show that the recognition of multiple rights and interests, which overlap, contain also the seeds of a socially cohesive structure that is responsive to the dynamics of a bigger group, and works against principles of individual accumulation and unfair dispossession. The authors extend these norms to evidence of local succession practices, which they maintain bring up the same issues in the context of distribution within the family, “where the rules governing inheritance of family property (usually land or a home) are guided by the same basic values as is land [re]allocation: the prioritisation of need” (ibid: 383-4).



9.4.3 Succession, inheritance and the law: at common law

In contrast to both the official customary law, and the ‘living law’ as described above, common-law rules of succession are predicated, not on the customary family, but on nuclear family consisting of husband, wife and children according to the European norms that found expression in the South African Roman-Dutch law. The common law definition of the ‘family’ was and is the nuclear family. The legal legacy of the Roman-Dutch common law notion of ‘community of property’ means that husband and wife share property, unless they opt out by a pre-nuptial agreement. The common law also confers individual powers over property, that is, registered owners are free to dispose of the land in whatever way they see fit, provided that in the case of community of property, the surviving spouse has prior claims. Thus property is closely aligned to the family form, i.e. the conjugal couple and their children, conventionally by the term ‘nuclear family’.

Research findings discussed above, both in the context of freehold property, and in ‘communal’ contexts, suggests that the evolution of ‘living law’ has been towards new notions of succession that make room for female succession, but not that women are claiming individual rights of inheritance.

9.5 Research findings

The evidence in Fingo Village and Rabula, in line with the findings discussed above, suggests that the most usual method of transmission of land was to avoid both sources of formal law: customary and common law. The most usual mode of transmission was/is not via individuals, but by processes of succession, each generation succeeding according the norms of the family descent groups. For the most part, formal inheritance was/is avoided altogether. The legal challenges tend to come into play when property is contested, which was not the majority of cases

The research revealed that there are indeed tensions regarding transmission of land, primarily reflected in conflicts between men and women. The findings do not support the notion, however, that these tensions reflect fundamental challenges to the 'structure' of the African family. The women in the research sites largely support the notion of family property and the associated kinship relationships. They did not make claims in terms of individual rights, independent of the family. This does not translate into claims on the basis of 'timeless tradition', that is, validated by the notions of traditional rights pre-colonial society.

The inferences that can be made from the research in Rabula and Fingo Village are as follows:

- Women made/make claims in the context of contemporary society and changing values. They did not refer to how it 'used to be', or in terms of specific customs. That is to say, their rights are expressed in terms of contemporary social relationships.
- Historical justification of 'family property' is expressed in terms of historical processes and family norms.
- Women as daughters challenge the notion that, in the absence of sons, they should be ineligible for claims to family property before collateral male kinsmen.
- Women challenge eviction when men tried to sell family property and assert the rights to retain property for themselves and the kindred unit.
- Women challenge the idea of marriage as a social necessity. Many women are choosing to remain unmarried and retain rights to the family property using the family name. Others are returning to family homes after failed marriages.
- Some women in Fingo Village and Rabula have children of their own, but have consciously chosen to retain the family name.
- There are signs of changes among a minority of families towards individualised notions of property (e.g. subdivision and wills), but these cases represent a small minority.
- Women retain the family name in the interests of maintaining rights to family property, an act of strategic importance which may be manipulated.

These findings suggest that, though some women are pushing the boundaries towards more freedom to deal with land as independent individuals, the more general trend is adaptations to the control and management of family property in such a way as to preserve the family unit and family property. The main adaptation has been the rejection of the notion of the eldest male heir (*indlalifa*) and the adoption instead of the strategy of custodianship. In Fingo Village the concept of custodianship is a gender-neutral term, while in Rabula the responsibility function still rests mainly on men. However, in both sites, women who are agnatically related to the family (e.g. sisters or aunts) play a prominent role in decision-making around property, and some are claiming the role of custodian.

There is little by way of evidence in the research sites to suggest that the tensions and challenges are resolving themselves in favour of the 'nuclear family' idea of property being shared by husband and wife, to be inherited solely by the offspring of a nuclear conjugal couple, though smaller family units occupying newly purchased or allocated land are influenced by this concept of the family.

9.6 Constitutional Reform

It remains to discuss how the post-apartheid state has interpreted the tangled problems of customary succession and inheritance. The post-1994 state inherited the highly bifurcated realm of family law, divided along the lines of official customary law and the common law. It is not surprising that among the most intense challenges to customary laws of property and inheritance has come from women who couch their challenge in terms of human rights principles embodied in the Constitution²¹⁷.

The first major legal change in customary law came in the form of the Recognition of Customary Marriages Act²¹⁸ that came into effect in 2000, but which I do not pursue here,²¹⁹ other than to point out the relevance of the fact that the new law extends 'community of property' to customary law of marriage. This effectively means that the customary laws regulating property in the matrimonial regime have been erased, and replaced with the common law (Himonga 2005: 84-87; Nhlapo 2000).

The constitutional challenge to customary law of succession, and the Constitutional Court judgement, of direct relevance to this discussion came in the form of three joined cases, known collectively as the *Bhe judgement* in 2005²²⁰. The *Bhe* case and one of the joined cases, the *Shibi* case, concerned the customary law of succession embodied in the Black Administration Act 38 of 1927 and the constitutionality of the principle

²¹⁷ The Constitution of South Africa, Act No. 108 of 1996.

²¹⁸ Act 120 of 1998, which came into force on 15 November 2000.

²¹⁹ See Bennett 2004: 187-293 for the legalities of customary marriage; and Himonga 2005: 83-97 for discussion of the reform of marriage and succession law taken together.

²²⁰ *Bhe and Others v Magistrate, Khayelitsha and Others* (2005) (10) SA 580 (CC). *Bhe* was heard together with two other cases. These were *Shibi v Sithole*, and *Minister for Justice and Constitutional Development and South African Human Rights Commission and Women's Legal Centre Trust v The President of the Republic of South Africa and Minister for Justice and Constitutional Development* (Himonga 2005)

of primogeniture. In *Bhe* the female excluded from succession to the deceased's estate was the deceased's daughter. In the *Shibi* case the female excluded was the deceased's sister. In the third case, applicants in South African Human Rights Commission applied for direct access to the Constitutional Court to have section 23 of the Black Administration Act (the relevant section that regulated the law of customary succession) and the regulations promulgated thereunder declared unconstitutional, on the ground that its provisions infringed the rights to equality and human dignity, and the Court granted direct access to the applicants (Himonga 2005: 92-97).

The Court made an order replacing the impugned provisions of the Native Administration Act and its regulations (mainly the principle of primogeniture), with the Intestate Succession Act. The latter is the statute derived from common law principles governing the administration of property, conventionally associated with 'white' property law. The implications of this judgement are that the customary law of inheritance and succession has been obliterated and replaced with the common law (Himonga 2005: 84). In reaching this decision, the Court acknowledged that there are questions regarding the "appropriateness of substituting customary law with the Intestate Succession Act in the light of arguments, inter alia, that the application of the Act in such an approach would obliterate customary law (inconsistently with the position it enjoys in the Constitution), and that the Act would not take into account situations arising under customary law" (ibid: 93). The Court agreed with submissions made by the South African Law Reform Commission Project Committee "the Intestate Succession Act, suitably adjusted, is capable of accommodating much of the customary law of succession" (ibid: 93-94).

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Before the decision in *Bhe*, the common law-derived statute, the Intestate Succession Act, which applied to the property of white minority across the board, applied to limited categories of blacks who were exempted from the application of customary law, and thus excluded from the Native Administration Act (see Himonga 2005: 91-92 for these exceptions). As discussed above, a particularly controversial aspect of the customary law of intestate succession was the principle of male primogeniture, which excluded women from succession and inheritance and also preferred older over junior males as heirs.

The discussion of 'heir' in the *Bhe* judgment alludes to the nuances in understandings of customary property succession discussed in section 9.6 and 9.7 above, but decided against these interpretations. The dissenting judge, Ngcobo J, quoting Bennett, suggested that the concept of 'succession' encapsulates the customary practice of succeeding to a status in the family and is thus more in keeping with customary understanding of succession than 'inheritance', which has more to do with inheriting material property (*Bhe* in paras [76], [80], [158]–[159], [167]–[175]).

The majority judgement rejected this interpretation but took its historical relevance into account when it considered the premodern notion of succession:

The heir did not merely succeed to the assets of the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. Property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. The members of the family under the guardianship of the deceased fell under the guardianship of his heir. The latter, in turn, acquired the duty to maintain and support all the members of the family who were assured of his protection and enjoyed the benefit of the heir's maintenance and support. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit. The rules of the customary law of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the distribution of his personal assets. (*Bhe* in para [52])

The judgement proceeded to criticise the notion of male primogeniture in terms of its 'patriarchal' construct, including the exclusionary provisions of women from heirship (*Bhe* in para [53]-[54]). The judgement however, came to the decision that:

Modern urban communities and families are structured and organised differently and no longer purely along traditional lines. The customary law rules of succession simply determine succession to the deceased's estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities. In the changed circumstances, therefore, the succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependants of the deceased. (*Bhe* in para [56]).

The Court therefore declined to 'develop' the offending customary law in accordance with the spirit, purport and objects of the Bill of Rights, and in line with the proposal in the Constitution that customary law should be elevated to an equal status to the common law, a position that has been criticised by legal commentators.

Himonga maintains there were three reasons for the approach adopted by the Court in preferring to substitute customary law with the common law, rather than 'developing' customary law in line with the Bill of Rights:

The first reason is the difficulty of determining the true content of the current customary law. The second is that adopting this approach would have entailed the development of customary law on a case by case basis, which is not only very slow but creates other problems, such as uncertainty in the law and the lack of uniformity in the application of the law by the courts. Thirdly, even though the Court did not provide any reasons for this, it considered the legislature to be best suited to deal with the defects in the customary law of succession. (Himonga 2005: 96).

Mbatha recommended the 'development' of customary law approach, quoted above in section 9.6, e.g. the idea of reforming widows' power to control and administer marital property, which would require a differentiation of inheritance and succession, as captured in the minority judgement delivered by Justice

Ngcobo). She maintains this approach will advance “the social position of women” (*Bhe* in paras [76], [80], [158]–[159], [167]–[175]); Mbatha 2002: 281 & *cf* 281-285).

Nhlapo argues that the reform of customary law should pay more attention to the rights of choice to “cultural life” or recognition of “marriage concluded under any tradition or ... system of religious, personal or family law”²²¹. (Nhlapo 2000: 139).

To sum up, the court refrained and declined to develop customary law, and opted instead for the common law. One of the reasons cited is the great variation in ‘living’ customary law across the range of socio-political units in South Africa. While the *Bhe* decision, like the Recognition of Customary Marriages Act, “represents a landmark development in the protection of women from gender-based discrimination under customary law” (*ibid*), clearly the process is merely the beginning of constitutional negotiation around these issues, rather than the end.

Another lawyer and legal scholar, Schoeman-Malan, analyses what the judgement means for the interpretation of the law:

1. The ‘white mans view:’

- the circle of potential intestate heirs can be easily identified and is drawn comparatively tight;
- men and women (spouses) receive equal treatment; and
- first born children do not receive special treatment.

2. Customary principles:

The order of customary succession is based on three principles: (i) a family unit is a culture concept in which the material needs of the component family members are not the main ingredients; (ii) primogeniture; (iii) and the male line of descent.

She argues, however, that customary law is in general more concrete and aimed at preserving group interests. Thus a rigid application of rules of succession will not always meet the needs of the persons concerned. Therefore a simple and inexpensive manner of resolving uncertainties and disputes is proposed. (Schoeman-Malan 2007: 4-7, 20)

Critics of the Constitutional Court decisions regarding customary law argue that the burning necessity to protect individual rights of women, following the ‘human rights’ paradigm, should be balanced with other rights. Nhlapo, as mentioned above, argues that the human values embodied in the right of choice to culture, language and religion, which are themselves human *values* with *meaning* embodied in the principle of the right to human dignity. Nhlapo suggests that section 10 of the Constitution, which provides a right of human

²²¹ Articles 31 (1) and 15 (3) of the Constitution.

dignity²²², should be invoked in matters that involve recognition of culture, such as differences in family kinship structures which provide the basis of people's identity, and "conception of the world and the meaning of life" (2000: 142, & cf 136-148). These contrasting paradigms are the most vulnerable to deeply held arguments on either side, the first of which maintains that cultural relativism or cultural specificity are open to abuse by the powerful in society, and the second of which claims that the right to culture is intrinsic to people's very notion of self-worth. These positions clash most intensely in the arena of family law.

9.7 Implications of the eclipse of the customary law of succession

The first point of concern about the *Bhe* judgement, drawing on the evidence in Part Two of the thesis, as well as the research findings in other contexts discussed in section 9.6 above, is that it is patently not the case that African families have generally restructured their family concepts in line with western constructs of the family in relation to property. While it is true that, in the physical and spatial sense, African families no longer live in extended homesteads, and that many live as small families that resemble nuclear families, where older concepts of responsibility by a single administrator no longer apply, the Court appears to have erred by conflating physical and spatial concepts of the family, with the social-relational structure of family.

A second erroneous conflation is that the customary heir, the eldest adult male, or *indlalifa* among the amaXhosa, continues to be an essential element in the concept of the family lineage. The freeholders, for example, adhere to customary concepts of tracing relatives by virtue of descent through the male line, but have attempted to sever the association of patrilineality with the gendered constructs of control over family property. By adapting a concept of custodianship to land ownership by the lineage group, the authority functions over land appear to be slowly opening up to the notion of females assuming the 'responsibility' role (in line with Mbatha's research conducted in non-freehold contexts, cf Mbatha 2002: 271).

The western concept of the family for the purposes of defining access to family property is predicated on a clear distinction between a conjugal couple and their offspring, who are the property-accessing group related by affinity (ties through marriage) and by the theory that children trace their kinship bilaterally through both their parents. The latter applies even when there is an absence of a marriage contract. The property relationship is therefore based on the relationship between the parents, and the parents and the children, reflecting a narrowly defined family unit and their direct descendants. African families adhere to construction of kinship relationships through consanguinity, and in the case of the societies discussed in this thesis, these are traced through the male line. Kinship terms are defined more widely to include lateral kin, such as father's brother and father's brother's children as 'family members', and property relations historically included collaterals.

²²² Section 10 states: "Everyone has inherent dignity and the right to have their dignity respected and protected" (Constitution of South Africa, Act No 108 of 1996)

The evidence suggests that kinship circles are indeed narrowing, and in particular, the collateral group for the purposes of property, is narrowing, and daughters consider themselves eligible before property passes to collateral kin. Nevertheless, even with the narrowing circles of kindred, the agnatic group conceive of rights to property as closely related to their construction of kindred. Passage of land is closely aligned to these cultural constructed ideas and norms about marriage and the scope of family membership with rights in the property. The evidence of these enduring and persistent inflections of culturally constructed ideas of kinship and descent among the landowning families may differ in *detail* between families of different class orientations, but there is a strong suggestion that these relationships are of wider relevance than the freeholder families discussed in this thesis.

As we have seen, far from fading away as a result of the pressures of commercialisation, wage labour and new smaller family units (e.g. female headed households), larger kinship groups such as lineages persist, though in highly modified forms. The modifications are seen in the spatial spread of family members, the division of families on account of migrant labour (cf Murray 1981) and the smaller units of residence. These changes have occasioned debate in the scholarship about the appropriate unit of social analysis.

Critiques of notions of the 'household head' (Budlender 2003), or the way households are conceived for social research, or analysis premised on 'cultural differences' have evoked similar arguments to those I raised above, i.e. the merits for research and analysis of cultural relativism vs cultural specificity (Murray 1981: 103; Russell 2003a, 2003b). Russell has pointed out the nuances in meaning between African families based on agnatic categories and White families based on the conjugal couple, challenging the uniformity of the concept of 'nuclear family' or 'extended family' to adequately define the difference. Either of these two terms could *describe* African family forms, but neither captures the difference in interpretation between the social and property relations among family members. The material manifestation of resource distribution in families (either living in a single house or spatially dispersed) tends to be conflated with the way people trace their relatives and social responsibilities. Scholars who stress the importance of cultural distinctions are frequently criticised for veering dangerously close to cultural essentialism (Rabe 2008: 169, Russell 2003a; 2003b).

The English term 'extended family' is frequently invoked by way of compromise between western and African norms, to mean that Africans sometimes live in larger social units than small nuclear families. Another adaptation is for both husband and wife to hold right to title. These adaptations in language, and in rights, do not solve the problem, and in some cases compound the problem. The 'extended family' does not capture the African family kindred group. This term is often misleadingly used with reference to African families, but takes its queue from western concepts to mean the western nuclear family with add-ons, such as grandparents and grandchildren, and at times uncles, aunts, cousins where these may be 'attached' to the

central household. In this sense, however, these ‘extended’ relations do not share in the property in the legal sense. African kinship groups are structured differently, as argued above. ‘Extended family’ must thus be used contextually to indicate which of the two meanings is being applied.

Nhlapo poses a direct challenge to the universality of individual rights as represented by the “United Nations-driven human rights system”. Defining culture as a system of shared ideas and meanings ‘that underlie the ways in which people live’, Nhlapo asserts that “Europeans, believing in the unquestioned superiority of their own moral, religious political and legal institutions, lost no time in suppressing various aspects of African culture by law and force” (Nhlapo 2000: 139, 143). The process of ‘othering’ he believes is being extended in the international human rights discourses that do not sufficiently distinguish between cultural difference and discrimination. It is worth elaborating his view in full:

The African customary law of the family is the outward and visible sign of a very deep and all-pervasive conception of the world and the meaning of life. It’s a view of the world as a place where life’s imperatives are survival and security, valued which have spawned a maze of elaborate mechanisms for their achievement. By far the most central and durable of these is kinship and the institution of the family. It is impossible to exaggerate the importance of kinship in the African psyche – education and modernisation notwithstanding. The configuration, ceremonies and rituals found in the elaborate process of marriage are testimony to the importance that Africans attach to the formation of families. These practices have over time acquired pride of place amongst many groups as the single most important feature of identity. Suppression by both the colonial and the apartheid state has merely served to kindle a passionate allegiance to these ‘badges of difference’ by the people who participate in them. (Nhlapo 2000: 142).

Failure to see the significance of the “deep understanding of the African value system” stokes the fires of continued condemnation by people who elevate European values to the heights of ‘universality’. Nhlapo notes that “western culture is powerful, transportable and all-pervasive”. (ibid: 143)

Nhlapo rightly encourages the “investigation into how the ‘new’ blacks view the question of relatives” as this would “be more illuminating than information that they live in town, in a house with running water, in a nuclear-family model, and have developed a taste for classical music. One would want to know whether the duty to advance less fortunate kin has been abandoned ...” (ibid)

The Constitutional Court judgement in *Bhe*, delivered some five years after he uttered these words, is an almost archetypal example of the failure to distinguish between how people trace their kin. By conflating spatial and social representations of the family, the judges mistakenly associated smaller *physical* family formations with western norms regarding kinship and property relations that apply only to nuclear conjugal couple and their immediate offspring. (*Bhe* in para [56]).

Himonga (2005) has similarly suggested that both the new property principles in the Recognition of Customary Marriages Act and the *Bhe* judgement are Eurocentric and unlikely to make an impact. She advances three reasons, the first two of which are substantial criticisms of the approach taken by the Constitutional Court.

A constitution that recognises customary law in its provisions could not have contemplated legislation that simply abolishes large components of this system of law with a stroke of the pen and replaces them with the common law. Any legislation dealing with customary law within the current constitutional framework must, as much as possible, permit the continued existence of customary law which does not offend the values of the Constitution, and it must take a culturally-sensitive approach. To do otherwise would amount to the use by state institutions of legislation for what it was not intended by the Constitution - killing customary law in all sorts of ways, such as simply abolishing it or replacing it by the common law - in the name of the Constitution and law reform.

The end of apartheid and the beginning of a new constitutional dispensation in 1994 ... created new expectations about the place that customary law would occupy in the legal system. The Constitution recognises the right of everyone 'to participate in a cultural life of their own choice'. As customary law is undeniably a part of the African cultural tradition, the protection of the right to culture by the Constitution amounts to the protection of customary law as a right (albeit indirectly) (Himonga 2005: 100-101).

She makes further points that the laws are likely to be resisted by traditional leaders who have a strong influence over people, as well as the fact the law is in any case 'inaccessible' (ibid: 100-101, 105-106).

The problem not explicitly articulated by the critics of the reformed laws of marriage and property, whom I have represented by Mbatha and Himonga above, and of individualistic, western notions of family law represented by Nhlapo above, is the conflation of *patriarchal relationships* that were bolstered by the colonial construction of African customary law, with agnatic relationships built on *patrilineal relationships*. The colonial construction of customary law conflated these two concepts by linking male primogeniture in defining succession to positions of *authority*, to *inheritance* of immovable property, thus converting the concept of responsibility and authority into an individual property relationship, altering it fundamentally into something different from its original meaning.

In the context of commercial and market relations in the modern economy, it is easy to see that a dangerous and thin line was thus created between asymmetric, gendered relationships in families and cultural concepts of how people construct their notions of kindred. We have seen that outside the confines of official law, the African freeholders are beginning to adapt a more equitable regime of control over family property between men and women, and that they almost universally reject the notion of the eldest male heir or *indlalifa*. The boundaries are arguably easily blurred, and indeed we saw in many of the family cases that men attempt to fuse their powers of heirship provided by the common law, with the official customary law notion of 'heir' to sell family property and evict family members. In many cases they have failed, and women are increasingly taking over the function of family custodian precisely to prevent the distortion in family values.

Under these circumstances, it is unsurprising that groups representing the interests of women on the basis of the human rights-based discourse have attacked the notion of male primogeniture and the idea that this can only be narrowly conceived in the legal sense of senior males succeeding to the 'heirship' of family land. Clearly many men have used custom in this way to inflect property concepts towards self-interest and individual control, as the cases in the *Bhe* and *Shibi* cases, and others discussed by Mbatha (2002), and in my case studies, bear testimony. By conflating the various concepts, however, the Court came to the conclusion that kinship ties by consanguinity have given way to ties of affinity. This is not borne out by the findings of my research. These findings suggest that research needs to be more contextually sensitive to these nuances in meaning and values associated with family life. In an overview of the scholarship on gender and land rights, Razavi (2003) makes only a passing reference to the "question about the conceptualisation of conjugal relations and the forces that bind agrarian households together" (2003: 28).

9.8 Conclusion

Africans with title were deeply affected by the stronger emphasis on legal pluralism, and the development of a state version of 'customary law', particularly regarding concepts of succession, which affects interpretations of gender relationships profoundly. Constitutional reforms have failed to bridge the gap between competing legal concepts of the family, in particular succession law.

Research in my own field sites, confirmed in other research contexts, reveals that an evolving African 'living law' regarding property and its administration diverged significantly over the course of the past century from the official customary law of succession; but also the anomaly that the common law as constructed around western concepts of the family provided, and continues to provide (in spite of legal reforms), a poor fit with the sociological realities of African concepts of the family and property.

A particular and glaring example of the mistranslation of African concepts of devolution with western law lies in differing understandings of 'inheritance', for which the terminology is ill-suited, either in English or in isiXhosa. These problems come to the fore when gender relationships come into the picture.

Women may couch their claims to their 'portions' of the property in the idiom of 'inheritance', but close examination reveals that women consider themselves eligible to rights of access to, and control of family property, rather than the right to individual proprietary powers, as implied in the common law. A particularly strongly emerging norm is for women to stake claims over the rights of male collaterals, particularly when there were/are no sons in the family. Most women make these claims in the context of the norm of indivisible, rather than divisible property into individual shares.

Scholars and lawyers tend to blur the distinctions between claims women make as wives or as daughters, and the precise context in which the claims are made. Feminist scholarship criticises the distinctions that are made between women as wives and daughters. Some suggest that by remaining in the “patriarchal household”, where they are allocated fewer resources, women and juniors may be exhibiting a “false consciousness” in subjecting themselves to the despotism of the male household head. Subordinate relationships may mask their consciousness of the injustices inherent in the customary system (Razavi 2003: 25, 28). Research findings, suggest, however, that women do recognise unequal resource allocation, but invest in a range of diversified strategies (ibid: 29). Among these, continued investment in social and kinship relations remains an important and conscious involvement. These local social relations customarily involve distinctions based on consanguinity and marriage. The terms are negotiated, and may not necessarily to be *inherently* discriminatory. The confluence of law and codified custom tends, however, to support male control.

The issues in this chapter raise the wider debate between universal language of human rights and arguments, represented in the writings, inter alia, of Martin Chanock, who suggests that reforms should be sensitive to particular contexts. This lobby is against universal solutions, emphasising the limitations of legislation and other prescriptive measures in bringing about demonstrable improvement in women’s land access and control. They suggest modifications to the customary law framework as well as institutional innovation to take into account the actual social and political realities of contemporary circumstances (Whitehead and Tsikata 2003: 88). The research findings in Part Two suggest that the latter approach is likely to be a more fruitful approach, with careful attention to the distinction between “technical conformity with rules and values embodied in rules” (Evans 1997: 346).

CHAPTER 10 “AWAY IN THE LOCATIONS”²²³: SPATIAL CONTROL AND SEGREGATION

10.1 Introduction

In this chapter I turn to the ‘technical rules’ of title, and the adaptation of these by the colonial administration to bring about greater conformity between African titles and the common law. Specific legal devices were invented to render African title more comprehensible to the official system. The previous chapter focused on official tampering with the customary law of succession, while this chapter focuses on official tampering with the common law. Neither of these two forms of legal intervention reflected the social forces underlying the ‘misfits’ between law and practice, and both were a misconception of evolving ‘living law’.

I prefigure the discussion on *specific* legal devices by drawing attention to the spatial controls that underlay the administration of all land held by blacks, regardless of the system of tenure. The device I refer to is the extension of the formerly neutral idea of ‘locations’ to the administration of African-held land. The delineation of ‘native locations’ as fixed spatial references for purposes of administration long pre-dated the development of official segregation in the Cape. The existence of prefigured collectivities facilitated the seamless transition to ‘native reserves’ and later Bantustans. Land held under title by Africans was also collectively conceived within the bounded space of the native location. Mapping Africans in ‘locations’ provided a counterpart to private property defined by cadastral survey. In its earliest incarnation, land held by the Mfengu landowners in title was clearly distinguished from white settler title on the basis of their identification with ‘Fingo Locations’.

In this chapter I discuss the concept of native locations as a crucial device by which African administration could be set apart from other racial groups, including land held by title. I follow with a discussion of three legal devices that strove to find a better fit between African freehold and the common law concept of freehold. The relevance for the thesis as a whole lies in the failure of these devices to close the gap, which has implications for titling policies in the present.

10.2 The politics of difference

Chanock’s has analysed the impact of indirect rule in Africa, and, in South Africa, segregation and apartheid, on the politics of ‘difference’:

²²³ Adapted from Beinart & Bundy 1987: 1

Only if the indigenous systems were different from the British one could the validity of a segregated property regime be maintained. The reserves had, therefore, in terms of property law, to be reserves of the rightless, legally dependent on chief and communalism, in spite of observed patterns of usage. That this was fundamentally in the interests of African polities hardly needs emphasising. (Chanock 1991: 75).

Chanock premises his critique of legal pluralism on the fact that there one economy. African urbanisation, participation in market transactions (including buying and selling land) and submission to contract showed that in these important arenas of the political economy there were no distinctions. He comes to the conclusion that family law was a kind of 'offcast' of the primary realm of the political economy, and that the domestic realm was easily subsumed under the mantle of customary law. When customary law was convenient for colonial rule, Africans' participation in the market economy was represented as 'uncustomary', a distinction that validated the stress on 'difference' for the purpose of family law and property law (Chanock 1991: 63, 68).

Pierce (2013) adopts a more nuanced position. Pierce also examines the complexities of the interchange and intellectual intercourse between colonised and coloniser in Nigeria.

... colonialism engendered particular forms of knowledge, many of which obscured the realities of the societies they supposedly represent but acted as agents of transformation. And yet, colonial projects were frustrated as often as they succeeded: colonial knowledge was not simply projections of Western fantasy but emerged from more intricate negotiations between colonizer and colonized. (142)

The complex intersection between subordinated power and state power has become a central focus in much of the scholarship on colonial power relationships. Some of the scholarship is inspired by the notion of 'legibility' in the creation of modern bureaucracies and the role of planning, mapping and categorising in the creation of modern statecraft popularised by James Scott (Scott 1998; Crais 2002; Braun 2008). Anthropological scholarship concerned with space and power reflects the increased interest in the ethnographies of the state, in so doing shifting the conventional emphasis from ethnographies of 'exotic cultures' to the structures of the ruling classes that effected the subordination of African society under colonialism.

Among historians, Clifton Crais has been foremost in foregrounding indigenous cosmology and its many and varied responses to state technology and bureaucracy, challenging the more conventional approach of 'imposition' and 'resistance'. He centres spatial control in the development of state power. The eastern Cape, according to Crais (2002: 8) "would become perhaps the best-mapped 'native area' in South Africa, perhaps in all of Southern Africa". Drawing on Foucaultian ideas about modernity and space, Crais devotes a large section of his book, *The Politics of Evil* to 'ethnographies of the state', where he constructs a multi-faceted view of the tools of state formation, and indigenous responses to it. The proliferation of spatial demarcators,

such as jurisdictional boundaries, maps and cadastres went hand-in-hand with classificatory records, numeracy and censuses to render the colonial world legible (2002: 68-87). He argues that the “desire to know” led to the attempt to define in greater and greater detail the subjects of state control ... to create a taxonomy through which rule could be accomplished” (2002: 8). Borrowing James Scott’s idea of ‘legibility’ as a “central problem of statecraft”, he paints an elaborate picture of the evolution of South Africa into a modern state,

... informed by the most advanced technologies of the day. Its modernist roots lay deep in European history ... Beginning in the nineteenth century, the industrialization of the state permitted the ascendancy, both conceptually and practically, of a new kind of power. The intellectual revolution of the Enlightenment rationality came to reside at the center of statecraft, specifically the importance of empirical information to the formation of bureaucracies. (ibid: 9)

Crais describes how cartography, cadastral mapping and ethnographic classification shifted spatial relations from imprecise and narrative forms of representation to legibility, registerability and bureaucratic classification, including ‘body counting’ in the transformation to what he calls a “governmental state”. The latter was obsessed with gathering information to achieve “administrative perfectionism” through massive social engineering (ibid).

What many of these studies have in common is an approach that sees the construction of knowledge as a reciprocal constitution of knowledge and practices formed through “points of encounter and intercultural exchange”, rather than purely as imperial transplants. The approach sees the importance of mutual constructions of identity — the creation of the conceptual ‘other’ — in the development of relations between colonizer and colonized. Mutual construction of cultural representation of ‘otherness’, this time between the imperial-metropolitan and peripheral-colonial centres of power, are also permeating the more conventional terrain of ‘frontier’ interpretations of space where the outcome is represented as a contingent interaction between dynamic metropolitan and peripheral Cape discourses (Lester 1998: 2-15). Thus the conventional delineations of relationships on each side of a borderline are being replaced by an emphasis on relationships of power and commerce.

Officials saw the frontier initially as a defensive line protecting a vulnerable colonial order and subsequently as an impediment of the kind that settlers themselves imagined. Settlers saw this frontier as an obstacle to the expansion of commerce and ‘civilization’. Humanitarians saw it as an opportunity for the extension of a benign (but fundamentally contradictory) civilizing influence. Lester demonstrates how ideas about the ‘other’ were never monolithic or uni-directional from the imperial centre, or “waves of influence” washing out from the imperial core. Rather he shifts a key focus of analysis to the material conditions specific to the colonial context, such as material conflicts over land and other resources arising directly from the extension

of settler capitalism (ibid: 3). This approach re-centres “an aggressive ordering of a materially integrative, but culturally defensive settler capitalism” (ibid: 14).

A number of studies concerned with the extension of the ‘geographic archive’ of Empire and colonial states have inspired an incipient South African historiography on mapping in the Cape Colony. In the field of historical geography the rich history of nineteenth century cartography at the Cape is coming under renewed scrutiny (Liebenberg 1997), while more broadly, cartographical history is redressing the tendency to portray the development of astronomical, cartographical and geodetic science as a purely European invention (Craib, R. 2009).

The discovery of the ‘imperial’ in specific local struggles is an important corrective to the more generalist discourses about how power is shaped from the centre. The competing ideas about freehold tenure in the eastern Cape supports the necessity to contextualise the responses of the freeholders in terms of ongoing and mutual engagement between ruler and ruled with new concepts of law, space, property and bureaucracy, much of which was ‘lost in translation’. The stories in Part Two reveal the process of ongoing struggle and adaptation, exemplified as much in African familial relationships as in the relations between land holders and the state.

10.3 Enclosure and exlosure: spatial control and segregation

It is difficult to understand the administrative niceties that applied over time to African freeholders without an appreciation of the distinctive spatial associations between black villages and the ‘native administration’. The legal and spatial distinctions of the twentieth century that became commonplace under official segregation policies had their origins in the ‘native locations’ of the nineteenth. Locations in the Cape Colony and Natal proved to be the building blocks of the future native reserves. The ‘native location’ became indelibly associated with ‘native administration’ from the first Mfengu settlements, and thereafter remained set in both the imagery and the hard regulatory environment of administrative rule. I argue that ‘locations’ was a key colonial spatial/technical device, and was pivotal to the way ‘African freehold’ was manipulated to fit in with segregation ideology.

The term ‘location’ has become iconic in the South African bureaucratic lexicon as both the symbol of colonial authority with the implied subordination of Africans to colonial law, and the concrete social units where lives were lived. Freeholders were far from immune from these processes. It remained in official use throughout the nineteenth and twentieth centuries (even though rural people used/use the word ‘*ilali*’), and is still ubiquitous in the former Ciskei as the English name for numerous ‘locations’, including those that were internally surveyed and titled. The collective noun for African spaces accentuated the inclination to treat

Africans as collectivities and as a subordinated category, even when they owned land in individual title'. Locations clearly separated black villages (and villagers) from white farms.

Locations were not always associated with African administration. The idea was part of the logic of imperial resettlement, a more neutral term to identify places of settlement for immigrants, e.g. the white immigrants that first set foot on African soil without other means of official identify. The act of 'locating' people was a means of categorising people collectively, prior to official land allocations and the conferment of official *individual* identities. An example was the setting aside of locations for the British settlers in the eastern Cape Colony, where they were initially settled in 'locations' according to the 'parties' in which they had been recruited and sailed, often named by their ships. A decade later, locations were the basis for resettlement of the Mfengu settlers who moved into the Cape Colony (see Chapters 4 and 5 above).

The 'Fingo Locations' were the predecessors of the future Ciskei. In the Cape the first locations were internally subdivided into individual units, and included both freehold villages, such as Rabula and Fingo Village²²⁴, as well as most quitrent villages (see Chapter 4 above). Unlike their white settler counterparts, locations 'stuck' as their official identities and addresses, being obviously suited to the administration of people settled as groups, rather than as individuals.

The concept of native locations spread from the Cape locations to the Transkeian territories of the late nineteenth century. In the Cape, locations were intended to clearly differentiate African-occupied land from white-owned land, whereas Transkeian districts were mapped on the basis of internal division into locations for administrative purposes, later renamed 'administrative areas'. In contrast, in Natal 'locations' were tribal units under chiefs, as developed by their architect, Theophilus Shepstone (Davenport & Hunt 1974: 14 and cf 38-39).

In the vernacular, the word *elukshini*, or '*lokshen*' proved more enduring in the urban context, rural villages known by the term *ilali*. As a bureaucratic measure, however, the term had its origins in rural administration, only later synonymous with black townships and informal settlements on the edges of towns. Here locations evolved into the highly planned and policed urban enclaves under apartheid (cf Evans 1997: 147-197). In self-parodying fashion the idea was transported to inner city occupations in Johannesburg during the late apartheid period, referred to in jest as 'locations in the sky'. In its rural evolution, the term also applied to African tenancies on privately owned farms (white and black), where they attracted the neologism of 'private locations'²²⁵.

²²⁴ First known as 'Fingo Location'

²²⁵ Indeed the 1913 Land Act was principally aimed at extinguishing these kinds of relationships in the Cape, by converting them into wage labour.

'Location' as a space and an idea has not disappeared from contemporary usage, having evolved into a trope symbolising the cumulative and composite impact of segregation and apartheid on every aspect of African lives. Locations above all defined the absolute limits of racial integration and social mobility. All Africans, irrespective of their status or spatial location, whether rural or urban, farm or village, were 'administered', from the perspective of officialdom, within the bounded spaces of locations. The concept underlined the subordination of individual to the collective interests, irrespective of title, and hit at the very concept of social mobility, or as Evans put it, the development of supra-location class identities (*cf* Evans 1997: 18). At the same time locations made it possible to render Africans more capable of being identified²²⁶ by the jurisdictional power of the state. In the present people still use the term (if in an ironic sense) to distinguish the former black townships from former white suburbs, revealing complex intersections between cultural and social identities.

Cape legislation prior to Union named its successive land laws, promulgated over a period of fifty years 'Location Acts'. Their changing faces reveal biographies of state power, much of the internal dynamics of which revolved around the distinctions between 'squatters' and 'legal' people. The laws also paint a picture of the steady growth of the specialised native administration that formed the basis of the Union civil service. The particularities of colonial tenure in South Africa are stripped of their historical meaning outside of these spatial enclaves. The surrounding space was mapped by the property cadastre, thus clearly differentiating the white mirror image. In law the distinctions were separated as 'property' and 'place', by land 'enclosure' and 'exclosure'.

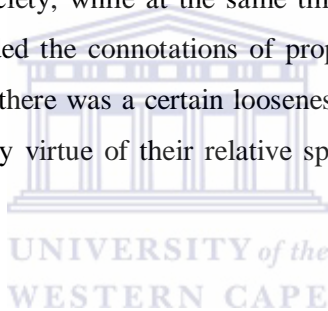
Locations thus represented the shadow image of the cadastre. As cadastral 'cut-outs', the law could be adapted to collective, spatial dimensions, rather than in dimensions of property or contract, even in cases where locations had been internally subdivided by survey and title. The ecological, geographic, cultural and ethnic variability across the South African landscape were embroidered together through the device of location administration prior to territorial consolidation of homelands. Locations had the advantage of fitting inbetween spaces, as well as easily adapting to bigger units, such as districts and reserves. The celebrated Transkeian administration, which formed a powerful model for the Union administration, was constructed around the localised mini-maps of the native locations, which simplified the transmogrification of reserves into bantustans — since they stitched together hetero-ethnic units and helped to gloss a Verwoerdian version of ethnic purity.

Since blacks predominated everywhere in so-called 'white' areas, locations were a means by which the native administration could distinguish between racial categories in urban areas or areas outside the reserves. The schedules to the notorious Natives Land Act of 1913 and the Native Trust and Land Act of 1936, which

²²⁶ Crais suggests the term 'cognizable' as a metaphor for the attempts to render black subjects legible to the emerging local colonial state (Crais 2002: 68).

were the legal cornerstones of territorial segregation (and included the Keiskammahoek rural villages), used locations as the basis upon which blacks were identified for inclusion in the reserves. The reconstructed ‘Tribal Authorities’ of the apartheid era, replicated by the ‘Traditional Councils’ of the current era, were identified on the basis of what were formerly delineated as locations. Locations can thus be seen as ‘reserves in miniature’, well suited to growing imperatives of political segregation.

Locations thus became the spatial basis of much of South Africa’s land law. Evans describes them as the “irreducible” building block of native administration (Evans 1997: 236). In keeping with the complex tension between the oppressive possibilities of spatial separation on the one hand, and the potential therein for refuge and ‘escape’, locations represented both spaces of domination (and tyranny), and spaces of protection. In the context of increasing threats of dispossession, locations eventually represented collective spaces of fortification from further dispossession. As Evans has conceptualised it, “space is a site where all social processes are worked as well as a crucial medium through which power is filtered. Space both restrains and enables” (Evans 1997: 351). There were obvious advantages ‘away in the locations’ to dodge the disparaging judgement of white society, while at the same time these spaces facilitated the particular mode of land administration that avoided the connotations of property law. In Rabula and Fingo Village (formerly known as ‘Fingo Location’), there was a certain looseness in the way officialdom interpreted the discrepancies in registering transfers, by virtue of their relative spatial insulation from the white property registers.



10.4 Simplification of native title

As alluded to in Chapter 9, the divergences between African customary systems of inheritance were noticed at an early stage in the evolution of African title, and over time, these divergences were manifested in the lack of currency of the Deeds registers. Several government Commissions had reported on the problems of title. In 1922, M.C. Vos, a former Secretary for Native Affairs, submitted a report on the survey of African allotments under individual tenure. He reviewed the history of title, mainly the confused attempts to survey and register quitrent title (UG 42—’22). He revealed that many allotments were in the possession of the wrong people, in some cases the titles to the surveyed allotments had not been taken up at all, and in others boundaries were not respected and common land was cultivated or self-demarcated for residence. For example, in the district of Glen Grey, the quitrent titles were shown to be in complete disarray, with 40% of the titles in the possession of the wrong people. While this observation applied to other locations with title, Glen Grey is significant because it was the district where the flagship legislation²²⁷ of the late colonial policy was rolled out as trial-run for the more universal application of quitrent title linked to new forms of local governance. Vos did not investigate freehold titles in the Keiskammahoek district (perhaps by virtue of its

²²⁷ In terms of the Glen Grey Act, No 25 of 1894.

early mixed status), but he summed up the situation with regard to freehold titles issued to ‘Fingos’ in a different locality thus:

[I]t entailed no less than three Select Committees and two Acts of Parliament to rectify the grants of freehold title to natives. This ... could only be done at considerable cost to the Government”. (ibid: 2)

Vos’ own preference was for a simplified form of title with less rigorous criteria for surveying and registration by means of private conveyancing, which would be both cheaper to implement and easier to administer (ibid: 13-14). Some aspects of this approach were already a feature of the Glen Grey Act of 1894 (ibid: 6). As a result of Vos’ report, however, senior officials of the Department of Native Affairs decided to discontinue the policy of surveying land and issuing title, arguing that “there is no need to disturb the practice of allotment by superintendents and Headmen or Chief and Councils” (Davenport & Hunt 1974: 51). In the meantime, however, “the Ciskeian conditions require remedial action” and was proof “that the policy hitherto pursued was not adapted to the native people at the present stage” (ibid). The Chief Native Commissioner of the Ciskei, Mr Norton, reported “the conditions in the Ciskeian locations were chaotic and impossible of amelioration by administrative action. Individual tenure had been imposed upon a people who were unable to understand it” (ibid). The view was that special legislation would be needed to sort out the ‘chaos’ (ibid).

The legislation eventually took shape within the Native Administration Act of 1927, which was also an enabling mechanism for rule by proclamation. As a result, the administration of quitrent title was systematised and centralised, and succession made subject to customary law, as discussed in the previous chapter. Freehold continued to straddle the divide between the common law and customary law as a result of the changes in marriage law. Vos’ recommendations for ‘simplification’ of title were in some respects taken up, though the overall affect of the Vos Commission was to discourage the survey of fresh titles. In this way, the problems resolved themselves into administrative corrective measures:

- Further surveys were halted, but to ‘simplify’ title, native titles were removed from the central deeds registries and separate ‘native registries’ were established. Different rules would forthwith apply to the conveyancing of transfers. In the case of native titles, Native Commissioners were authorised to transfer the properties upon simple endorsement on the title deeds.
- Substituted Deeds could be issued in cases where the former Deeds were so out of date that they could not be updated in the usual manner.

- Adjudication of titles by state appointed Commissioners was legislated. Titles Commissioners were empowered to enquire into situations where titles had fallen out of currency. This reality affected all the African localities with title, including Fingo Village and Rabula, as we saw in Part Two. It takes up this discussion under 10.4 below.
- The Titles Commissioners, along with the Chief Native Commissioners, were given powers of conveyance over titles, which means that titles could be administered locally, thus avoiding the expense and tedious red-tape of the formal system. This also meant that titles were, in some senses, legally downgraded, but without public awareness of this shift²²⁸.

The idea of simplification of title is an enormously compelling argument among land professionals in the contemporary context, where many landholders are calling for some form of recognition via registration, but within a cheaper and simpler paradigm. The problem with a ‘dumbed-down’ version of title is that the same problems that beset freehold title beset any form of registration of individuals. The obvious advantage is the lowering of costs of survey and titling, but this tends to be somewhat overshadowed by the concerns raised throughout the thesis, without the advantages of full legal recognition. Whether registration is cheap or expensive, it still requires the nomination of an ‘owner’ or ‘holder’, and one is at once back to the problem of currency and the likelihood that people will thereafter continue to evade subsequent transfers.

The concept and imagery of ‘simplification’ has a long history in the social evolutionary idiom of colonial rule. Regardless of the ideological content of these arguments, one must return to the crux of the argument, which is that whether the title is a small, simple map, or an expensive, complex and big map, the problems will tend to replicate themselves unless more attention is paid to the sociological issues, or the ‘genealogical map’, discussed in Chapter 2.

The legal alternative to Titles adjustment was the dispossession of title, a course of action many administrators would have wished for. In urban contexts the political motives for not extending freehold were explicitly linked to the administrative problems outlined. In a hearing of the Select Committee on Native Affairs in 1923, which discussed the merits or otherwise of freehold title in urban areas, the Eastern Province representative of the Cape Municipal Association reflected the view of the majority of the commissioners thus:

It is difficult for the Municipality to retain control of these areas once you give them title deeds. The native is more amenable to discipline if he is merely a leasehold proprietor.[...] We do not think ... that the native is ready yet for title ... This ... opens grave dangers because the Estates Act does not make provision for estates of natives; polygamy still exists and there is always trouble in regard to

²²⁸ These measures were enacted in terms of the Native Administration Act, 38, of 1927 section 8.

succession. It is difficult for the Municipality to retain control of these areas once you give them title deed. King William's Town is a source of great trouble ... in Grahamstown [Fingo Village] there is similar trouble.[...] Once he has a title deed there is no shifting him without trouble. (quoted in Davenport & Hunt 1974: 74).

In spite of the hostile climate and official attitudes to African freehold title, existing titles nevertheless represented a boundary beyond which the state would not ordinarily transgress. As we saw in Chapter 4, the state transgressed this boundary frequently in the interests of the 'the public good' for purposes of consolidating the homelands or removing 'black spots' from white-proclaimed areas. Here the state's right of *eminent domain* was applied to white as well as black owners in the border region of the Eastern Cape. We saw in Chapter 5.5 that attempts to dispossess Fingo Village freeholders of their title failed.

10.5 Titles 'Adjustment'

As discussed above, the Native Administration Act of 1927, in response to the recommendations of the Vos Commission, included a section²²⁹ whereby state-appointed commissioners with legal qualifications were empowered to investigate, adjudicate and transfer titles in 'locations' where property ownership details were shown to have lapsed. Commissioners could make awards to whoever was identified as the common-law owner, on the basis of which the registrar of deeds was empowered to issue Substituted Deeds of Grant, later changed to simple endorsement on existing title deeds.

We have seen in Chapters 4 and 5, and in Part Two, that Commissioners frequently 'updated' the titles into the name of a living 'owner' in terms of these new legal prescriptions in Rabula and Fingo Village. These interventions did not solve the problem, as with each generation the registers reverted to a similar state as before. In other words, adjudication was never a once-off solution, but became an ongoing feature of African title. Historical records reveal ongoing appointments of commissioners in Fingo Village every 20 years, suggesting that titles tend to 'lapse' with each generation. The deeds also prove conclusively that, viewing the titles as whole, the most common form of 'conveyance' has been awards through administrative intervention by commissioners, rather than formal transfer and conveyancing.

In terms of the Land Titles Adjustment Act 111 of 1993, titles adjustment commissioners currently have similar powers. Where claimants are indigent, they may be exempted from having to pay for these services. In other words, the scale of 'non-compliance' by African owners still necessitates a state-subsidised system of adjudication as an alternative mechanism to conveyancing.

²²⁹ Section 8

This represents a good example of ‘poor translation’ of the underlying causes of the problem, but at the same time these actions reflect the continued good faith by successive governments in upholding the legal status of title, though continuing to complain about the problem of its administration.

For present purposes the important principle is that the evidence of evasion was of such magnitude that it was considered necessary to institute statutory measures to put them right, and this characteristic of title has continued into the present era. The process could be likened to legal ‘adjustments’ to remould the ‘chaos’ into a legible system. The underlying assumptions are that the causes of the discrepancies lie in lack of education, capital, understanding or motivation. We have seen that these assumptions are based on western-law concepts of ownership with implicit moral judgements that denigrate the social and cultural basis for the discrepancies.

10.6 Ethnography of the Deeds Registry

As the tenure and distribution landscape changed from Grey’s mixed settlement patterns to segregated homelands, the Deeds office was faced with administrative dilemmas. Important changes were made, and this history is a fascinating glimpse into the ethnography of official land administration.

An integral component of the shift to administrative oversight of African title, along with the idiom of ‘simplification’ of title, was the segregation of native registries. The Glen Grey Act of 1984 had already established the principle of simplified transfers under the administration of the Magistrate, whose certification required endorsement by the Deeds office, rather than transfer through private attorneys. In 1920, a separate deeds registry for ‘native titles’ was established in the office of the Chief Magistrate of Mthatha by proclamation.²³⁰ The Chief Magistrate was given the powers of a Registrar of Deeds to register and take custody of the deeds information of African titles (UG 42—’22: 6, Rogers 1947: 117,119). The same principle was extended to the Ciskei after the passage of the Native Administration Act of 1927, when a ‘native registry’ was established in King William’s Town in 1931.²³¹ Paving the way for these changes, the Native Administration Act of 1927 made provision for “a cheap and simple procedure for the transfer of [individually-held] allotments” along the lines suggested by M.C. Vos who investigated the problems of ‘native location surveys’ in 1921-2 (UG 42—’22: 6; Rogers 1947: 118). The Chief Native Commissioner of the Ciskei was given similar powers to his Transkeian counterpart, by being given the powers of ‘Registrar of Deeds’, and the power to approve transfers. By a simple endorsement on the title deed on payment of a small fee, the Chief Native Commissioner could affect formal transfers, thus obviating the legally required

²³⁰ In terms of Proclamation No 196 of 1920.

²³¹ In terms of Proclamation No 119 of 1931. The registry was later moved to the ‘capital’ of the Ciskei, Zwelitsha, and later Bhisho.

route of private conveyancing that pertained to freehold transfers regulated by the national Deeds Registry system.

In this way, African title passed from the sole purview of the common law, to the magisterial and administrative rule of the politically segregated state of 1920's. Native Commissioners, as administrators of African land were substituted for the national Registrar of Deeds under whose authority property was governed in terms of the common law regulating property. The establishment of the Ciskeian registry coincided with the process of consolidation of the Ciskei into a black homeland. Keiskammahoek and the neighbouring district of Middeldrift were excised from King William's Town district (synonymous with the 'white' border region) and became fully-fledged magisterial districts in the Ciskei in 1928. Territorial segregation meant administrative segregation, title no longer being a badge of difference.

Ciskeian territorial consolidation was legally accomplished by listing the predominantly black localities and districts previously scattered in the Cape province as schedules to the Natives Land Act of 1913, and those not included in 1913 were declared 'released' in terms of the Native Trust and Land Act of 1936. The Keiskammahoek village administration is complicated by the fact that the villages were scheduled to the Natives Land Act of 1913 as late as 1950, chiefly on account of the inoperability of a host of proclamations that defined the scope of their application in terms of the criterion of whether an area was scheduled (i.e. listed) under the Land Act. The scheduling of the villages made a string of proclamations relating to the administration of land legally enforceable in the Keiskammahoek villages, including forced resettlement in terms of 'betterment'.

In addition, the villages were 'released' land in terms of the Native Trust and Land Act of 1936. The meaning of 'released land' was land identified for the consolidation of black reserves or 'homelands', and rights in this land were reserved solely for Africans. This means that Europeans could no longer acquire land there, and all European land in these areas was expropriated, as discussed in full in the case of Rabula in Chapter 5 above.

These overlays in time and space complicated and already complex legal and territorial framework, and there was frequently confusion about what law applied where and from when (cf Mills & Wilson 1952: 137-151). The regulation of freehold land continued to straddle the common law — customary law divide (distinguished in terms of marriage contract), whereas quitrent tenure was thoroughly subsumed under the administrative purview of segregatory rule, from which choice of land transmission was completely removed. Quitrent title had to devolve according to the customary law rules of male primogeniture following the 'Tables of Succession', which prescribed the lines of transmission through males. Freehold title divided along the lines of marriage by civil or customary law.

These nuances in the law had an impact on the separation of the 'native registries'. In the case of the quitrent registers, the process was fairly uncomplicated. These registers were clearly separated from white areas from their inception, being location-based. Although Rabula was also regarded as a 'location', Keiskammahoek villages were for a long time part of the King William's Town district, and thus part of the King William's Town property division. For the purposes of the Deeds Registry, property divisions were called "registered divisions" (RDs), and usually followed the lines of magisterial districts. Rabula deeds registers were therefore integrated with the farm registers for the whole district, which included the white-owned properties. These registers were far harder to separate, and in the end were spread between the Ciskeian and the King William's Town registries. The transfers continued to be recorded in the latter (possibly in duplicate), and it is these latter registers that I consulted for the purposes of the research into Rabula properties, discussed in Chapter 5 above. The properties were located by using the survey diagram numbers represented on maps (in contrast to quitrent properties which are easily located in separate location-based books). The King William's Town farm property registers were recorded in books per property. This makes it possible to track the passage of individual properties across time relatively easily. The entries in the Deeds Registry are handwritten per property, and showed each transaction per property over time. This procedure provides the researcher with an overview of each property, and enabled me to compare and tabulate property transactions across the whole of Rabula and over the entire period from first grant to the present.

The Fingo Village registers were, and still are, held in the Cape Town Deeds Registry, which followed a different system. The geographic basis for the scope of the respective jurisdictions of the Cape Town and King William's Town Deeds Registers is roughly the old border separating the 'old' Cape Colony from British Kaffraria (i.e. west or east of the Fish River). This remains the case today.

The Cape Deeds are organised and filed by the transaction history, and not by locality and property. New Title Deed numbers are issued for each property transaction, whenever a transfer occurs. These Deeds are stored according to the dates of transfer of all properties held in the Cape Town registry. The legibility of this system is therefore based on particular transactions. The Title Deeds of all properties, rural and urban, that fall under Cape jurisdiction that were transferred on a certain day are filed together. Particular property 'biographies' are not held together in a single storage file. To track the passage of individual properties, the researcher must have all the Title Deed numbers for each transfer, and locate each of these Title Deeds individually amongst all the other properties that underwent transactions on that day. This requires several backwards-forwards searches in different storage rooms, sometimes located on different stories of the building. Tracing an individual property history is thus extremely time consuming. It meant, for the research, that it was not possible to gain a 'synoptic' view of property biographies with the same ease as is the case with the Rabula farm registers.

The following conclusions can be drawn from these administrative entanglements and distinctions.

The first is that although legally downgraded in various ways (as discussed in the previous chapter), African freehold title continued to have a degree of legal and administrative status, which meant that certain aspects of the common law continued to apply (in contrast with quitrent title, for example). Asked why he thought the black freehold properties remained integrated with white properties, the Deeds Registrar at King William's Town maintained that the black freehold properties "were never moved to the Native Commissioner's registry because they were held in full ownership". Only the "Grey registers" [he meant quitrent, see below] were moved.²³² It is both interesting and significant that African freehold property resisted complete segregation into the racialised administrative grid.

The second is that the freehold registers continued to maintain some degree of integration with the white property registers even through apartheid rule, if in different ways, according to the respective bureaucratic cultures of the Cape Town and King William's Town Deeds offices. The glimpses into the policy discourses among administrators over time indicates how frequently administrators did consider dispossessing Africans of title, due to the administrative and political inconvenience of administering African freehold, which in some respects tended to slip through the network of controls that governed other forms of tenure.

Although many of the legal nuances and intricacies may not have been fully understood by African freeholders (and which certainly would be as true for white title holders), there is evidence that Africans clearly made the distinction between property governed according to the common law rules developed by the legislature as opposed to rules developed by the native administration by proclamation and executive action. The former was premised on the common law separation of powers between the legislature, judiciary and executive branches of government, which principles were abandoned in favour of executive authority in the case of rule by the administration. The latter was premised on the fusion of these powers, when 'native administration' subsumed the governance of African property under the administrative domain. Ntsebeza's evidence of the battle by title holders in the Transkei district of Cala for their titles to be the 'same' as the titles of their white neighbours makes this clear (Ntsebeza, 2005). Glen Grey title holders in the district of Glen Grey also fought to preserve their quitrent titles under the parliamentary domain when the Native Administration Act of 1927 sought to separate quitrent title from the common law domain.

These observations have important implications for law reform of tenure in the present. Differentiation of tenure according to different institutional domains based on racial distinctions remains a highly problematic area of tenure reform. For example, the current attempts to control African 'communal' tenure by traditional councils, where the separation of powers are abandoned in favour of the fused dominion of colonial 'tribal units' of authority is clearly a problem for constitutional reform (*cf* Claassens and Cousins 2008). One of the

²³² Interview, A. Styles, King William's Town, August 2007

lessons of 'African freehold' is that, although the common law principles of title were clearly ill-suited to the family structures and values of the title holders, as demonstrated in Part Two of thesis, there are other principles of jurisdiction of powers that should be taken into account, rather than simply a focus on the rules of individual ownership. Land tenure and family law, even when adapted to 'living law' concepts of family and property, is an area of constitutional law reform that should continue to be governed by the national legislature and parliamentary oversight, rather than delegated to the executive or 'traditional authority' branches of governance that cannot be monitored by parliamentary oversight and conformity with the Bill of Rights in the Constitution.

The third conclusion that can be drawn from the distinctive characteristics of the two Deeds offices discussed above is that even where the same legal principles and rules governing property and Deeds were operative in both registries, they modified their administrative *practices* according to the demands of different circumstances. The evidence of variation in the institutional mechanisms in the Deeds Registries suggests that adaptations to the strict rules of ownership and transmission of property are possible. The variability belies the implicit representation of the South African Deeds Registry as a monolithic and immutable institution, capable only of abiding strictly by the rules of private conveyancing and transfer. The Deeds Registries, far from being a 'single construct', was historically constructed and adapted in various ways to fit changing circumstances. The variations discussed here challenge the notion that there is only one immutable, infallible and uniform Deeds Registry in South Africa, a view that has attached itself to the general claims that the South African Registry is among the most accurate in the world.

WESTERN CAPE

Under circumstances of massive spatial engineering in the old 'frontier' region to segregate Grey's mixed settlements of the previous century, black freehold properties, on the whole, managed to elude, to some extent, the racialised grid of land division.

10.7 Administration of Deceased Estates

The administration of deceased estates was another key domain for segregated control of property. It was frequently in this realm that struggles between family members, young and old, men and women, were fought out in practice. In an ironic twist, the racially segregated method allowed for some negotiation and discussion around the idea of custodianship of property, and it became a method whereby families with title could avoid the legalities of registration.

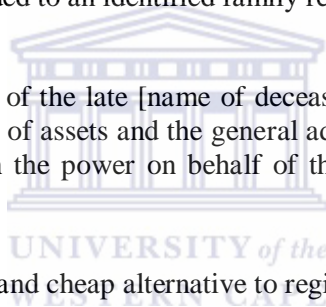
As far as the winding-up of deceased estates go, legal scholars agree that it was normally regulated privately by the deceased family. They would meet after someone's death and distribute the estate and see to the needs of the widow and children. Unless there was a serious disagreement at this meeting, no outside authority was

involved. Family councils had considerable discretion in deciding how best to secure the welfare of the surviving dependants. (Schoeman-Malan 2007: 18)

Under the system established by the succession laws of the Native Administration Act of 1927, estates were administered by Magistrates, as opposed to the Master of the Supreme Court who had the delegated powers to administer property under the common law (Schoeman-Malan 2007: 9). The magistrate had jurisdiction over the intestate estates of blacks who resided within their areas of jurisdiction. The conventional route followed was for the family in question to select a family member to represent the family in the distribution and administration of a deceased estate. In the case of intestate estates, the administering agent was determined according to whether the deceased had been married in terms of the civil or the customary law. In terms of the Black Administration Act, the magistrate had powers to appoint a family administrator in terms of 'native law and custom' if the deceased had been married by customary procedures or was unmarried.

A Certificate of Appointment was awarded to an identified family representative to:

... represent the intestate estate of the late [name of deceased] and to assume responsibility for the payment of debts, the collection of assets and the general administration and distribution of property in the said intestate estate with the power on behalf of the estate to pass and receive transfer of immovable property.'



This shadow process provided a simple and cheap alternative to registration, although patently open to abuse by unscrupulous family members or dubious interpretations of customary law by the bureaucrats in the Magistrates' offices. There were, however, cases when this method of administering estates was an effective method of settling negotiations between family members regarding the management of family property. The formal step of conveyancing by a lawyer is reported to have rarely occurred subsequent to the family negotiations, and the method of deciding on a family administrator (the 'custodian') synchronised with local practices of custodianship. Through the language of 'responsibility' and 'representation', a somewhat familiar route of identifying a caretaker was followed in preference to registration in title deeds. The Native Administration Act's provisions with regard to male succession were, strictly speaking, supposed to be applied, but an official in the Grahamstown Magistrate's Court²³³ reported that during her tenure, the strict rules of male primogeniture were ignored and officials were willing to appoint females if the family chose a woman. Here the approach was to consult family members and appoint whoever the family chose as representative, departing from both primogeniture and the male line of succession as required under the Tables of Succession.

²³³ Interview with M Kotze, Senior Administrative Officer, August 2004.

The administration of estates as a means of property identification is important in showing two things. Firstly, it shows ways in which customary practices can be adapted to immovable property to reflect ‘living law’ rather than the official customary law. Secondly, it provides an example of an official alternative to conveyancing that to some degree mirrored local understandings of succession. That it has over the years favoured male appointees, thus contributing to structural discrimination against women over a long time, is one line of reasoning that discredited this method, as were its racially exclusive provisions, concerns which were raised by the Constitutional Court judges in the *Bhe* case, discussed in the previous chapter.

The administration of estates of all South Africans is now governed by the Intestate Succession Act, following the Constitutional Court judgment in the *Bhe* case. As already alluded to, the judgment acknowledges that replacement of the official customary law by statutory law may jettison some customary principles of succession — notably the idea that succession has connotations of responsibility rather than material inheritance of property. However, pending the further development of ‘living’ customary law, this practice was considered to have lost much of its original meaning under changing social circumstances, and therefore to be secondary to the damaging effects of racial and gender discrimination which were found to be unconstitutional (*Bhe* in paras [76], [80], [96], [110], [118], [158]–[159], [167]–[175]).²³⁴

There is a paradox in that a system regarded as illegitimate on constitutional grounds nevertheless filled a gap between the law and practice. The process represents an interesting example of local adaptability and of practical bridge-building between custom and statutory law demonstrates a potential model for reconciliation between social norms and practice on the one hand and formal legal procedures on the other.

10.8 Conclusion

This chapter has provided glimpses into the labyrinthine realm of ‘native administration’, and the twist and turns of the administrative idiom when it came to freehold title.

The law in South Africa has been the most powerful shaper of the political structure of the state. The story of ‘African freehold’ however confirms Moore’s theories of the existence of layers within layers of law and custom, and that the law has limited reach in many areas of people’s lives. We have seen in this chapter that the more elusive the administration of freehold title became, the more the state legislated to close the gap. Legislation for the purposes of governing Africans no longer had to pass through the halls of parliamentary oversight after the Native Administration Act enabled rule by proclamation, and these were generally crafted by officials in the native affairs department, who regarded themselves as experts of ‘native

²³⁴ As mentioned above, Ngcobo J dissented from this opinion, pointing out its continuing relevance (*Bhe* in para [229]).

law and custom. The proliferation of legislation never succeeded in closing the gap. It could be said that the gap is never closed.

Attempts were made to harmonising the law with the administration's view of the problems with freehold title, to both maintain it within the common law paradigm of 'ownership' and at the same to engineer an element of 'difference' and separation. This proved to be a delicate balancing act, achieved philosophically by the validating official discourse of social evolution, and practically by way of 'simplified' measures to separate African title from the full glare of exposure to market principles. The notable issue here is that these interventions, though protectionist, were achieved without exterminating the individual ethos of title, thus in principle keeping a foot in both doors: Chanock may well be right that the individualising philosophy underpinning western law might one day catch up with reality. In the meantime Africans, even those with title, were to be governed by means of segregation in the spatial confines of locations, where differentiation was masked and suppressed.

The following themes have been highlighted in this chapter:

- Africans with title were not immune from the spatial control via locations as units of administrative control, as the mirror image of the cadastre, which allowed for the formal structuring of 'difference' away from the glare of parliamentary oversight.
- The construction of official customary law regarding inheritance of immovable property entrenched male powers in a way that was absent from precolonial society.
- Most African titles have been 'updated' by state-appointed titles Commissioners, after countless evaluations that Africans tend to avoid registering transfers. This method does not take into account the source of the problem, but merely attempts to 'fix' it, thereby masking the underlying causes.
- The administration of estates was/is a key domain where property struggles are fought out in practice. A shadow system developed that in some cases evolved to take into account the roles and rights of women, in contradiction of the legal route. The method allowed for some negotiation and discussion around the idea of custodianship and it became a method whereby families could avoid registration of an individual.
- The Deeds Registry was historically not a 'single construct' but adapted to various local conditions. This challenges the notion that there is only one 'uniform' structure of Deeds, and suggests the system is amenable to manipulation and flexibility.

The post-apartheid state has had to confront a highly bifurcated legal domain with regard to succession and inheritance of property. It is in this area that gender activists have most challenged customary notions of inheritance. Feminist scholarship is inclined to see in some of the adaptations to customary law dangerous precedents for the rights of women in this discourse of the "re-turn to the customary" (Whitehead & Tsikata: 67, *cf* overview of policy discourses 67-112).

CHAPTER 11 SOUTH AFRICA'S 'TOUGH ROPE' OF OWNERSHIP

The result of our system of registration is that in the Deeds Office and in the Surveyor-General's Department one has a complete picture of the land of this country in miniature, notifying one of the ownership of, and of real rights in, every piece of land in the Republic. (Wille 1991: 304).

Legibility implies a viewer whose place is central and whose vision is synoptic. State simplifications ... are designed to provide authorities with a schematic view of their society, a view not afforded to those without authority... [A]uthorities enjoy a quasi-monopolistic picture of selected aspects of the whole society (Scott 1998: 79)

11.1 Introduction

The evidence discussed in Part Two of the thesis shows how the African freeholders embraced the principles of title highly selectively, which meant that they did not follow the freehold 'package' as a whole. This had, and has, dramatic consequences, since the law conceives of freehold precisely as a single package made up of multi-facetted parts that are intimately connected. The parts all revolve around a single concept of private individual property. By disassembling the package, the freeholders upset the legal rationale and the administrative framework of freehold title.

In the two previous chapters we have seen how 'African freehold' came to occupy an ambiguous position in the interstices of two legal systems: the common law and customary law. The development of legal dualism resulted in two worlds of official land tenure in South Africa, divided not by class, wealth, social status or cultural values, but purely along the lines of racial difference. The institutional frameworks underpinning each followed increasingly divergent trajectories. The common law claimed moral superiority validated by social evolutionary discourses that increasingly posited Africans as existing outside the frame of 'common law', membership of which was 'yet to be attained'. Customary law was validated by 'custom', but, in the context of colonial rule, became a tool by the colonial authorities to legitimate its subordination to the overarching national political system. The latter was reproduced by its dependence on African labour and ongoing legal interventions in African land systems to validate land dispossession and subordinate forms of land tenure and land administration.

In reality we have seen that legal dualism and political segregation did not channel the law into neat parallel lines. This was not possible, since people occupied one economy, and even with the most concerted efforts of legal pluralism could not make the customary genie go back into its ancient, traditional magic lantern. The real world was one of interweaving; of mutual influence of diverse legal cultures on each other, forged, as Chanock (2001) shows, in the context of the formation of a new society.

The paradox raised in this thesis, seen through the trajectory of ‘African freehold’, is that there is some truth in the official view that Africans did not comply with the law. Africans indeed filtered property concepts through ‘customary lenses’. As Chanock argues, however, ‘customary’ only materialises in contrast to something else. Even a cursory study of the development of legal centralism in England and Europe in the aftermath of feudalism involved the merging of diverse customary systems of property and land ownership. The painful process of transplanting uniform systems of law on highly variable local customs frequently resulted in dispossession of formerly locally recognised land rights (e.g. access to the commons in England, and access to family property in Europe), and the concentration of resources in the hands of the few. In the process of struggle between the different interests, people did not defend their ideas on the basis of ‘customary law’, but on the basis of familiarity with their social systems. The African freeholders who have populated this thesis similarly did not present their narratives of their social practices in terms of ‘customary law’, but in terms of their living social relationships, and what was considered ‘normal’ in their eyes. The real dilemma was not that of ‘difference’ but the way in which difference was interpreted to validate political subordination.

In the process of restructuring the institutions that governed access to, and control over resources, such as land, both the customary systems and the common law system were altered. For all these reasons of competition over meaning and struggle for control over material resources, Chanock maintains that one can only understand each in relation to the other, they were mutually constructed in the context of the development of South African society. (Chanock: 2001: 35)

The implication of his statement is that one should not seek to understand African customary law in the present by searching for its content in timeless traditions rooted in the pre-colonial African past, just as one cannot explain the common law system of property with reference only to the European institutions that gave birth to them. Nevertheless, each was filtered, and continues to be filtered through the lenses of the past, through familiar patterns generated in earlier social systems.

Understanding the complex intersection between the centralised state system and subordinated customary law involves shifting the microscope from African ‘customary’ systems to a hard and frank appraisal of the process of construction of the common law. In this chapter I show how property regulated by the common law in South Africa, far from hatching ready-made from a pristine European past on the African soil, was itself forged from a process of struggle and competition over meaning, custom and control over resources between diverse elements among the colonial white society. The purpose of this discussion is to raise questions about the basis upon which the law is divided into ‘common law’ and ‘customary law’, by showing how the common law itself was constructed to hold its line in defence of, and in opposition to competing values.

In following historical policy discourses it is possible to see how the common law evolved in response to the changing conditions of South African society, and in the process the diverse cultural elements among white society had also to be confronted. The common law was shaped as much by struggles between different interest and values within white society, as it was by the struggle to maintain dominance over black society.

Customary law was similarly a domain of struggle between people with differential access to recourses and authority as we saw in the previous chapter. In this chapter the focus, however, shifts from African freehold to the 'other side' of the curtain to examine the constituent ingredients of the formal system of property: title and registration, and its close allies, the laws regulating sub-division, succession and inheritance. The relevance of this discussion for this study is to draw attention to the multiple possibilities of constructing and interpreting ownership, even within the same western tradition of private property.

This chapter follows Chanock's view that in order to understand the dualistic paradigm of law inherited by the post-colonial state, it is necessary to bring the construction of the common law into the picture, since the two were mutually constructed as mirror images of each other "... customary law cannot be understood without its white 'other'" (2001: 35, see 1994: 314).

If the common law in South Africa, known also as the 'Roman-Dutch law', developed *in relation to* African customary law, it also "grew in an intimate relationship with English common law". These diverse origins of the common law slowly merged into a solid framework to take the dominant position in South Africa's legal culture, which in the area of property law tends to be depicted in terms of a monolithic and immutable legal order. Establishing the principle of difference between European and African norms obscures the internal struggles within the common law for control of authority and material resources.

11.2 Enter the cadastre

In this chapter I provide glimpses into the slow and halting development of the concept of 'freehold title' in the Cape. The application of rigorous property boundaries was possible on account of the growth of a technically sophisticated cadastral network, which proved to be central in the construction of private property in the context of capitalist relations in the twentieth century. The eclipse of 'African freehold' cannot be fully grasped without an adequate understanding of the powerful influence of new forms of spatial and legal control of 'white' property. The extension of state controls over white property did not only involve the subordination of African tenure, but also the crushing and demise of many white cultural practices, including concepts of familial relationships, which had arisen in the context of the pre-capitalist colonial frontier. The importance of re-centering the internal struggles within settler and white society lies in the revelation that the construction of the common law was ultimately a political, social and cultural

construct in response to changing conditions within South African society. Far from being a monolithic 'implant' from Europe, Chanock has shown how it grew out of complex struggles in colonial society (Chanock 2001).

When spatial and social units come into the picture, succession and inheritance regimes follow. These dimensions are frequently neglected in policy discourses regarding land tenure reforms. This may be partly attributable to the highly differentiated character of the modern South African legal-institutional framework. There are different legal and administrative institutions for land registration, surveying, succession and inheritance, planning, land use, etc, in spite of their ultimate convergence in Deeds Office procedures. Furthermore, as we have seen, law was differentiated according to racial criteria resulting in complex webs of legal pluralism. These aspects should be considered together as interleaving sub-systems, in contrast to the emphasis that is usually placed on different 'forms' of tenure, as if the categories themselves are the soul and substance of land tenure.

I centre the introduction of the cadastre as a significant 'event' that 'changed how things were done' with regard to property recognition in colonial South Africa. The cadastral framework vastly facilitated the development of racial and spatial segregation discussed in the preceding chapters. The significance cannot be over-emphasised, since the cadastre is what defines, directly or indirectly, the (unequal) property relationships in South Africa. The extensiveness of South Africa's cadastral infrastructure sets it apart from other African contexts. The very notion of 'ownership' in South African law is referenced to the cadastre. It is necessary therefore to take a closer look at what is meant by the concept of the cadastre in relation to land ownership.

Like most modern cadastres, the South African cadastre is multi-dimensional: there is a spatial component, which is the geometric description of land parcels; and linked directly to the spatial dimension, is the textual component, which comprises the records or registers recording the real rights in the land parcels, such as ownership, bonds (mortgages) and servitudes. The spatial and textual records must reflect up-to-date information, which means that every time a change occurs, such as sales transactions or inheritance, or spatial alterations such as subdivisions or servitudes, each must be duly registered. Three characteristics of this 3-D land information system are: (a) the core unit is the land 'parcel', which is a discrete unit, and, which according to statutes governing survey standards, must be surveyed within an accuracy range of centimeters; (b) registered owners of real rights have a certain degree of autonomy from other users of the property in deciding about the use and disposal of the property (though users, particularly lessees, have some legal protections); and (c) registered owners of real rights have fiscal obligations: property registers are linked to other registers, such as records for purposes of income tax and servicing. Transactions set off a domino effect, reverberating along a chain, like a train moving through stations: you can't get to the destination of ownership until there has been an exchange of information at a number of stations along the

way. A 'grid' of ownership is overlaid on the terrestrial dimensions of land, gathering up all the multi-faceted aspects of ownership into a thoroughly quantifiable private property regime that is legible to the central and local state simultaneously, as well as the wider public.

The composite nature of the contemporary South African cadastre penetrates virtually all institutions that affect property rights regulated by the common law and statutory law. The framework that undergirds the recognition of private property articulates uneasily with 'African freehold', as we have seen, and even more so, other 'customary' or off-register tenures. I start with a brief historical overview of processes that shaped the present construction of private property, with a reminder that any system of property is the outcome of class struggles, which in this case includes various strata of white society. An implication of this view is that the 'formal system' of spatial controls and property law did not hatch ready made from the central metropole, as observed above. I proceed with a discussion of the legal dimensions, including the registration system.

11.3 Private property versus 'birthright'

The cadastral system of surveying land parcels had been poorly developed before the British took over the Cape. In the interior the traditional Cape Dutch system of loan farms were measured, not by survey, but by how much land an expectant owner could traverse on a horse in half an hour's ride from the centre. There were few, and at some time, no professional surveyors, and farm boundaries were approximate. The 'horse-ride' measurement resulted in an archetypal 3,000²³⁵ morgen farm that came to characterise the settler idea of an adequate land holding to support pastoral habits. As early as 1813 the British authorities set about to improve the Roman-Dutch system of registration of real rights by making survey and registration compulsory²³⁶, from which period the growth of the private sector surveying industry is traced, replacing the previous convention of government-employed surveyors. From then on there was a steady process of centralisation of land registration functions. A centralised national registry is still a feature of the system today. The first Surveyor General's office and Deeds Registry was established in Cape Town in 1828. The office took over registration duties previously undertaken by the governor's office, but land surveying and registration were still regarded as inefficient.

The British failed for at least a century to reverse the customary methods of the Cape Dutch farmers of the interior gaining land cheaply through low rentals with minimal state oversight and capitalisation (Christopher, 1971: 8). British land policy, from the broader imperial perspective, had wished to settle its colonies with large numbers of immigrants by reproducing social contexts similar to its own by establishing close rural settlements along the lines of the United States system of land division and sale devised after the

²³⁵ 2,570 ha.

²³⁶ In terms of governor Cradock's 'Cradock Proclamation'.

American War of Independence. Colonial administrators failed to appreciate the aridity and lack of ground water in large parts of the Cape colony, and the Cape Dutch traditions of obtaining land cheaply with minimum government interference persisted (Christopher 1971: 6-8). The systematic enforcement of fixed tenure thus met with limited success in the Cape Colony for much of the nineteenth century.

Christopher (1971: 8) attributes at least some impetus to the great population movement of Afrikaners to the north (called the Great Trek) in the mid 1830's to British colonial attempts to impose surveys and title through sale of Crown land to replace the more informal methods of renting and measuring land. The maxim that "[e]ach member of the family was entitled to a farm and a farm was regarded as a birthright of every man" (Christopher 1971: 3), contributed to the ever further outward extension of settlement. Many British settlers took up the slack in the land market created by their departure to expand their sheep farming activities from Albany into the drier interior Karoo districts.

Historically, many white rural dwellers of Dutch extraction (known as *boers*) lived in extended family networks on farms. Their customs of transmission resulted in the distribution of large tracts of land to a small, thinly distributed white rural agrarian population. Under Roman-Dutch law in the Cape, a child could not be disinherited; there was no primogeniture. The living could impose binding conditionalities on the next generation to prevent alienation of the land. A strong "cultural legacy" arose that promoted the notion of equitable shares of farming land that could not be realised separately (Chanock 2001: 184-185).

The imperial policy favoured a large European immigrant population to the British colonies to inculcate new values of commercial farming and private property to replace the 'backward' practices of the white rural population. Colonial immigration schemes generally failed to materialise in the Cape, but one colonially-sponsored settlement plan came to fruition in the form of the collective immigration of around 4000 British immigrants who were settled in the eastern borderlands in 1820, as alluded to in Chapter 9 above. The idea had been to settle the settlers densely in typically English village agricultural settlements to defend the borders of the colony. Delusions of reproducing English society in settlements like "'the England of enclosure, of country squires and cottage agriculture', with small fields, valley-based homes, and mixed farming" (Beinart 2003: 47) were overtaken by the realities of the eastern Cape ecology, fragile polity and a heterogeneous cultural mix. The British settlers' acculturation to, and involvement in the complex history of colonial economy and society in the Eastern Cape nevertheless had deep implications for the distribution of land and the development of formal land tenure²³⁷.

The English settlers were not agriculturalists, for the most part the product of unemployment as the industrial revolution bit in their home country. They had been attracted by possibilities of rural proprietorship and

237 See e.g., Keegan, T. (1996); Dubow, S. (1982); Beinart, W & Coates, P. (1995) ch 4; & Beinart, W. (2003) pp 47-63 for perspectives on the regional political economy that grew out of the British immigration to the Cape, centred on wool exports.

misleading accounts of favourable agricultural and social conditions in the colony, the fallacy of which soon led to their rapid dispersement. Many moved into the military settlement of Grahamstown as artisans and traders, thus contributing to its growth into an urban settlement, while others took up grants of large farms in the region called Albany. Contrary to the original imperial expectations, they continued the culture that had taken root among white *boer* Afrikaners of spreading themselves thinly over large tracts of land to suit pastoral habits more conducive to the ecological and economic conditions in the Cape colony.

The British, according to Christopher, tried to inculcate an approach to “land as being of intrinsic value and therefore a price could be placed upon any parcel of land; land, in fact, was a reserve of revenue which could be called upon by the state to meet other expenditure, often that of financing immigration” (Christopher, 1971: 1). Imperial reformers in the earlier phases of colonisation were anxious to put an end to what they saw as a squandering of the colony’s only natural resource, land (ibid: 7). In the 1830s reforms were introduced based on the policy that there should be a price on the land, low enough to be affordable, high enough to ensure a supply of labour. Christopher’s thesis is that colonial reformers believed that to develop a successful colony of settlement, there must be a balance between the supply of land, labour and capital. A minimum price was consequently put on the land, but even after it was lowered, it failed to attract buyers, and the imperial system was thereafter abandoned in the Cape. White farmers and settlers were accustomed to the availability of land through loan farms and grants at low annual quitrents.

The growth of settler pastoral farming, meanwhile, led to a remarkable burst of market-led agrarian transformation based largely on the introduction of woolled sheep, contributing to radically changing social relationships in the eastern Cape Colony previously based on competing economies of cattle accumulation. The rural economy took off from wool exports, contributing to an economic boom based on merchant capital and export markets during the 1840s-50s, implicating the entire southern African economy (Beinart 1994: 390). The requirements of sheep farming created an insatiable appetite for land in the form of large enclosed farms, both in the Xhosa-occupied regions south-west of the Kei River, and in the drier interior occupied by *boer* farmers (who had subjugated the Khoi). Beinart estimates that the number of woolled merino sheep leapt to about 5 million in 1855 and to 10 million in 1875 where the numbers remained static for the next thirty years (Beinart 2003: 9). Later moderated by the mineral revolution, the wool industry continued to flourish till well into the twentieth century (ibid: 1-27). Returns on wool, and diversification into trading and other mercantile activities, added increased impetus to appropriate land, a movement that implicated both white and black settlers in varying degrees.

As we saw in Chapters 4 and 5 how land was acquired through large-scale confiscations from the amaXhosa. The beginnings of integration of the eastern Cape into the world economy coincided with the period when the amaXhosa lost their independence during a series of three successive frontier wars in 1834-5, 1846-47 and the most brutal in 1850-53. The latter war (known as the eighth) culminated in the ultimate act of

desperation by large numbers of Xhosa in a millenarian process of grain and cattle destruction, known as the disaster of the 'cattle killing' (Peires 1989). The land was appropriated as 'Crown land', and redistributed to settlers under a range of land disposal schemes and tenure.

We saw in Chapter 4 that one of the consequences of the relatively low density of white settlers was that land was distributed not only to white settlers, but also to the black settlers, to the endless resentment of the commercialising white settler farming and merchant class. Methods of disposal of Crown land varied from public auctions and the lodging by settlers of 'land claims' to specific blocks of land that were adjudicated and awarded (Keegan 1996: 187). Their African competitors, as we saw, were not returning Xhosa, whose ability to negotiate favourable terms had been all but completely eroded as their social and economic system was being dismantled bit by bit. As previously elaborated in Chapter 4, the competition came from the Mfengu, who were imbricated in the emerging social composition of the eastern Cape frontier in the mid-1830s. Their active participation in the commercial economy, for example in the form of cash cropping, sheep farming and transport riding, took on qualities of an emerging peasantry (see Bundy 1979). They were also a potential supply of labour within the colony. The ambiguous needs of border defence and a desire for labour created a confused set of land tenure policies inside the 'old Colony'.

Sheep farming being seasonally labour intensive relative to the traditional African and Afrikaner *boer* cattle-keeping economies created an absorbing demand for labour. Sheep farms also required physically secure farm boundaries, sheep being more vulnerable to both wild prey and theft than cattle. The twin processes of physical and social enclosure that were set in motion by the new demands of animal husbandry produced contradictory policies regarding the terms of black land access, as we have seen. Administrators, missionaries and settlers' priorities were not the same, and the search for a balance of rights and restrictions on those blacks who had been incorporated under colonial law produced ongoing struggles within the various sectors of colonial society regarding the appropriate degrees of controlled land access and labour coercion that should be applied to Africans.

When land values increased with the advance of commercialisation of agriculture in the late nineteenth century, many of the white rural farmers, mainly of Dutch extraction, began to sink into poverty. It was no longer possible for white families to access land cheaply according to the old systems that encouraged spread. When land became a scarce resource, the white rural poor continued to retain their rural bases by retaining their shares in the family properties. Unable to capitalise or accumulate more land, they increasingly split up their inheritance rights in undivided shares, leading to some farms supporting large families with heritable rights. Some individuals sold their shares and migrated, but a great deal of land remained under the control of extended white families, and their practices were increasingly depicted by the emerging 'progressive' farming lobby as a brake on the growth of a white commercial agricultural sector.

The liberal historian W. M. Macmillan (1919) provides insight into the new attitudes of the emerging capitalist elites towards poor rural whites in the period following the First World War, by which time the 'poor white problem' had grown into a significant socio-economic concern, identified by the neologism 'poor whiteism'. The discourses of the time reveal that it was not only blacks who were singled out as being 'uncivilised' and 'backward' when the imperatives of capitalism had resulted in changed attitudes towards agrarian production and reproduction. In lectures on the 'poor white problem', he summarised the broad problem in the early nineteenth century as the "disheartening effects of scanty markets, lack of transport, and the dependence on slave labour ...[as] two marked features of the land system" (ibid: 32), but he singled out the land tenure and social customs of succession practiced by the rural white Afrikaners for particular criticism (ibid: 33).

According to Macmillan, the land tenure system of one-year lease farms had encouraged "the less arduous pursuits of the pastoralist", with their extensive farming practices, rather than more "civilised habits of true agriculturalists" which required intensive agriculture. He concluded, however, that the system of *inheritance* was the greater factor in contributing to the 'backwardness' of white rural society than the lack of fixity of tenure. He regarded the Cape Dutch succession laws and customs as having contributed to the emergence of poor-whiteism in the first place. According to Macmillan, the old Cape Dutch practice had entitled every child to a 'legitimate' share of his father's estate, or in the case of intestacy, to equal shares. Where the farm was a '*leeningsplaats*' ('loan-place', the typical *boer* loan farm), owners frequently divided the land and sold the portions with the buildings and equipment ('*opstal*') to pay the heirs, whereupon the custom was for the children to take up "fresh and ever more remote" farms for themselves as an almost "natural right of every Dutch South African ...[to be] a landowner". This custom of 'universal right' had survived into the twentieth century (ibid: 33).

[I]t was easy come, easy go; farms were as lightly abandoned as they were easily procured, and thus the really serious defects were the lack of inducement to close development, and the encouragement it gave to the already strong love of roving [... which meant] the impossibility of thorough, devoted labour where there was no settled attachment to any one spot, no home less immense ... than all South Africa. (ibid: 33)

The conditions produced a nomadic, almost patriarchal type of society ... (ibid: 39).

They destroyed the conditions of learning, or the desire to learn or even better themselves; the danger was that the pastoralist by reason of his isolation, should pass from being inexpert in his methods, into a hardened habit of ignorance and a refusal to learn, from being casual about his work — and fond of hunting — into actual laziness (ibid: 38).

Keegan points out that the actual reality is that by the 1930s the majority of *boers* were non-landowners (Keegan 1996 :187), but due to the perception of the social ills of the poor, rural whites' method of land division had become a burning issue in the light of the growth of capitalist agriculture in twentieth century South Africa.

Chanock (2001:184-6) shows how the government, supported by the 'progressive' elements (capitalising farmers) among rural white landowners, increasingly disapproved of the unmarketability of farms where such practices persisted, and to which the accusation of "rural backwardness" was attributed in the context of growing class divisions among whites. Eventually "the interests of the poor attempting to cling to a vestige of land rights were overridden". The Removal or Modification of Restrictions on Immovable Property Act of 1916 provided for testamentary dispositions and discouragement of family entitlements. Chanock comments how

... the force of the drive to rationalise the common law and bring it into line with market principles ... [showed] how readily the principles of the Roman-Dutch common law were discarded when they appeared to obstruct economically rational use of land (Chanock 2001: 184).

11.4 Science, the control of space, and property law

We have seen how the commercial agricultural revolution provided renewed motivation to tighten up the informal practices of allocation that characterised the frontier districts during the nineteenth century. Reforms in land tenure and succession law among the white settler population was matched by intensification of spatial controls. The wave of land enclosures in the eastern Cape frontier resulted in increasingly sophisticated cadastral surveys spreading through the frontier districts, encapsulating large settler farms and black settlements. Technical improvements to cadastral surveying corresponded to replacement of extensive pastoral farming with more intensive methods which required capital investment. The period of most significant land conquest, the 1850's-60's, saw a great leap forward in the technical methods of cadastral surveys. In 1856 the graphical manner of surveying land using natural features for boundaries was replaced by theodolites, which were instruments that could measure both vertical and horizontal angles and calculate deep distances by triangulation.

The extension of cadastral mapping did not follow the moulded patterns branded in Europe, but evolved according to the conditions in the Cape Colony. The way the variables are assembled reflects the kind of society that is being produced. Technological advances in Europe and South Africa were nevertheless directly connected. Land surveying was becoming a highly refined technical and scientific skill, the European mathematical system of triangulation having been brought to the Cape by prominent astronomers who were appointed on account of the Cape's strategic position for the advance of European scientific developments in measuring space. The side effect was the phenomenal growth and development of cadastral surveying in the Cape Colony and British Kaffraria from the mid-nineteenth century, happily coincident with the spread of commercial agriculture.

The Cape held considerable attraction for scholars of physical science, particularly astronomy, positioned at the most southerly accessible outpost of the imperial world. Navigation was still guided by the stars, but knowledge of the position of the stars of the southern hemisphere was very scanty. In the northern hemisphere rapid strides were being made in scientific methods for measuring deep space to assist navigation, and the techniques were subsequently applied to geodetic surveying. The new methods assisted the process of wide-scale surveying of European national boundaries attendant on the emergence of continental national states, with their new civil law codes following the civil revolutions. The new methods of land surveying were simultaneously being applied to define private individual land ownership in relation to state law and civil institutions, rather than by feudal and kinship ties.

The process of geodetic spatial measurement had always been technically challenged by the curvature of the earth's surface. The discovery of techniques to measure the earth's surface using the stars led to increased precision and sophistication in cadastral surveying, which previously relied on natural features of the earth for boundaries. The method of systematic surveying known as triangulation was already in use, relying on chains assisted by the instrument called the theodolite, which measured angles on the earth surface simultaneously along both the horizontal and vertical planes. With the use of astronomy, land surveying was transformed into a system that could measure space more and more accurately using numeric rather than graphical information. Developments in astronomy therefore led to increased capacity for precision and surveying land surfaces at scale.

In Europe astronomers and geodetic scientists were interested in improving the earlier Egyptian measurements of the earth's curvature, for which they developed units of measurement of the earth's longitudinal axis, which were called 'arcs' from the 'arc of meridian'. This was an imaginary line on the true North – South longitude, drawn anywhere on earth, with accurate determinations of distance between two points with the same longitude, and which took into account of the elliptical shape of the earth.

The Cape was considered a site of considerable interest to European astronomers who, having charted the northern Arc of the Meridian, were anxious to replicate the arc in the southern hemisphere. The Arc of the Meridian was measured at a few places e.g. America, Russia, Germany and France, proving that the Northern Hemisphere was round. In order to verify these findings, scientists wished to find the same scientific proof for the Southern Hemisphere.

Three leading astronomers were sent to the Cape²³⁸ where they studied and applied the new forms of spatial measurement between the mid-eighteenth to the end of the nineteenth century. Though initially concerned

²³⁸ Famous French astronomer Abbè de Lacaille was sent to Cape Town to measure of the southern arc of meridian. Due to a mistake, his measurements showed that the earth was pear shaped, round on top (Northern Hemisphere), but bulged at the bottom (Southern Hemisphere). In the 1840s his calculations were recalculated by Her Majesty's Astronomer at the Cape of Good Hope, Irish-born Sir Thomas Maclear, who re-measured the Arc of the Meridian and discovered the mistake, proving that the earth is round. Maclear's Beacon on top of Table Mountain is said to symbolise

with advancing European interests in the astronomical characteristics of spatial measurement, they simultaneously advanced the science of geodesic surveys at the Cape considerably. The result was to boost the overall land surveying capacity at the Cape. The last royal astronomer, Sir David Gill, developed the Cape Observatory into a world class institution towards the end of the nineteenth century.

The growth in capacity in land surveying accelerated the development of registered land titles that could be linked to accurately surveyed land parcels. The technical developments assisted the authorities in their growing preference for selling land outright and issuing corresponding land titles under the freehold system. All these developments contributed to the growth and sophistication of the land surveying industry in the Cape, the legacy of which has survived into the present. The South African deeds registry system, set up in 1828 alongside the Survey General's office of the same year, is regarded as among the most accurate in the world.

Meanwhile from the mid nineteenth century, private land surveyors began to replace government-employed surveyors for the surveying of property boundaries, and a local land surveying industry became established. This contributed further to the impetus towards land enclosure and the means to put into effect the growing philosophical and legal proclivity of Europeans towards private property, in line with the growth of capitalist relations more generally.

The rapid advances in surveying coincided with the governorship of "the great civiliser", Sir George Grey. By extending the cadastral network, the authorities were able to slowly but surely reign in the expansive tendencies of *boer* and indigenous pastoral farmers, and enclose land parcels by means of accurate surveys. All this took time as white settlers and *boers* alike were unenthusiastic about buying land, paying for surveys and staying fixed in one place.

The cadastral grid was systematically extended in a process of wall-to-wall triangulation, involving the laying out of a series of interlocking grids, covering expansive terrains. The method involved measuring distance by means of angles, to which trigonometrical mathematical formulae were applied, a method advanced through astronomy. The new technology at the Cape led to the laying down of geodetic baselines as a foundation for cadastral surveys. These methods encouraged systematic surveys over extensive areas, in contrast to sporadic surveying of isolated pockets of land using the older methods of geographic reference points, which became redundant. Parcels had to relate to the system of coordinates as in a grid, established by triangulation.

the knowledge that the earth is round. Maclear had earlier worked with John Herschel performing a survey of the southern sky and making important astronomical observations for which he was knighted. From 1879-1906 Scottish astronomer, Sir David Gill was appointed Her Majesty's astronomer at the Cape, and turned the Cape Observatory into a world class institution; he was famous among many other achievements for introducing astrophotography.

The work of Sir David Gill in particular, contributed to the expansion of the system of triangulation, and also provided a solid basis for cartographical development. In 1883 he was given the job of establishing a geodetic framework for both cadastral surveys and for mapping purposes. This gave a boost to the system of boundary coordination, first used in 1833, though only became common and standardised when the geodetic network reached a “reasonable density”. An office of Director of Trigonometrical Survey was created to increase the number of reference stations and to map the country (Barnes 1984: 2).

Whereas in western Europe the cadastre adapted to political and economic change over a long period of time the South African cadastre exploded on the Cape colonial geographic and political map in a space of fifty years, on conquered territory redefined as ‘Crown’ or sovereign land. Land enclosure through mapping and surveying formed an important part of the legitimising process, accompanied by military force, violence and brutality as rapid resettlement of conquered and confiscated land proceeded on the basis of sophisticated technological and bureaucratic development.

The Cape therefore provided a context where the advance of global scientific methods could be harnessed to advance the interests of the local mercantile economy and shape a synoptic view of the colony that facilitated the early establishment of an all-embracing regional administrative apparatus. The tightening up of administration through accurate measurement meant that the expansive tendencies of the *boer* farmers could be reigned in, which ironically contributed to their movement further north. Their departure opened up their land for appropriation by capitalising British immigrants, reinforcing the growth of a local mercantile economy based on wool. The representative government at the Cape invested the revenue generated in administrative apparatus previously circumscribed by lack of funds.

The adoption of new surveying techniques simultaneously facilitated the disposition of expropriated Xhosa land in large blocks to settlers in private ownership or leasing arrangements *de novo*. The increase in accuracy of land measurement increased the viability of registerability of ownership, since numeric spatial data could be easily linked to textual records of ownership. The same conditions were, paradoxically absent in Britain, where registerability was not compulsory²³⁹, and ‘general boundaries’ were used as spatial evidence. General boundaries meant that geographic markers such as roads, hedges, walls, rivers, etc. retain legal saliency, rather than numerically calculated co-ordinates on the cadastral map. The spatial controls over sovereign territory and private property in the colonial outpost were of a far more technically sophisticated and rigid quality than the metropole, and must be seen in context of colonial imperatives to divide, define, and categorise the population in order to control mobility and underline the spatial and social differentiation of the population. Barnes (1984) quotes a prominent British writer on land law and registration as having stated: “there is no country in which parcels are more closely defined than in South Africa” (Barnes 1984:

²³⁹ Systematic registration is only now being extended over the United Kingdom.

2). In technical language, boundaries identified by mathematical co-ordination are known as 'fixed boundaries'. One of the hallmarks of the survey industry in South Africa is the statutory requirement that surveyors perform rigorous surveys using the fixed boundary, rather than general boundary concept.

11.5 Land tenure, the market and property law

We have seen in the developments outlined above that white land access and tenure began to change in response to emerging imperatives of the market. Christopher shows official preferences changed from quitrent (rental) to perpetual quitrents (sale by auction followed by annual rentals) to freehold, not in neat lineal evolution. The changes occurred in fits and starts. Settlers used to getting land for low rents resisted outright transfers involving cash purchase prices. Colonial authorities compromised by combining sale and rental in the form of perpetual quitrent. The latter involved issuing titles on initial deposits, followed by annual quitrents. Quitrent already existed under the Dutch. But whereas previously quitrent did not require survey or imply full ownership, the advance in surveying meant that quitrent could be linked to surveyed parcels, and rents could become market-related.

The improved techniques allowed for the market to dictate the price of land, which meant the relaxation of mandatory fixed rents and farm sizes. Prices and rents were low as both were calculated on the apparent value of the land for pastoral farming. The Cape's responsible government (formally established in 1872) introduced new regulatory measures based on both sale and lease, whereby a return to rents on land could be enforced without limitations on the extent of land that might be rented. "The Surveyor General's office was able to adjust rents, minimum prices and the extent of the farm according to the capabilities of the land'. (Christopher 1971: 6).

The initial resistance to payment for land meant that freehold was only actively promoted in the last few decades of the nineteenth century. Registration allowed for an increasing range of tenure, including sales and various types of lease. Under the Crown Lands Act of 1891 land could be disposed of in any manner with the consent of the Cape Parliament (Christopher 1971: 6). Increasing liberalisation must be seen in the context of increasing economic differentiation following the growth of the wool industry and the development of mineral resources following the mineral discoveries. Land was no longer the only productive resource and imperial asset, and surpluses were needed to feed the non-agrarian sector of the economy. The new property relations nevertheless took time to develop. Many farms (white and black-owned) were heavily tenanted with Africans whom legislation defined as 'squatters'. 'Squatter farming' was the term used to differentiate 'productive' from 'unproductive' farming, judgements about which we have seen were deeply loaded with sociological prejudice towards both black and white.

11.6 Boundedness and the law

We have seen that a new set of property relations was replacing older concepts of space with their undefined lines, registers, maps, taxes and printed records. A grey area remained at the intersections, following normative and cultural fault-lines. Van Sittert (2002: 95-118) shows that the legal advances towards private freehold property, which he describes as a “contested novelty” (ibid: 96) in the nineteenth century, had created powerful symbolic social boundaries between farms, but that this was not a sufficient condition to establish the basis of private property for capital accumulation. He shows how boundaries remained porous, not only between white farms and black ‘locations’, but between capitalising farms belonging to ‘progressive’ farmers and those still defined along pre-capitalist lines. The latter usually meant that farms were heavily tenanted with African ‘squatters’; or that farms were measured according to older Cape Dutch mechanisms of informal survey, which left blurred and potentially overlapping spaces between farms. Van Sittert (2002: 98) and Beinart (2003: 195) show further how the predations of wild animals, particularly jackals were also a constant threat to agrarian commercial activities.

It was only with physical enclosures by way of massive fencing operations that enclosures could begin to encapsulate private property for commercial purposes. The new class of capitalising farmers relied increasingly on fencing to convert boundaries into physical barriers. These developed as a mirror of the new racial and class relationships that were shaping Cape society. Fencing operations were backed by state fencing law and policing. State fencing law made private fencing compulsory for purposes of state law enforcement. Investment in fencing by its nature implicates neighbours in relationships of coerced mutuality, and the laws implicated neighbours in joint responsibility for purposes of boundary protection, e.g. between black and white, richer or poorer, ‘native location’ and farm. When the neighbours involved were black untitled land holders, these kind of relationships could be fraught, as communal land was technically state land, whereas the laws that obliged owners to fence their properties were premised on private property. Fencing operations were backed by state fencing law and policing, which implicated neighbours in relationships of coerced mutuality, e.g. between black and white, richer or poorer, ‘native location’ and farm (van Sittert 2002: 101-105).

Fencing, backed by legislation that legalised private space and criminalised public access, completed the South African ‘grid’ of private property and enclosure. Physical enclosures of this kind cut out intervening public spaces (such as persisted in England) by emphasising the contiguous lay out of farms. Private property relationships were thus transformed from symbolic to concretised powers over space, reinforced by physical barriers. These combined features contributed to the perception that enclosed private space was/is the ‘natural’ order of things.

11.7 The Legal dimensions of freehold title

The emerging concept of 'freehold tenure' in the colonies of South Africa has also to be disaggregated from the idea of freehold as a fixed and monolithic idea that was simply transplanted from the west to Africa. Freehold meant different things to different social actors in various European contexts over time. It is more usefully thought of as a set of associated characteristics which serve particular kinds of interests. The term does not have the solidity of meaning ascribed to it by the state, lawyers and large sectors of the public. South African property law in fact does not refer to 'ownership' by the term 'freehold title'. Property law, both common law and statute, identifies land 'ownership' purely in relation to the system of Deeds registration. Property law differentiates between movable and immovable property, the latter being land. Title deeds are associated with registerability of title, and it is therefore to the system of registration that one must turn to understand the concept of 'ownership', or colloquially speaking, 'freehold' tenure.

Freehold tenure is seldom scrutinised for the qualities of 'negotiability' and 'flexibility' that have become the hallmarks of discourses of African customary systems of tenure, as discussed in Chapter 2. The hard binaries of land ownership in South Africa and indeed throughout the world tend to overlook the flexible origins of freehold tenure and its roots in feudal society. With the growth of capitalism in the western world, land 'ownership' became increasingly subject to processes of centralisation and, in Europe, codification of law, which has given the idea a uniformity that was lacking until fairly recent times. Under complex conditions of colonialism, there was an added value in presenting legal 'ownership' as a solid concept to differentiate white ownership from indigenous tenure. As discussed in Chapter 9, it was convenient to represent differences in tenure in terms of essentialist cultural difference. During periods of political transformation and struggles over claims to land, these differences tend to be exaggerated yet again, infusing freehold tenure with an air of immutability which disguises the historical evolution, social construction and variability of legal forms of private property in the west, as well as the versions that were adopted in colonial common or statutory law.

The word 'freehold' in South Africa is really a colloquial representation of a commonly understood concept of full ownership. Freehold is a term that came to South Africa from English law, but was welded on to the Roman-Dutch law adopted by the British in the Cape Colony to form a hybrid legal concept of land ownership. These varied legacies have inflected South African formal property law in curious ways. The Roman-Dutch influence in South African common law saw the adoption of the Roman-continental view of property, which defined property as 'things'. The 'thing' or 'property object' is defined as the actual property itself, and the relationship is between the owner and the property object. English law, on the other hand, grounded in feudal social organisation, tended to be more flexible and to reflect a range of possible relationships *between people concerning things*. Here property is defined as a set of social relations, while

the 'thing' itself, when it came to land, could remain undivided. Indeed indivisibility was promoted in the formative stages of individual private property in England.

Macfarlane shows how a strong notion of primogeniture in England contrasted with the endless divisibility of land that characterised much of continental Europe (which he associates with peasant economies). He goes further to propose that the passage of large land units in tact through primogeniture underlay the early development of capitalist relations in England. The importance of these contrasting ideas lies in the ability of the English version to accommodate coterminous rights, including relationships between people of different classes or 'social estates' (1998: 104-117). Freehold, according to this analysis, had connotations in England that were for a long time absent from concepts of ownership on the European continent (ibid: 108-117).

In England freehold essentially meant that land was held directly from the crown: the Crown as sovereign owned the land, while the holders of rights owned an abstract entity, or estate. It was the rights to use the property that were owned, not the land itself. 'Freehold' as an expression of real rights in England evolved to mean 'estates' of property, the most usual real estate being 'an estate in fee simple' or 'fee-simple title' which is the legal name for freehold in England, and is still in use.²⁴⁰ As the law evolved, estates could be divided into a 'legal estate' and a 'beneficial' or 'equitable estate', in other words what is sometimes called 'divided ownership' or ownership separated into parts.

Fee-simple title during the feudal period was associated with freedom from service obligations (tenants could become owners) also free of the constraint by expectant heirs to inherit portions of the property automatically. Owners of title were free to alienate or mortgage the land, or write wills to transfer the property to a designated heir, free of family claims. Intestate succession also identified single heirs, which meant that family members did not have a birthright in the land²⁴¹. In contrast, on the continent, property was associated with family or lineage entitlements.

It is no coincidence that it was an English jurist, Sir Henry Maine, who in the nineteenth century first formulated the idea of property being a 'bundle of powers'²⁴², rather than a solidified 'thing'.²⁴³ The usefulness of the metaphor lies in its injunction to identify the range of differentiable rights and obligations that are associated with property. Karl Marx described the tendency to see private ownership as a fused set of absolute rights under the control of an individual as the 'fetishisation' of property in capitalist societies. The

²⁴⁰ Fee or 'feo' is derived from 'fief' meaning a feudal estate, and 'simple' meant that no conditionalities were attached to tenancies on the estate.

²⁴¹ Owners who wished to continue the family line could enlist a special title called 'fee tail' or entail, whereby an estate could be held with conditions of heredity (with a tail of prescribed heirs in succession) to keep property in the family.

²⁴² In his words: "The rights of property are, in the eyes of the jurist, a bundle of powers capable of being mentally contemplated apart from one another and capable of being separately enjoyed" (1871: 158). He also used the term 'bundle of rights and duties' in other work.

²⁴³ As a concept, the 'bundle of sticks' or 'rights' metaphor, as it is now commonly referred to, has been found by many modern anthropologists to be a useful approach to analysing property in various cross-cultural contexts, and was used by Max Gluckman in his work during the 1960s in relation to African property in the 1960s. (Benda-Beckmann *et al* 2006: 15; Hann 1998: 26). We saw, however, that Okoth-Ogendo pointed out the limitations of the concept for African property relations, see Chapter 2.5 above)

notion of a multitude of powers or rights, which, like strands, could be feathered apart in different people's hands is contrasted with the hardened and fused concept of ownership in recent times. Macfarlane (1991: 124) contrasts the 'loose strands' of coterminous rights with the 'tight rope' that characterises modern private property concepts.

Legal scholars have shown how in South Africa, in the early twentieth century, the more flexible English ideas about property relations were passed over for the continental view. As mentioned, the British accepted the Roman-Dutch law of property in South Africa in the nineteenth century. Chanock quotes a groundbreaking case where this decision was made (Chanock 2006: 376-7; van der Walt & Visser 1989: 248-9). The case set the precedent for the adoption of more absolutist interpretations of ownership, where rights are concentrated in one owner (single or corporate), and which cannot be divided. The judgement rejected the idea of ownership divisible into "bare ownership and beneficial ownership" as the judge could "not see how, consistently with the principles of our law, we can support such a contention, *because it appears to me that it is one of the essential differences between the English law regarding ownership of immovable property and our law*" (emphasis added) (ibid).

The precedent is generally regarded in legal scholarship as *a choice* that was made "between alternatives within the same legal tradition", which they ascribe to individualism and liberal capitalism (van der Walt & Visser 1989: 248-9). Chanock goes further, arguing that this choice should be contextualised in terms of "the intense struggle to establish, hold and exercise rights over land in South Africa [...] in the context of racial competition over land" (2001: 376, ff7, 377). A paradox emerges. How could a country like England, that spurned the industrial revolution, and was even more entangled with liberal individualism than other western powers, accommodate the less absolutist idea of ownership? This challenges the necessary causal association between the growth of capitalism and the rigidity in property law. The argument suggests that Chanock's stress on the need for strong controls in the context of racial domination is more compelling. (ibid: 377; Macfarlane 1998: 108-117). This is important for the debates in South Africa where the inflexible ownership concept is frequently defended on the grounds of its close association with liberal values regarding property.

The provision for registration of deeds in South Africa has origins in Germanic practices and Dutch law (Badenhorst, Pienaar & Mostert 2006: 202-3; Kleyn & Boraine 1992: 89-90). The Roman notion of property as a 'thing' was invoked in Europe when Roman law was re-introduced in the early modern period, just about the same time as the imperial projects in Africa were expanding.

Some legal scholars associate the transportation of the 'absolutist' concept of ownership with an influential German school of law in the nineteenth century, known as the Pandectists. They were known for their close reading of Roman law, and their 'rediscovery' of the Pandects of Justinian in the late nineteenth century (van der Walt & Kleyn 1989: 248; Visser 1989: pp no missing). Chanock comments on the irony that these

Roman law concepts had less traction in Holland, where the Roman-Dutch law of South Africa originated. He owes the introduction of these concepts, not to Roman law *per se*, but to the interests involved in “the social formation of early twentieth-century South Africa [when] property rights were fiercely disputed”. It is this reality that allowed for the opportune discovery of the “pure doctrine of absolute ownership” (2001: 376). The decision was made despite the clear availability of other possibilities “in the repertoire” of the Roman-Dutch law (Chanock 2001: 376-377). Van der Walt & Kleyn similarly describe the decision as the adoption of “a dogmatic approach”. (1989: 248)

The contemporary challenges to property law reform in South Africa has resulted, not surprisingly, in a revival of academic interest “and legislative support” for the concept of divided ownership or “diversification or fragmentation of rights” (Badenhorst, Pienaar & Mostert 2006: 6). The concept of fragmented ownership, called *duplex dominium*, a feature of Dutch law, was rejected in the development of South African property law in favour of absolutist principles of ownership (van der Walt & Kleyn 1989: 248-260). The idea of fragmentation, in line with the concept of ‘bundle of rights’, which implies the possibility of ‘feathering out’ rights in land, signals a necessary change in direction in law reform discourses. Calls for the reappraisal of this approach in the context of land tenure reform are certainly merited.

11.8 Registration of land: “Giving notice to the world of rights in things”

South African property law is also distinguished by its method of registration of ownership, which also lend a particular specificity to property law. Deeds registration requires that all real rights in land are registered, which means that, to be registered, land must be registerable. Like freehold title, the registration system evolved piece-by-piece from the seventeenth century²⁴⁴ with roots in the Roman-Dutch law of the Cape (Badenhorst, Pienaar & Mostert 2006: 205). An office of Registrar of Deeds was created in the Cape Colony in 1828, and the expansion of the colony to the east resulted in the establishment of a Registrar of Deeds in King William’s Town in the 1850s in response to the disposition of farm parcels to new settlers, including blacks. Registries were eventually adopted in all the provinces, and the system made more uniform throughout South Africa after Union. The Deeds Registries Act 1937 eventually established uniformity across South Africa.

The legal expression of registration is ‘giving notice to the world of rights in things (*traditio coram iudice rei sitae*) which is still the meaning attributed to registration of rights in land in South Africa. This means simply that when property is transferred, notice must be given to the public in the presence of a designated authority. The requirement of public acknowledgment is equivalent to the *delivery* of movable property. Since this

²⁴⁴ The system was introduced to South Africa in 1685 when a register of all properties was established. Commissioners of the Court of Justice fulfilled the role of registrars (Hutchinson 1991; Badenhorst, P and M, Wille’s Principles of SA law: 303-4).

cannot be done with land, which is *immovable*, registration provides a means of ‘delivery’²⁴⁵ by way of registration. (Badenhorst, Pienaar & Mostert 2006: 201-205)

Registration is a central reference point for the recognition of property, without which the associated processes of succession, inheritance, land use, division, taxation, and so forth are all stripped of their legal basis.

The Deeds Registry is regulated by statute and the process of registration involves a high degree of state oversight. The South African system is regarded as a ‘negative’ system of Deeds registration in contrast with ‘positive’ systems known as titles registration. Positive systems denote a high level of state guarantee, where the records themselves constitute ownership and the documents issued by the Registrar are proof of title (e.g. the Torrens system). South Africa’s registration system is theoretically a negative or deeds system, by which is meant the registry’s role is primarily to record transfers and hold records. In South Africa, however, rigorous examination of records, regulated by statute, forms part of the process of deeds recordal to ensure that the rights being transferred comply with the law, and the Registrar plays an active role in the registration process. The system of conveyancing of land by private professionals is governed by high technical standards also regulated by statute. South Africa’s registration system is therefore usually classified as being similar in effect to a positive system. The accuracy and reliability of the South African registration system has been a consistent feature of South African discourses and legal texts on the law of property, both nationally and internationally (Badenhorst, Pienaar & Mostert 2006: 219; Carey-Miller 2000: 53, 63; Dekker 2003: 149-150; Wille 1991: 303).

Registration has significant implications for land tenure reform, and for the discrepancies between law and practice discussed in Part Two of the thesis. One cannot be a legal ‘owner’ without registration, which is compulsory for real rights. Property passes from one registered owner(s) to another registered owner(s), in the manner described above, involving a conveyancer and the Registrar, both of which carry fees, and there is a tax payable to the state.

Textual records, furthermore, must comply with spatial prescripts. In order to be registerable, the property has first to be surveyed according to exact measurements into a legally regulated parcel of land. The parcel diagram, duly approved and registered, is stored in the offices of the Surveyor General. The parcel details must correspond precisely with the records in the Deeds Registry. The owner has proprietorial powers over the registered parcel of land and has the freedom of decision-making to transfer property through testament (a will), lack of testament (in which case it passes according to statute) on death, or sale or donation. The owner is free to mortgage the property, thus giving a third party right to a bondholder, or to confer provisional

²⁴⁵ “*Traditio*” in Roman law referred to a mode of ‘delivery’ of property.

rights such as a lease, to third parties. The owner is obliged or empowered to register servitudes in favour of third parties, such as right of way, and has the right to divide the land through sub-division.

Modern states have extensive powers of intervention and oversight over spatial planning of land in modern systems of governance. There is consequently a body of regulation and statute to which registered parcels of land must comply before changing its spatial composition.

In sum, the South African notion of ownership does not accommodate the fragmentation of rights, or coterminous rights. Leases are not real rights, but personal rights, the contract being between two parties in a private agreement. Lessees do not have proprietorial powers.

The idea that property transfers must be conveyed and publicised is the essential point of difference that emerges between black freeholders and white freeholders, as discussed in Part Two of the thesis. African freeholders tend to see the paper title as itself embodying ownership, rather than registration, a view which contributes to the abstention from registering transfers. Title furthermore carries a symbolism of meaning, which further divorces title from conventional official pattern of administration. There are thus fundamental differences in the respective connotations of divisibility and separability of land.

11.9 Inheritance and succession: “No one is the heir of a living man”

The deeds system not only encapsulates or circumscribes rights of ownership, but also has implications for transmission by means of sub-division, inheritance or sale. Since heritable immovable property is identified only through the registration system, the institutions involved are closely interlinked.

As mentioned above, a strong tradition developed in England where the principles of indivisibility and primogeniture went hand-in-hand. In western continental Europe, on the other hand, divisibility was much more the norm, associated by many historians with the customs of inheritance and succession of peasant holdings, though there was a great regional variety of local customary systems (Goody, Thirsk & Thompson 1976; Macfarlane 1998: 115). The idea of a will strongly challenged many local customs where inheritance was regarded as an automatic right, much in the way I have described for African freeholders in Part Two, but with important differences in systems of descent.

The evolution of the concept of wills for the purposes of land disposition is captured by the expression “no one is the heir of a living man” (*nemo est heres viventis*) (Macfarlane, A. 1998: 109). This means that an expectant heir has no rights while his father lives, they are not co-owners, or conversely, as long as an owner is alive, there can be no expectant heirs. This approach transfers all rights of disposition or transmission to the owner, rather than successors. An owner has full proprietorial powers and is not a co-owner with other

members of his or her social group, such as family or lineage who may have claims of control or decision-making over the future rights of the property.

For many legal scholars, this is the essence of individualism: the freedom of testation, implying the movement away from kinship ties, or other group attachments, in property transmission. In France, for example, the idea clashed with customs in the western regions that favoured egalitarian distribution based on automatic succession, a view that “did not trust wills”. In the south of France, on the other hand, wills became “an instrument for spreading inequality”. Here the “freedom to favour an heir, which is so dear to renascent Roman law” took root (Ladurie 1998: 62-63). We have seen similar cultural variability in South Africa. The local practices of the African freeholders, as well as Afrikaner pastoralists in the nineteenth century, follow the idea of automatic succession, and resist testation.

The older Roman-Dutch law of succession in South Africa was historically premised on equitable distribution of family property. This resulted in endless divisibility. Succession rights, like rights of subdivision of land, were regarded as common law rights, and thus legally protected. At some point in the social formation of the united South African state, shortly after Union, the English principles of common law came into headlong collision with Roman-Dutch succession principles which favoured egalitarian division. The reason for shifts towards the right of testation and individualism can be traced to the rise of capitalist agriculture and the emergence of the ‘poor white’ phenomenon in the early twentieth century, as discussed in section above. We saw how the modernising state, intent on maintaining the ‘tough rope’ of ownership in the context of racial competition over land, took an unsympathetic stance towards poor whites retaining ‘uneconomic’ units of land. The laws of rural tenure and succession law were consequently tightened up, despite the risks of increased white landlessness.

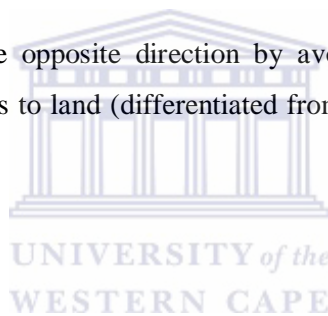
Succession law continued to evolve to allow for increased rights of women. The Succession Act of 1934 included spouses in the category of ‘successors’, by providing for spouses to inherit intestate property, largely to acknowledge the property rights of widows, in response to increasing pressures for reform of laws that discriminated against white women. Thus succession law began to follow the trend in the west, which is to emphasise property succession rights based on the conjugal family, thus narrowing the claims of members of the extended family to a small circle of eligible heirs associated with the nuclear family based on conjugal relationships. The legal system was nevertheless still characterised as a “rather complex legal mosaic”, having origins in diverse elements of Roman-Dutch and English legal principles (Rautenbach 2008: 7).

The Intestate Succession Act of 1987, which is still in force, and recently extended to include blacks (as discussed in the previous chapter, 9.8), simplified the formerly complex and variable legal principles of the past. In general South Africa has followed the modern European trend of testation, all South Africans currently enjoying the right to make wills. In the absence of a will, the circle of intestate beneficiaries has

been narrowed to be as small as possible. This is the principle contained in the 1987 Intestate Succession Act, and which now includes blacks. Spouses (male and female) receive equal treatment and first-born children do not receive special treatment (Schoeman-Malan 2007; Rautenbach 2008).

The point of significance is that the narrow definition of kin in the Intestate Succession Act can be shown to have evolved in white society in response to the imperatives of class division and capitalism. The continuing tendency is to favour direct transmission to the nuclear family, interpreted as the conjugal union. The issue of how narrowly or widely the kinship circle is drawn is as much a social and cultural issue in western law as it is in customary law. The narrowly defined circle led to social repercussions among poorer white families who, like African families, traced their kinship circles according to the extended family. As discussed in the previous chapter, however, African and western families define 'extended families' in different senses. Africans follow the logic of unilineal descent; westerners bilateral descent. As discussed in the previous chapter, the recent constitutional changes have not recognised living customary principles, but have taken a normative approach favouring a narrow band of successors in property.

The 'living law' tends to work in the opposite direction by avoiding testation in favour of automatic recognition of multiple family claimants to land (differentiated from personal property) rather than a single heir.



11.10 Subdividing land

The second outcome of the growth of capitalist agriculture and the emergence of the rural poor white phenomenon was increased intervention by the state in defining 'economic units' of land, and preventing subdivision. The concern about division of agricultural land came under the spotlight in the mid-twentieth century, when legislation was passed to curb the common law freedom to subdivide land. The matter has important consequences for property transmission.

During the 1960s, during the height of apartheid, there was growing alarm in official circles about increasing scale of division of white-owned land, or alternatively, inheritance by means of undivided shares. The tendency among poorer white rural landowners to cut up the land into smaller and smaller fractions resulted in a burgeoning number of "uneconomic farming units", as they tended to be labelled, across the white South African landscape, interpreted as threatening to turn whites into a peasant class. Here again the justificatory rhetoric was couched in terms of the market and capitalisation of agricultural assets, whereas the context was anxiety about the future of the white farming community in relation to black land rights.

A Commission was appointed to investigate the phenomenon in the 1960s, a process that culminated in the promulgation of the Subdivision of Agricultural Land Act, 70 of 1970, which prevented subdivision unless

the Minister's consent was obtained. According to a recent thesis (Franz 2010: 29-30), the aim of the Act was explained at the time as "preventing the injudicious subdivision by testators and property speculators creating uneconomic farming units that would eventually lead to a peasant farming community". A judgement in a trial in 1977 cited by Franz (ibid: 29) averred that there was a need to curtail subdivision of agricultural land to promote the "national welfare". The Act is still on the statute books, having been on the brink of repeal in 1998²⁴⁶. It is still a contentious issue in the context of land reform and redistribution, its retention being an important indicator of the present government's fear of abandoning land use controls that previously shut blacks out of the rural economy, and now threaten to constrain the development of a black peasantry²⁴⁷.

Discourses about distribution of land among white owners should be viewed against the concerns of the preceding decade about the threat of the '*beswaring*' (blackening) of the white-owned rural and urban South Africa. The early 1950's had seen the passage of the Group Areas Act in 1950 and the Bantu Authorities Act in 1951, which laid the foundations for forced removals of blacks from 'white' South Africa and the conversion of the black reserves into Bantustans with increased powers over internal governance.

In 1951 Dr Verwoerd, then Minister of Native Affairs, laid his cards on the table:

The only alternative [to the whole of South Africa becoming a Bantustan] is deliberately to see to it that the whole of South Africa does not become a country occupied by Natives and therefore run by Natives... If we could succeed just to this extent in keeping the Native population in the reserves ... if we could achieve that measure of separation, then the 2,000,000 or so who now there remain behind in our towns, and the 3,000,000 approximately who are in the rural areas remain there, white South Africa will be saved²⁴⁸. (Davenport and Hunt 1951: 49).

The Tomlinson Commission was appointed thereafter in 1954 to plan and investigate the future of the reserves and make recommendations for their development. The report (1956) adopted the prevalent language of 'economic units' of land for a limited number of African farmers who would become a 'farmer class'. This implied moving large numbers of people off the land. Compliance with existing segregation ideology was accommodated by recommendations for urban zones within the homelands (with decentralised industries) to prevent urbanisation to established cities, and the continuance of 'betterment' (see below) policies in the rural areas. The recommendation for concentrated landholding was rejected "because it would undermine the chiefs on whom the Bantustan strategy depended and precipitate even more rapid urbanisation" (Beinart 1994: 155) Instead, the radical spatial reshaping of the reserves in the form of

²⁴⁶ The Subdivision of Agricultural Land Act Repeal Act 64 of 1998 has not been brought into operation. During 2003 the legislature tabled the Draft Sustainable Utilisation of Agricultural Resources Bill, which contains "identical" provisions to the Subdivision Act. In 2008 the Constitutional Court ended the uncertainty when it decided that the Act continues to apply to all agricultural subdivisions until the legislature chooses a definitive course of action (Franz 2010: iii)

²⁴⁷ Franz somewhat curiously argues in his thesis for its retention on 'legitimate constitutional ground' as opposed the 'illegitimate apartheid' concerns that drove it previously in the interests of economic development. My argument is that both present and past interventions are/were, politically inspired and have political consequences.

²⁴⁸ Senate speech 1 May 1951

increased densification of rural settlements by way of villagisation and agricultural planning, called betterment²⁴⁹, was set in motion with increased vigour. In 1959 the Promotion of Bantu Self-government Act was passed to underpin racial segregation through spatial and political separation. The three succeeding Group Areas Act enactments and amendments, the first in 1950, culminated in the 1966 version that not only divided towns and cities into separate race areas, but also defined all other land, including agricultural land as “controlled areas” reserved for white owners.

11.11 Conclusion

The discussion in this chapter draws attention to the choices that were made in law that tended almost invariably towards rigidity rather than flexibility. This was nowhere more apparent than in the framing of legal ownership of land. The chapter has attempted to show how state law shadowed and also shaped, and was shaped by, social and economic transformation. Law and social processes were mutually and normatively constructed. I used selective examples to show how strands in property law were discarded, adapted and shaped by particular intersections of race, class and geography. Following Chanock’s concern about the need to bring both sides of the coin into focus, I have attempted to show the mirror images of law and property that were brought differentially to bear on racial, cultural and class distinctions.

My intention is to show that the formal property laws designed primarily for constructing white property evolved in response to a range of social and political interests. These laws were not, and are not immutable. It is important to unsettle the pervasive idea that a particular form of titling, such as that adopted in South Africa, is a uniform and singular embodiment of private ownership. Property is socially and politically constructed; made up of many different components and moveable parts that can be taken apart, changed, adapted and recalibrated according to the dominant or prevailing normative interests in any society. Property concepts in law are an amalgam of different dimensions in time and space, designed to construct legally and socially permissible ways of publicly recognising rights and claims to ownership, passing property across generations and controlling and adapting the spatial features of land.

Despite the tendency in modern South African historiography to portray South Africa as having been rigidly territorially divided by race in terms of the Land Act of 1913, Beinart (1994: 11) reminds us that “it proved more difficult for whites to control land than defeat African armies”. Many Africans stayed on white-owned land and private property was sometimes imposed over areas which were still occupied by African communities (ibid). Indeed, the main purpose of the Land Act of 1913 was precisely to bring the reality of tenants on white owned land under control. Land tenure laws facilitated both the extent of land that whites controlled, and the way that control could be increased through the cadastral boundaries and ever more rigid

²⁴⁹ See application in Rabula, Chapter 5.10

forms of ownership. The version of freehold ownership that took root through Deeds Registration provided one important way that white owners could increase their control over land to defend the capitalisation of their assets through state and market institutions, fencing, credit facilities and so on, in a situation where their vulnerability to the strength of African numbers and the saliency of African prior claims and culture would otherwise have presented an insurmountable obstacle.

As we have seen in the previous chapters, even as ‘culture’ was being re-invented and manipulated by the colonisers, it continued to exert a “unifying social force” among the colonised (Beinart 1994: 93).



CHAPTER 12 CONCLUSION

12.1 Introduction

The research aimed to deepen the scholarship on land titling in Africa, which has conventionally focused on debates about the link between titling and increased productivity and/or tenure security. The focus of the research for this thesis involved a switch from a wide-angled view of the impact of titling across a broad social landscape at a single point in time, to the impact of titling on intra-familial relationships over a long period of time. The research also encompassed a thorough understanding of the structure of the formal legal system, since the point of the research was to diagnose sources of previously observed disjuncture between the formal structure of property law, and local practices that do not conform to the law.

The result is a diachronic analysis of the outcomes of land title among families whose relationships to the properties can be tracked back over time. The objective was to explore the correspondence between variables such as family organisation, devolution of property and intra-familial transmission practices with the view to assessing the incongruity between vernacular norms and the common-law norms concerning the registration and transfer of property.

There were significant methodological implications of a diachronic, microscalar approach to the study. The research involved probing familial accounts of the historical trajectories of individual properties over time; examining the official records of these properties to assess the rate and levels of formal registration, subdivision and interaction with the market; comparing the documentary records with family narratives; and comparing the family accounts across a wide number of families in each field site. The objective was to establish whether there was a coherent, alternative normative account according to which the record of titling could be interpreted.

The different socio-spatial contexts, an urban and rural field site, increased the comparative value of the research across the rural-urban nexus. This is significant because land tenure discourses tend to divide along the lines of urban and agrarian sociological landscapes. The common characteristics of cultural and social homogeneity and a comparable time-frame of titling across the field sites helped to cut down the number of external variables that typically impact on legal interventions in land tenure.

The evidence that emerged showed a high degree of consistency in the way families conceptualise the meaning of title (i.e. ownership), how they conceive of their familial (including gender) relationships and how they regulate access to, and transmission of their properties. The dimensions connected up into an internally coherent explanation of how families manage their properties. The significance of the findings lies

in the problem that the normative pattern established for the research sites diverges considerably from the formal legal system that regulates title.

This finding are more widely relevant in the light of evidence of problems permeating emerging legal interventions in the present, such as the issuing of titles to newly developed RDP housing for the poor. These gaps and disconnections between policies and local practices are, moreover, identified in a number of policy contexts concerning land and agrarian reform, which is seen to be a constraint in addressing historical inequalities, poverty and tenure insecurity (see Cousins & Hebinck 2013).

The findings suggest that by taking the ‘long view’, which dissects and reassembles the various elements bit-by-bit, there is a logical connection that can be made between the various models of land tenure across various socio-spatial contexts. Rather than seeing each variation in terms of a distinct ‘form’ or ‘type’ of land tenure, rigidly sunk into law as a closed ‘system’, my findings suggest that variations in land tenure should be viewed as ‘models’ that combine common elements in different ways. This approach helps to overcome the conventional dichotomy between western and African land tenure systems, often depicted as binary opposites.

By comparing the sub-elements of property management across the various systems, it became possible to conceive of a coherent pattern emerging from the dense and entangled thicket of legal pluralism. By following and exploring the patterns and contours of ‘African freehold’, I have tried to identify and map the characteristics that have a bearing on the outcome of land tenure interventions. In doing so, it was possible to identify key points of incompatibility between the formal legal processes and local processes of property holding and transmission.

The evidence shows that the Eurocentric ‘package’ associated with holding land, transmitting land and spatially dividing land is incompatible in many key respects with the way that African freehold families conceive of these processes. The evidence in this thesis, supported by evidence in other Anglophone countries, shows that African familial relationships, which are derived from pre-colonial concepts of the family, were not, and are not extinguished when title is issued, though they are altered. Africans with title regard the land as family property; and rules of access and transmission are intimately connected to familial relationships derived from African norms of tracing kindred through unilineal descent.

The evidence from the research sites reveals that distinctions between cultural norms about familial social relationships and the meaning of land ownership have a critical bearing on the impact and outcome of land title. There is significant divergence between interpretations of ownership, transmission and spatial division of land when land is held by western-derived nuclear families as opposed to land held by African families who interlink their members through descent groups.

12.2 The chasm between map and the territory

This thesis examined the characteristics of freehold title acquired by a small number of Africans who were incorporated under the common law of the Cape Colony. This means that title had roots in an historical context very different from the context of segregation that emerged a century later. Freehold title in both research sites arose against the backdrop of a single common-law system, which applied to both the black and white population. By the twentieth century, a strongly segregationist state emerged, based on the retention of African land rights in African reserves. The process of political segregation was accompanied by increasing separation of African land and family law from the main body of the evolving South African common law. Rights to the land in particular were sharply divided between 'ownership' and 'non ownership' by a legal distinction in the common law that recognised (and still recognises) 'ownership' only by means of registration of title. African rights were not accorded the status of ownership, but were subordinated to colonial law as possessory rights under state trusteeship. The new legalities regarding African land rights, local governance and property relationships were eventually codified in terms of a body of 'customary law', enforced by means of edictal powers conferred on the native administration. The rigid interpretation of customary law prevented the spontaneous adaptation of customary law to the new imperatives of the colonial economy, where the concept of wage labour made rapid intrusions into traditional African systems of production and family life. The migrant labour system nevertheless ensured the continued investment by Africans in traditional agrarian social systems.

Africans with freehold title found themselves in the interstices of the new social and economic relationships. Their identities were no longer defined by the status of land ownership, which had given them a toehold in the political structure and common citizenry of the erstwhile Cape Colony, but by racial criteria. Race and not property differentiated colonial society. Their titles no longer had the sanctity of meaning implied by ownership under the common law. Africans with freehold title found themselves subject to two sources of official law: the common law that recognised the legalities of their title deeds, and customary law that recognised the laws of succession regarding claims to family property, with a grey area inbetween for those who actively sought to escape the consequences of customary law. Rigid principles in both sources of law served to maximise the distance between African land rights and white land rights, enforced by increasingly inflexible legal and spatial boundaries.

The arguments used to justify legal differentiation masked the social and economic logic that drove the construction of both western and African law, and emphasised the negative judgement by colonial administrators of the backwardness of African society. The arguments suggested some 'inherent' quality of culture in both sources of law. Customary law was interpreted to define African land rights in terms of principles of state and tribal trusteeship, justified in terms of a colonial view of African 'custom', previously bad, but later recognised for its utilitarian value. This positive value attributed to customary law meant,

happily for the authorities, that there was to be no 'ownership' in land. Seen as a whole, this interpretation did not recognise parity in the difference, but ensured the subordination of African tenure to the dominant paradigm of ownership. There was to be a fixed hierarchy according to which rights accrued legal value. The common law relied on an interpretation of ownership that conferred recognition by way of registered title i.e. owners were mainly restricted to the white minority. Furthermore, as argued in Chapter 11 above, 'ownership' was narrowly interpreted to embrace the singular interests of proprietorship, which meant that those defined in law as 'owners' had maximum, indivisible, dominium over their land. This interpretation was invariably justified with reference to the superiority of western cultural values, rather than the logic of capitalist relations of production.

Neither of these interpretations came close to the concept of property that emerged in the mind and practices of the African freeholders. By processes of adaptation, African freeholders developed a concept of property that aligned traditional institutions of the family to a fixed parcel of land, symbolised by a title. In both research sites the family group was, and is, held to be the owner of the land, and the structure of the group is defined in terms of kinship concepts. Kinship is traced through unilineal descent (Chapter 3). The close correspondence between 'title' and 'family group' resulted in a form of property described by the freeholders as 'family property' (Chapters 6, 7 and 8). Access to land became both a "symbol and consequence of membership in the descent group", as other scholars found also among freeholders in Kenya (Haugerud 1989: 61, quoting Berry. See Chapter 3.3).

The evidence discussed in Part Two reveals the dissimilarity between the concept of the African family that freeholders had in their minds and practices regarding access rights to land, and the definition of 'family' under the common law. The common law is important in so far as it defines the parameters of affiliation for the purposes of identifying heirs to property. The legally recognised family was (and is) based on European concepts of the family (Chapter 9).

In Chapter 9 of the thesis I argue that the divergence in law between African and European family concepts accentuated the discrepancies between African freeholders' methods of recognising and transmitting rights between family members, and the methods that were recognised by the formal legal system governing title. The formal registration system, which is intimately linked to laws of succession and inheritance, recognise family claims in terms of the single proprietary power of the registered owner and his or her direct descendants, traced through bilateral descent. This is the legacy of European legal concepts that evolved in the metropolitan society, woven from many disparate threads in western feudal society. The modern concept conforms to the notion of individual private property rights based on a narrow band of kin traced through both parents.

In contrast to this view of the family, African freeholders recognised rights in the family property according to African norms of descent, which differentiated kindred according to their status in the lineage descent group. In the present context the descent group defines family membership according to agnatic principles, i.e. patrilineal descent.

We saw in Part Two how these divergences in modes of recognising land rights resulted in African title holders avoiding many of the requirements of registration of transfers. Colonial and legal administrators interpreted the evasions in social evolutionary terms as evidence that Africans were not sufficiently socially evolved to embrace the more civil habits of private property. The avoidance of registration could be interpreted as ‘circumventions’, which were not always consciously constructed, but nevertheless provided the means by which families could avoid the potentially socially disruptive consequences of registering an individual on the title deed; and thereby endangering the rights of the other family members — given the import of the powers conferred on the individuals who were recognised by way of registration as the ‘owners’.

The disparaging view of African society as being ‘unready’ for title was frequently invoked to validate the form of customary law that emerged. Chapter 9 reflects on the landscape of succession law that is intimately linked with registration of title. The official version of customary law relied heavily on pre-colonial laws of succession to property and office, in spite of the obvious fact that African relationships in colonial society were shaped by multiple factors that were previously absent. As mentioned, the differential terms of incorporation of African men and women, young and old into the colonial polity, while not eradicating customary social relationships, significantly altered them. Official customary law was constructed to maximise male control over property in a way that distorted features which had previously served different political and economic purposes, and which were in turn served by different sets of social relations, all of which must be seen as a whole.

Some African male elders contributed to the version of official customary law that emerged, a process that must be understood in terms of the waning political power of Africans in the broader political economy, and particularly Africans who had previously been vested with special status markers and authority. The version of customary law that found its way into legal texts obliterated the rights of women to independent access to property, in spite of the changing economic realities that provided individuals with other channels of engagement with the world than the traditional resources of the family. Customary law was most controversial when it came to the rules governing the inheritance of land with title²⁵⁰ (‘communal’ rights were not heritable), and was the source of contestation by women in particular.

²⁵⁰ Quitrent title was subject only to customary law, no matter what form of marriage contract, whereas with freehold Africans could access the common law on the grounds of civil marriage.

As demonstrated in Part Two, most African freeholders avoided both sources of law and defined their own modes of transmitting land, but it was never possible to entirely escape the emerging legal landscape (Chapters 9 and 10). They found themselves caught in the pincers of contradictory legal processes that increasingly defined African identity in terms of 'customary' law. Customary law in turn helped to legitimate segregated structures of authority, land rights, spatial control and laws of succession; added to which was the way that customary law distorted the internal authority structures of African families in the direction of male control. At the same time, African freehold property rights were defined in terms of the common law, but a common law that recognised only European concepts of the family. In this way, African 'property rights' fell into a chasm between concepts of property, family and succession that were in extreme tension with each other.

12.3 'African freehold' and its specificities

In Part Two of the thesis, various norms were distilled from the individual property histories of African freeholders. The norms coalesce around the powers of access and control (concepts developed by Okoth-Ogendo, discussed in Chapter 2.5), in this case exercised by members of the unilineal descent group, which transformed, under circumstances of title, into a property owning and transmitting group. In pre-colonial society lineage groups did not hold and transmit land, and moveable property was controlled according to the norms of 'house', 'family' and 'personal' property (see Bennett 2004: 254-265), distinctions that were not made with respect to land ownership, the land not being viewed as transmissible property.

With title, the norms evolved to define rights of access to family members on the basis of their relationship to the family. The land owning entity was (and is) regarded as the unilineal descent group. Rights of access and control vary according to status based on seniority, gender and roles of authority, as Berry has described for African productive resources more generally (Berry 1989b: 42). New forms of engagement arose premised on acquisition of land by purchase, commercialised agrarian relationships, education and access to other sources of wealth through wage labour and civil service employment. These alternatives meant that a degree of differentiation developed between freehold families, as well as individual members of the families. In spite of accumulation across and within families, the descent group concept remained as the durable point of reference for social relationships. African freeholders did not convert land into a fungible asset, and land continued to be a means by which people maintained descent group affiliation as observed more widely in other contexts of title, such as in Kenya, as discussed in Chapter 3.3.

As suggested by Okoth-Ogendo (see Chapter 2.5), the rules that evolved to manage access and control rarely gave rise to rights of exclusive control by individuals. In the context of title, rights of access incorporate the customary inclusive principles of access by kin, but also exclusive principles with regard to non-kin. The

freeholders control access, not so much by *rules* of exclusion, but by means of the power to control access on the basis of what Berry has described as “perpetuating a distinctive identity” (Berry 1989b: 48). As mentioned, rules defining eligibility to property and authority generally define *categories* of potential heirs to property or office, rather than designating individuals (cf Berry 1989b: 42).

Authority functions that were previously strictly prescribed by rules of gender, birth and position (in this context, the eldest adult male controlled property), have evolved into a concept of custodianship, to which position women are eligible (though still somewhat tentatively in the rural site). Principles defining roles of responsibility are strongly influenced by individual capacity to fulfil this function, rather than older traditional principles of heritability of office. Berry uses the terms “ascribed” and “achieved” qualifications to distinguish these principles (Berry 1989b: 42).

New economic opportunities increased the likelihood and incidence of intra-familial tensions and conflicts over property and inheritance, and we saw many examples of these in Part Two of the thesis. These were invariably negotiated in terms of cultural definitions of familial relationships. In some cases individuals evoke the common law to claim individual interests and dispossess family members, but these actions evoke social disapprobation.

These insights indicate the importance of viewing property in relation to both spatial and temporal dimensions: making sense of land tenure rights involves an understanding of the transmission of property, and how it is divided either physically or conceptually. These processes are often not regulated by law, particularly in circumstances where the variance between law and practice was as marked as it became in South Africa, and so continues. Among the freeholders discussed in this thesis, the norms for managing ownership and transmission evolved to a large extent outside the framework of state law (customary or common law).

It is significant that the norms described above are replicated across African freeholder families in both the rural and urban research sites. The similarity in the concepts of ownership between rural and urban families, given the varying conditions of these settings, suggests a spontaneity and consistency in the patterns that cannot be explain away solely by the changing terms of the agrarian economy.

There is overwhelming evidence in the research data to support the contention that the individual narratives and property histories represent a consistent pattern of normative discourse and practice that may be generalised across the families. The replication of norms across freeholder families who differ in social composition, employment profiles and levels of wealth, suggest a rubric of normative conditioning that derives from deep-seated cultural concepts of the family. These are not primarily constructed around

investment in productive resources. Rather, people invest in social relationships defined in terms of family values.

These ‘patterned responses’ among freeholder families emerged despite the lack of direct social linkages between the families. Families manage their properties as individual family units without reference to community relationships other than in matters of local governance. They do not share the (registered) property resources co-operatively²⁵¹, or as community collectives; and nor is their property controlled by a local or traditional authority. The surveyed parcels of land define separate land units, and claims to land are thus contained within the boundaries of the parcel and the family. The concept of the ‘community’ or traditional authority plays no role in the distribution of property. In other words, the quality of nested social relationships, described by Cousins (Chapter 1.2 and 2.11) in ‘communal’ tenure contexts, is in the context of title confined to family relationships.

The norms and local ‘rules’ are not blueprints, but contingent and sensitive to shifting social dynamics. The norms nevertheless conform to a repertoire of values shared by the majority of families in the research sites. The families, and individual members of families, face a great many social and economic contingencies that are not the same for each family. Their responses to ongoing challenges and tensions may vary in detail, but their choices are constrained within a discernible — but not codified or enumerated — range of variables, which are dynamic.

For these reasons, I have isolated ‘African freehold’ as a distinct sub-group of land ownership in South Africa. It is neither accurate nor helpful to assess African freehold through the lenses of western law alone, though it was western law that conceived it. African freehold is still, in theory at least, regulated by the common law system of Deeds registration. Yet the divergences between the formal notion of freehold title, and ‘African freehold’ are too glaring and too wide to ignore the possibilities of exploring alternatives in law.

Customary law, as we have seen, did not provide a credible alternative framework for the freeholders, and does not provide a lens for analysis. At the same time, customary law is an influence that cannot be neglected. We have seen that African freeholders evoked, and evoke, aspects of African custom, but significantly, they do not define these concepts by the rubric of ‘customary law’, and seldom refer to ‘custom’ by name. It is now generally accepted that official customary law is limited in its interpretation of African folk concepts. The ‘living law’ notion of customary law has become an important discourse for the future definition and negotiation around the interpretation of customary law. The ‘living law’ is a far more

²⁵¹ In the rural field site, however, the common grazing land was (and is) regarded as common ‘property’ but the state took over ownership in direct contradiction to the norms of freehold ownership at the time of purchase. This gives rise to complex overlapping rights and claims which the freeholders view as qualifying for restitution on the grounds of past ‘dispossession’.

credible concept with which to work in order to disentangle living values from those imposed under colonial conditions. The 'living law', however, while being useful to the analysis of 'African freehold', does not seem sufficient.

12.4 Registration of title and its consequences

A key concern in the thesis has been with one aspect of the larger proposition that titles, theoretically, have the power to alter property relations, since the power to internally dispossess some members of the landowning unit has become associated in western law with private property recognised by title. Hernando de Soto, the man who in recent times famously resurrected the notion of titles to rescue the poor from poverty, did not pitch his grandiose claims on the basis that titles increase tenure security. He is said to have complained that absence of titles makes people too secure on the land. Titles have the power to convert property into fungible assets, and this is not achieved, as the poor white Afrikaners discovered in late colonial period, by protecting the rights of all family members. Titles that spread equality among family members do not *create* wealth if viewed through the prism of private property under capitalist relations of production. If titles are to serve the purpose of asset formation, titles need to exclude family claims to property (see de Soto 2000: 46).

The characteristic of South Africa's property system is that it not only supports the proprietary powers of owners, but in addition, stresses singular (fused) ownership. This makes it impossible for the law to recognise divided ownership or coterminous rights in property. As discussed in Chapter 11.7 above, by conscious interpretation of the law by those in power in South Africa earlier in the twentieth century, this more uncompromising approach was chosen, despite alternatives in law. The excessively rigid application of western concepts of property has been described in legal scholarship as a dogmatic 'absolutist' approach to title. This interpretation remains in sway today.

The rigidly enforced proprietary concept of title was, and continues to be, ill-suited to the familial structure and property concepts of Africans who acquired freehold title. As discussed above, they viewed the land, now spatially fixed by survey and title, as an anchor for the production and reproduction of the domestic group, even with the advent of wage labour. Acquiring title actually strengthened the family group, as we saw in Part Two of the thesis. Whereas previously it would appear that clans were the more important unit of social reproduction, title provided a rationale for strengthening lineage ties (see Chapter 3.4). The lack of fit between African family claims to property, on the one hand, and concepts of individual ownership on the other, went much deeper than the case with poor white Afrikaners, whose family concepts had similarly striven to retain the rights of all family members to the land. In the case of African freeholders, the kinship

group is a self-generating group that could not be so easily dissolved and absorbed into more individualistic economic relationships.

The comparative context of poor Afrikaner families, discussed in Chapter 11.3 above, provide a means to illuminate the distinctions between African and European concepts of the family. The mode of incorporation of poor white Afrikaner families into the wage economy was facilitated by the easier assimilation of the Afrikaner concept of the extended family into new laws governing succession and ownership. Afrikaner families did not have a concept of a 'descent group', though their families were extended, and kinship derived from descent was important. Their family concept, derived by means of bilateral relationships to both parents, could succumb to succession laws that defined the eligible kindred in similar cultural idiom, though set more narrowly. When combined with tight laws of ownership, the universal claims by all family members to the land could be curtailed. Most of these families were eventually absorbed into wage labour and lost their toehold on the land through the rigid application of rules of ownership and succession. A similar process of dispossession over time did not occur at remotely the same scale in the case of African freeholders. Some land was lost to white (and more recently black) creditors through mortgage, which indicates that there is inter-penetration of the two systems. To a large extent, African families managed to retain their land as 'ancestral land'.

In this thesis I have stressed the importance of the adaptation of the family descent group concept to the concept of title, and vice versa. African freeholders were committed to protecting and defending, not so much the individual rights of family members *per se* (in the modern sense of 'rights'), but the very concept of the family itself. The family descent group, as we have seen, became the property owning and transmitting unit, rather than individuals in the family. In pre-colonial times the family group was not a landowning unit, and this adaptation to title may be regarded as an evolution of African customary law to fixed property in land.

This concept of 'family property' implies that the family group is a perpetual retainer of family claims to the property. It is 'perpetual' in the sense that the family group is reproduced over successive generations by the mode of tracing kinship relationships on the basis of unilineal descent (as conceptualised in Chapter 3.4 above). Groups that are identified by unilineal descent patterns do not, in the words of Russell (2003: 12) 'self-liquidate' as does the western family that traces kinship according to bilateral descent. The western family centres the conjugal unit, rather than the lineage, as the property holding and transmitting unit. This kind of family re-generates in a new form with each marriage, generating new sets of relatives. The African concept of family, by contrast, a self-perpetuating group, and as a group, it avoids extinction (somewhat similar in idea to companies whose property is separate from its individual members).

The application of the African family group concept to land ownership clashed in multiple ways with the proprietary concept of the single owner, a position that bestows legal power on the owner to dispossess family members by sale, mortgage, subdivision or testamentary disposition, etc (discussed in Chapter 11). That these two concepts were in tension with each other in multiple ways hardly needs overstating, since the various parts of each model combine to form a very different concept of the whole.

As intimated above, the concept of family retainership to rights in title came up against the requirement in law to register a living owner according to the Deeds Office prescripts of legal recognition. The registration of a single owner clashes fundamentally with the descent group concept of ownership. It is not surprising that freeholders tend to avoid registering transfers (and not always consciously). For legal administrators, the failure to register title in the name of a present owner, and the consequent loss of currency of the Deeds Registers was, and is the most visible manifestation of disjuncture. It is therefore to this aspect that the law tended to pay attention, rather than the sources of the problem. We saw in Chapter 10 that various devices in law have been contrived to close the gap in the registers, but that these devices have done little, if nothing, to alter the practices of African freeholders.

Further complicating the terrain of registration, landowning families associate their titles with the ancestral forebear who originally acquired the property. Title lent itself to the 'genealogical map' of family relationships according to which forebears are traced as representations of the joint property of their descendants. By a process of deductive reasoning, I argue that, by a strange paradox, African freeholders would prefer to leave the registration in the name of the forebear who acquired title, since it is the symbol of the forebear which embodies the idea of conjoined family and title. The 'first man' to acquire title continues to be the reference point for calculating descent, and thus identity and access. It is this tendency to leave the name of a forebear on the register that is ridiculed by officials who administer the law, and is characterised as a sign of lack of education or mental or economic disability.

We have seen in the narratives of the freeholders that the 'title' is closely associated with the family forebear, who became the symbol of family property as well as family unity, and the means by which descent was traced and kept alive. Title in this sense was (and is) the fulcrum around which the family relationships were traced and perpetuated. Thus ownership of the land became a source of validation for the reproduction of the family group, and to some extent, privilege associated with the title.

The group was an important means by which the penetration of the market, alienation of land and state intervention were resisted, since no individual members had independent powers to perform transactions, or to identify particular individuals as heirs at expense of others who were eligible. The paradox was thus that, instead of promoting the idea of liquidity or fungibility of property, title did the opposite. Title *attenuated* the

potential for the development of proprietary relationships. It remains open to debate whether these approaches are positive assertions or defensive strategies (see Chapter 2.8 above).

Registration of title is geared to the Western family concept, not just by way of registration, but even more importantly, by the system of succession. In Chapter 11.9 I showed how the common-law approach to intestate succession (which largely by-passed Africans until more recently) protects individuals' claims to property in the absence of a will. South African intestate succession law was amended over the course of the twentieth century to define the family circle ever more narrowly, in line with western cultural concepts of the family. This interpretation of family membership for the purpose of identifying heirs is based on the biological, rather than the cultural concept of family, as already discussed. Thus, father, mother, (or surviving spouse) and their immediate, identifiable, descendants are regarded as the family members eligible to inherit property. This law did not apply to Africans in the past, except in the case of certain exceptions. Recent law reforms, based on judicial decisions in the Constitutional Court (discussed in Chapter 9 above), have extended this law of intestate succession (i.e. for purposes of inheritance) to include all African families, regardless of the type of marriage.

This change in the law boils down to the simple fact that the African group concept of kindred is not legally recognised as the relevant referent for succession, and therefore claims to property. Conjugal or parentage is the defining feature, expressed in terms of the 'nuclear family' concept. This is an example where the western concept of the nuclear family (father, mother, children and bilateral descent) has been confused with smaller African families who live under one roof. African families are spatially stretched, and family members reside together in small units in way that resembles the western family (e.g. mother, father, children, or mother and children, or grandmother and grandchildren, etc), but the components of which continue to recognise familial relationships in terms of a wider set of kin (the descent group). The family is not defined in terms of 'household' concepts, but in terms of kinship relationships.

12.5 Familial authority, inheritance and succession

The evidence discussed in Part Two of the thesis found that African freeholders have over the course of time woven new concepts of management into the traditional concept of the role of traditional family head. The older customary idea of the eldest male heir, who was in pre-colonial society responsible for the welfare of the entire family, and also controlled the (moveable) property, has evolved into the concept of custodianship of the land and family (Chapter 6). The previously rigid adherence to male status by birth to identify the position of responsibility, has given way to personal criteria, such as personal integrity, degree of participation in the family affairs and demonstrable capacity to undertake this role. In the urban research site it is common practice for women to occupy this position, which represents a radical departure from

previously rigid adherence to male authority. These adaptations demonstrate the ongoing evolution of concepts of property that are becoming increasingly sensitive to women's claims to both access to, and control over the properties.

The innovation of 'custodianship', which has developed to oversee the management of the property and to mediate relationships, access and conflict is an example of the 'control' functions of property having changed and adapted to new ideas about roles that are no longer prescribed by gender and birth.

When viewed through the prism of 'devolution', which Goody defines as the movement of property as a *whole* (Goody 1976a: 1-2, see Chapter 3.7), it is possible to comprehend how the various parts of transmission of land fit together. Where the parts come together in the African model, the devolution of land has important implications for how transmission is controlled to retain land within the descent group. Where the parts come together in the western model, the devolution of land is geared towards maximising the proprietary rights of prescribed individuals.

The consequences of these two different models of devolution mean that, as far as land is concerned, the concept of 'inheritance' fits uncomfortably with succession rules in western law that stress the individual relationships of the parents and children of a narrow family circle of kindred defined by bilateral descent. Goody has explored in detail the differing implications of property moving 'downwards' through a 'line' of descendants based on unilineal descent (which is prevalent in Africa) and property moving 'sideways' through the direct offspring traced by biological relationships to the parents. In Africa, succession is traced through male-to-male or female-to-female succession, both of which result in the continuity of the family group.

The term 'inheritance' in the scholarship, as well as ordinary linguistic expression, tends to conflate many different processes of transmission into one verbal symbol, which carries weighty legal consequences. Where registration of an owner(s) results in the conferral of proprietary powers over the land, the term 'inheritance' is accurate, in that the laws of succession recognise the proprietarial rights of the individuals in the next generation, and of the partner, when the owner dies. They become, in effect, identified and enumerated 'legal persons'. Where the registration of an owner is interpreted to mean, as with the African freeholders, ownership devolving through the succeeding family group, *and* in a way that does not recognise proprietarial powers of individuals, the term 'inheritance' is misleading and generates confusion. Used in this sense, the term inheritance does not capture the ongoing processes of inter-generational succession (cf Okoth-Ogendo's similar conclusions discussed in Chapter 2.5).

The legal framework does not make these distinctions, but only recognises the western model, which is a crucial contributory cause of the disjuncture between the legal concept of title and African concepts of land

tenure. As we have seen in this thesis, however, it would be theoretically possible to adapt title to African concepts of tenure (as the freeholders have done), providing the registration and succession laws are modified to take into account these distinctions.

This discussion leads naturally to the problem of gender relationships in African land tenure, which is the issue that is most directly affected by unilineal descent patterns that define kinship relationships in terms of either male-to-male or female-to-female succession. We have seen how colonial codification of African customary law accepted the whole package of customary notions of familial authority vesting in men, *and* defined by birth and seniority. In addition to these exaggerated biases towards senior male control over property, in South African customary law a third distorting element was introduced, and it is this aspect which is responsible for one of the greatest legal distortions that passed into 'law'. This issue pertained to the misleading characterisation of the position of the eldest adult male (*indlalifa* in the Xhosa cultural complex) as the 'heir' of land, or immovable property. As argued in the thesis, this position had never in the past had connotations of heirship to *land* in customary pre-colonial society. The position of authority formed the basis of management of polygamous (or potentially polygamous) households, where land was not retained in the way that it is when land is viewed as private property. Along with responsibility over the welfare of the entire household complex, the position included power to distribute moveable property, mainly cattle.

The conflation of three powers in one person, identified by birth and seniority, has unsurprisingly resulted in protests about both the interpretation of the law, as well as the practical effects and potential abuse of power over familial property by men. It is also unsurprising that the greatest tensions around property concepts in relation to customary law are manifested around tensions between men and women; and that the tensions are frequently triggered in processes of transmission of property.

To summarise the three powers:

- The first pertains to the 'birth' position of a person who is conferred powers over the property.
- The second pertains the gendered position of the person who is conferred powers over property.
- The third pertains to both of these powers conferred over *land*

New economic relationships and greater engagement by women in the wage labour economy has rightly led to the questioning of the gendered interpretation of male authority over property more generally. When these three powers are analysed separately the problem becomes less 'dense', however. By separating the three strands of authority, we have seen in Fingo Village that all three concepts have evolved or adapted to fit the current realities. Neither birth nor gender are criteria employed for identification of positions of authority over property. In Rabula, birth is no longer important, while gender is still a consideration, though less so

than in the past. In both Fingo Village and Rabula, there is a separation between powers of access and control in such a way that those who are vested with the status of authority or 'responsibility' over the property are not accorded proprietary power, and all family members (identified by kinship status) have rights of access.

The natural evolution of these concepts in circumstances where property and familial relationships were left to their own devices, i.e., were regulated by local norms outside of the framework of state law, indicates that customary law has the capacity to respond to change in certain key areas. In the examples that have come to light in Fingo Village and Rabula, we have seen that by separating various strands in property relations, it is possible to see how some aspects of the access and control functions responded to change. The 'patterned' aspects of rules and norms (which Moore uses to describe cultural patterns, such as descent and kinship) are, however, the most resistant to change. As discussed in Chapter 3.6-11, the dimensions do not necessarily move in one direction as a 'totality', but different parts move at different paces in response to different stimuli. This is a cautionary warning about the dangers of projecting one attribute to a whole range of attributes that all become identified with a single immutable structure.

There is an added danger in analysing the processes in terms of single, dense structures, in that separable dimensions tend to be conflated into single causes, such as the idea of 'patriarchal relationships'. 'Patriarchy' is more like a description containing sweeping generalisations, but which, when exposed to analysis, may refer to many different dimensions of power not specified by the term or concept. The relevant variables need to be feathered out and separately scrutinised in relation to the whole (Peters 1983: 102).

Peters (1983) argues that analyses also need to distinguish between different phases in the development cycle of the entire household, particularly where migrant labour resulted in households that were at times run and managed by single people, often women. We have seen that the freeholder families do not conceive of the family unit as the resident household unit. Instead, members of the family are stretched across a range of spatial units that belie attempts to pin down concepts such as 'household head' in one particular spatial unit.

When these dimensions are separated for analytic purposes, it becomes clear that the concept of 'succession', referring as it does to categories of potential claimants to property, rather than 'inheritance', captures the 'African freehold' concept of devolution of land across space in and time, and helps more accurately identify the troubling aspects of gendered divisions.

A fourth strand in gendered relations complicates the terrain to potential breaking point. The male-to-male or female-to-female succession practices in Africa tend to emphasise the gendered constructs of families. When these intersect with other socially and culturally constructed norms and values, such as women's rights, a great many tensions result. While questions of male authority and tensions between male and female powers

over property are to be found in both patrilineal and matrilineal societies (cf Peters 1997, 2010), these tensions are potentially more intractable when patrilineality overlaps with male controls over property. Male-to-male succession, when viewed through the prism of kinship and descent, is a *potentially* gender-neutral concept, since both male and female members of the family are related by agnatic descent. The concept in itself does not exclude women. We have seen in the discussion above, that both men and women are eligible for both access to, and control of property. The primary distinction that comes about from unilineal descent lies in its identification of kinship relationships through either male or female succession, which in turn results in the concept of the descent group. Kin groups are distinguished from relationships that come about through marriage. The unilineal descent group concept elevates the former over the latter in the structuring of property relations. This structuration of relationships does not diminish the importance of biological affiliation and close relationships of affection based on marriage, but it distinguishes between the property rights of kin from rights based on parentage. The rights of kin are conceptualised as lifelong bonds which cannot be altered by social circumstances, such as marriage. Ties of siblingship usually become more important in property relationships than ties of marriage.

It is possible to see through this entire process of devolution how the official customary law, in its fusion of male powers over land, exacerbated and distorted these dimensions. Four strands that, in reality, may be distinguishable, were fused into a single power conferred on particular members of the family, identified by birth and gender, to own, control, inherit and distribute rights in land, and to generally define the parameters of land ownership.

These massively distorted powers over land have not been replicated in general among the families in the freehold research sites, as exemplified in the almost universal rejection of the term *indlalifa* (the eldest adult male invested with status and authority). There are individual examples where men attempted, and continue to attempt to use their powers either in terms of customary law (through primogeniture) or the common law (through proprietary powers) to dispossess family members. These were, however, the exceptions rather than the normative patterns, and there is strong social disapproval of the men who do. In general, left to their own devices, freehold families have adapted the potential bias in male powers to allow for more equitable distribution of powers between men and women. The bias towards male power is nevertheless persistent, and family members are on their guard, and have developed various strategies and devices, to keep this power in check.

12.6 African freehold as a semi-autonomous social field

In order to accommodate the distinctiveness of African property concepts among African freeholders, but also avoid the binary models, I employed the concept devised by Moore of the 'semi-autonomous social field'. It is worth rehearsing some of the main tenets of the semi-autonomous social field:

It is well established that between the body politic and the individual, there are interposed various smaller organized social fields to which the individual "belongs". These social fields have their own customs and rules and the means of coercing or inducing compliance [] They have what Weber called a "legal order". [...] The semi-autonomous social field is defined and its boundaries identified not by its organization (it may be a corporate group, it may not) but by a processual characteristic it can generate rules and customs and symbols internally, but that it is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance. (Moore 1973: 721-722)

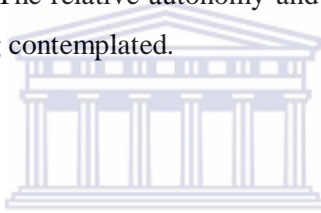
This conceptual lens obviated the need to make sharp divisions between common law and customary law; or between the individual unit and the group unit; or inalienability vs the market, and the various other conventional distinctions that are drawn between private ownership and 'customary' tenure. The semi-autonomous social field cuts across these dimensions. By differentiating a 'social field' from a 'legal field', the range of forces could be explored without 'boxing' the concepts into the conventional categories of the law or economy. Legal and economic categories tend to be overly deterministic in their definitions of land tenure, which can easily result in the conflation of various dimensions of tenure into single generalised causes, as we saw with regard to analyses of gender relationships and inheritance.

As discussed in Chapter 2.10, Moore's semi-autonomous social field accommodates two kinds of processes that are involved in dealing with the dynamic processes of change and continuity. The one she calls a process of 'regularisation' or rule-making, which attempts to 'normalise' and 'fix' rules in order to lend some predictability to the situation. The second she calls 'situational adjustment', which is ongoing socio-legal adjustment to accommodate the many and varied contingencies that occur in day-to-day life. Moore's concept of semi-autonomy also takes into account indeterminacies that cannot be predicted, which means that there are aspects of social relations that can never be controlled by law or law-like customs.

The 'relative autonomy' of social and economic relationships captured in Moore's concept of the semi-autonomous social field makes it possible to explore both the distinctiveness of the structures and relationships in a particular social field, as well as the interconnections with the wider society. Seen in this way, the legal field is only one strand in the multiplex relationships that characterise semi-autonomous social fields. Moore argues that there are a number of 'law-like' processes below the level of government enforced 'law'.

It was possible to circumvent some of the ‘cultural baggage’ of custom using the prism of the semi-autonomous social field, since rules and norms that are locally generated and enforced are better viewed as organic responses by society to the ongoing struggles of adjustment to change. Moreover, these local rules are as open to manipulation and evasion as is the formal state law. This moves beyond the notion, as Moore expressed it, that culture is somehow inherent in African norms and customs. Yet, cultural values invade the social field, as does the law. Moore refers to the cultural domain as the ‘patterned aspects’ of the social processes that can be seen at work in various layers of society (i.e. semi-autonomous social fields), and she observed in her own research that these are the most resistant to change. This accords with my own research findings, where the cultural values that are brought to bear on local processes are consistently obdurate in their resistance to radical social changes.

By conceiving of ‘African freehold’ in terms of a semi-autonomous social field, it was possible to analyse African freehold both in its own rights, and also in the context of wider legal and political framework. Semi-autonomy is not the same as isolation. The relative autonomy and the inter-linkages both need to be taken into account when law reforms are being contemplated.



12.7 Change and Continuity

The larger frame of reference for this thesis is the policy of land titling for Africans in South Africa. As we saw in Chapter 1, titling is a controversial reform measure in African land tenure by virtue of its potential power to reshape relationships with respect to property and production systems, as well as structures of authority. Titling in Africa has generated long-standing, unresolved and ideologically charged debates in both scholarship and political discourses as to the negative and positive attributes of titling. Historically titling had symbolic power as one of the most sensitive and value-laden points of intersection between coloniser and colonised, and continues to have political-economic power in its potential to transform the class structure of society by reshaping the relations of production.

As briefly reviewed in the introduction of the thesis, much of grand theory and rationale for titling in Africa have lost their veracity — both moral and economic — in the light of overwhelming evidence that titles do not in themselves result in increased productivity, asset formation or security of tenure to warrant the social disruption, expense, and maintenance that are the inevitable consequences of titling. This thesis confirms many of these conclusions (with some qualifications), but does not directly engage with those debates. To a large extent my point of departure is an acceptance of the limitations of titling at this broad level. The arguments in this thesis therefore goes beyond the more conventional approaches to the problem of titling,

by looking at the effect on intra-familial relationships, which by its nature situates the analysis in the processes of inter-generational transmission of land.

I used the lens of titling, not so much to come down on one side or the other of these debates, but as a means to unlock some of the inner processes and thinking that occurs among African families with title. The presence of a title makes visible those aspects of familial social relationships that in circumstances of communally shared resources are less easy to discern. This distinction is in itself an important finding, viz., that the presence of title indeed circumscribed the role of community-level structures of authority with regard to the management of land. The emergence of more individualised control over property accentuated the importance of the family unit; and the management of family property required clearer definition of the rights, roles and responsibilities of family members. It was with the detail of these relationships that the thesis was largely concerned.

The findings demonstrate, on the one hand, that outcomes of land tenure interventions such as titling are sensitive to the social and political contexts in which the circumstances unfold. The effects are contingent on a range of variables, which, moreover, do not move in one direction. The responses are shaped by many factors that may not be directly attributable to the presence or absence of title. The responses in turn shape and alter the terms of engagement. The trajectories vary according to wider circumstances, such as national policies, legal and cultural institutions and agro-ecological conditions. The world in which the African freeholders participated was one in which their African identities became progressively emphasised, and their property-owning status, which had previously conferred a special status and common citizenship in the colonial polity, was increasingly downplayed by the forces of larger political transformations.

The evidence viewed over the long term shows that distinct patterns of land management emerged among the African freeholders, to the shape of which the fact of a title clearly had a bearing. Of particular interest and concern in this thesis is how the imprint of African cultural values shaped the ultimate trajectory of title within the parameters of customary familial relationships. The findings show that Africans freeholders replicated patterns of investment in social relations observed in great variety of other African contexts. In this sense, there is a connection with broader African values and a 'rubric' and continuity in thinking and behaviour that accords with enduring cultural notions of family relationships, which are adapted to particular systems of production and spatial concepts of property.

The findings in this thesis show that titling did not extinguish the social structures and values of traditional familial relationships expressed in terms of clan and lineage affiliation. The property relationships that adhere to familial relationships have not been transformed into one-to-one relationship between individuals and property objects, in this case a fixed spatial unit, as implied by the western concept of title. Rather, inclusive principles of family membership are adapted to the confines of surveyed parcels of land. Access to,

and control of land by family members are defined, not by delineating individuals, but in terms of categories of eligibility.

In the western model, the rules prescribe the identities of particular individuals who have legal powers over the land. Ownership thus changes from generation to generation as the individual identities change. In the African model replicated by African freeholders, rules prescribe a potential category of members with access to the land, defined by their relationship to the descent group, past and future. The group remains the constant owner of the land, and is not dependent on the individual identities of its members.

Both the western and African models find correspondence in distinctive modes of transmission of property, which in turn constitute, and are constituted by corresponding structures of authority. One of the big changes titling brought about was in the replacement of traditional, interlocking units of authority, such as clans and chiefships, with that of the family lineage, the importance of which is accentuated with title. The family lineage assumed roles regarding land ownership and transmission that were previously absent, land not having been a significant constraint in pre-colonial African society.

The western model of titling is regulated by the common law and statutes, which define the individuals who are eligible to inherit property with reference to principles of bilateral descent, i.e. the relationships are traced from both parents. The African model, as we saw in Part Two of the thesis, does not conform to this definition of individuals who are eligible for access, but instead, traces relationships through unilineal descent, which is the very device whereby the 'group' concept is maintained over time, as discussed above. Conjugal relationships, and mother-children relationships embrace bonds of affection and are valued and important, but are not the reference point for the distribution of property entitlements. This mode of recognition of kindred relationships contrasts with the western model, which, as we saw in Part Three, recognises property entitlements on the basis of parentage. In the past the conjugal relationship was sanctified by marriage. Presently a greater range of relationships, such as single parents, gay parents, life partnerships, etc are culturally and legally recognised, but the property entitlements are regulated by the same principles of biological descent.

The thesis looked at both sets of concepts on account of the fact that African freehold title was regulated by the western legal model, but was modified by customary principles. The problems of the disjuncture have been compounded by recent law reforms that have extended the western model to include all South Africans regardless of their social and cultural affiliations. The laws that regulate the inheritance of immovable property are uniform across the social landscape, and are not confined to the small band of landowners discussed in this thesis. It is in this sense that the thesis connects with broader debates about the shape of land tenure reforms, since land tenure cannot never be viewed in isolation of the processes whereby land is transmitted.

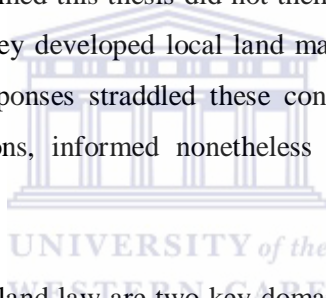
The continued relevance of African cultural values to families with title presented challenges in the analysis of 'African freehold'. The theories of scholars such as Bohannan, Okoth-Ogendo, Lund, Moore, Berry and Peters, discussed in Part One of the thesis, provided a way to work with some of the concepts that underpin ideas of land ownership among African freeholders, as reflected in the narratives and documentary evidence discussed in Part Two of the thesis. The African experience suggests that though the details of the respective property maps differ according to varying social, spatial, temporal and political dimensions, the patterns correspond to the idea of 'gradations' of socially recognised rules of access to, and control of land, which adapt to changeable spatial units, as theorised by Okoth-Ogendo. The norms that inform processes of adjustment share common principles observed across a wide range of African contexts. With titling, the spatial units are fixed, but the social units conform to a consistent pattern of social relations identified in other African property systems.

Berry (1993) has identified a consistent thread in African social relationships in the continued investment in social relationships and networks, which means status and social identity are often prioritised over investment in increased production. Peters (2006) has critiqued and extended this view, which tends to limit the emphasis to the negotiable properties of social relationships. She argues that these relationships, defined as they are by discernible, repetitive, patterns of kinship, should not be interpreted in ways that conflate investment in social relationships with endlessly fluid or equitable property relationships. Under circumstances of change, such as commercialisation and new avenues of wealth, customary social relations may mask processes of concentration and accumulation, and some claims to property do 'stick'.

The findings presented in this thesis confirm many of these trends, both those that stress the flexibility of African social relations, and those that show that processes of accumulation are not completely disabled by investment in social relations. Rather, these set certain parameters within which accumulation can occur. The African freehold experience discussed here shows that title provided a social and economic platform from which many families were able to invest in education, which in turn increased their prospects for clerical, civil service or professional employment. At the same time their investment in inclusive social relations with regard to rules of access to family property limited their investment in increased productivity or asset formation associated with ownership of the land. In keeping with observations by scholars in other African contexts, customary institutions and social relations were restructured to accommodate new sources of wealth, but land was generally not viewed as source of investment in productive resources. Even with title, there was under-investment in increased agricultural production, notwithstanding evidence of a 'rise' and then 'fall' of a South African peasantry in the nineteenth century, interestingly drawn largely from amaMfengu households, whose cultural affinities were similar to the residents of Fingo Village and Rabula (Bundy 1979). The evidence suggests that productivity was, and is, constrained also by inability to mobilise labour under circumstances of inclusive strategies of access.

The synergies with broader African cultural values among the African freeholders cannot be ignored. At the same time, all Africans were affected by the broader political and economic processes that gave South Africa a distinctiveness not shared by other African countries. In the area of land tenure, the extreme structure of legal differentiation and political segregation that emerged between black and white drove a wedge between the formal property system and African systems of land holding. An important dimension of differentiation was the separation of African land and family law from the common law. Chanock has conceptualised the South African example of legal pluralism as “a pathological case” of legal pluralism on account of the excessive manipulation of colonial and customary law to validate political segregation, and later, apartheid (Chanock 1994). He argues that in spite of legal differentiation, Africans continued to live in “one world in which all the parts were interrelated” (Chanock 1995: 64). Legal dualism is “conceptually neat” (ibid), and helps to make sense of the institutionally dualistic world of colonial administration, but it does not reflect the actual territory of people’s day-to-day lives.

The people whose narratives have informed this thesis did not themselves rely on the distinctions that were becoming increasingly rigid in law. They developed local land management practices that by-passed legal nuances. Their thinking, and their responses straddled these conceptual divides. They constructed their approaches from a range of institutions, informed nonetheless by enduring cultural values that were remained important symbolic markers.



It is not surprising that family law and land law are two key domains where customary law continued, and continues to have traction. These are key sites where, in the present, customary law continues to be negotiated, along with traditional structures of authority. Nevertheless, the reality of the inter-penetration of different sources of law represents a challenge for analysis of property relations in circumstances of cultural and legal pluralism. The complexity of these inter-relationships does not lend itself to any neat divisions or compartmentalisation between western and African concepts of property, yet at the same time there are discernible differences.

‘African freehold’, situated as it is in the interstices of western and customary law, accentuates many of the problems that ignite debates about the role of law and custom in land tenure reforms. As mentioned earlier, ‘African freehold’ is useful prism through which to view these relationships as title puts a spotlight on intra-familial property relations on account of the clearer focus on rules regarding inter-generational transmission. These processes are more diffused and therefore less visible in other land tenure systems where issues of heritability were historically unimportant, and which, under colonial conditions in South Africa, was suppressed in law. Heritability in the context of ‘communal tenure’ was not a right protected in law, but was controlled by the discretion of the native administration.

The problem of 'African freehold' thus brings to the fore both change and continuity in African social relations, and reflects many of the problems that surface in debates about a number of inter-related issues in law reform, such as:

- Legal pluralism versus legal centralism as a future trajectory
- The role of law in shaping social and property relations
- The implications of renewed emphasis on the relevance of the 'customary' domain
- The problems of gendered structure of African customary family and property relations
- The tensions between the 'rights' discourses of international human rights models that emphasise the independence of the individual, and the customary discourses of relational and nested social systems that characterise African social and property system

12.8 Reforming the law of family and property in contemporary South Africa

In Chapter 9 the thesis provided an outline of some of the key developments in family law in South Africa to:

- bring about more parity between customary law and common law;
- allow a version of customary law that reflects 'living law' and not 'ossified' customary law;
- challenge the bias towards male powers over property.

Three key test cases where the rights to property by women or children were at stake were combined for the purposes of adjudication by the Constitutional Court in 2006 (referred to collectively as the *Bhe* case). The majority judgement delivered a verdict that introduced common law principles into customary law, and more or less obliterated the customary law of succession. The judgement resulted in law reforms whereby the common-law version of succession has been extended to all South African families. The common law places emphasis on 'equal inheritance by male and female offspring'. The consequences of striking out the customary law of succession are profound, and more complex than is often assumed. Where social identities continue to be shaped by kinship relationships, and where these are in turn strongly associated with descent groups, which seems generally to be the reality, the reach of the new law is likely to be more limited than might be assumed.

These reforms must be seen in combination with the earlier reform in marriage laws, in terms of which customary African marriages are not only recognised, but covered by the proprietary consequences (by default if no alternative contracts are made) of 'community of property' that is similarly based on property rights defined in terms of the relationship between the conjugal couple. A third legal reform that flowed from

judicial review of family law was that all deceased estates are administered according to one common platform for all South Africans, i.e. by the Master of the Supreme Court.

The judges in the *Bhe* trilogy of cases justified their ruling, firstly, on the grounds of gender discrimination, arguing that the older customary law infringes women's rights as identified in the Bill of Rights in the Constitution; and secondly on the grounds that African families are no longer 'customary' in the sense implied by customary law, and could be described as nuclear families. I argued in Chapter 9, based on the evidence in the research sites, that the judges conflated 'nuclear families', which are the smaller atomised units in which Africans live in their day-to-day lives, with the western nuclear family that defines kinship relationships in terms of biological descent from the parents, or the conjugal couple.

As argued above the smaller family units are a pronounced feature of African freeholders, perhaps even more so than usual on account of their relative prosperity compared with the average African families, which means that the smaller family units that make up the 'family' for the purposes of 'family property' have the individual capacity to invest in substantial individual homes. In terms of affiliation, however, the smaller family units are stretched across spatial landscapes, rural and urban, and describe themselves as 'one family' defined in terms of their relationship to the descent group or lineage. While moveable property may be separately owned and inherited, land is regarded as a common family estate.

The implications of the *Bhe* judgement, and the associated legal reforms, have been analysed by various legal scholars as questionable. Some question whether the laws will be enforceable, given the divergence in realities between the world reflected by the judges, and the realities of the 'real' world in which the 'patterned aspects' of social norms continue to have considerable traction. Others, commenting on the conceptual vision more generally, argue that a Eurocentric approach prevails in South African law, and African values are being side-stepped in the interests of ideologically constructed versions of 'individual rights' that are based on western norms. While many women frame their claim to 'rights' in land in their own right (e.g. as single women) there is nevertheless evidence that even among those women there is continued adherence to African family values, which has implications for how these women conceive of transmitting the property they have acquired as individuals. The evidence suggests that the older values are being adapted to new spatial units, rather than being abandoned in the interests of direct one-to-one concepts of inheritance as suggested by western law.

Pauline Peters has come to similar conclusions concerning the mistranslation of the logic of matriliney in central-southern Africa. In the matrilineal context, Peters shows how equal inheritance rights, may, paradoxically, have adverse affects on women's rights. An example is a new pending law in Malawi which aims to protect 'women's rights' by means of equal inheritance by male and female offspring. But since a large area of the country combines matrilineal inheritance with matrilineal (uxorilocal) residence, where only

daughters inherit lineage land, the policy would actually disinherit millions of women (Peters 2010, see also 2013: 543)

Two key issues addressed in the thesis from the perspective of law reform are:

1. South African law is structured according to a ‘hierarchy of rights paradigm’ with ownership at the top (van der Walt, 1999). I have tried to reveal the magnitude of the implications of this construction of property law, where freehold title is legally constructed at the apex of the hierarchy, and all other rights are either removed entirely from the paradigm of ownership, or they are subordinated to the ownership model. Neither of these two methods of recognising variations are sustainable ways of recognising the land rights of the majority. Removing property rights from the dominant paradigm means ascribing them to the customary realm of traditional authority controls, which is open to abuse. Subordinating rights limits people’s property rights, such as the right to transmit land.

2. The same argument may be extended to the problem of succession and inheritance. The conflation of the two, based on western norms of succession, means that there is no legal framework that recognises the pattern of inter-generational transmission of land observed in the research sites, and which there is every reason to believe is relevant to African contexts of land holding more broadly in South Africa.

This means there is a ‘double disjuncture’ that can only be addressed if, firstly, the sources of the problem are acknowledged and the realities recognised; and secondly, the whole structure of law, as well as the substantial detail of the law, is modified to reflect the kinds of realities described in this thesis.

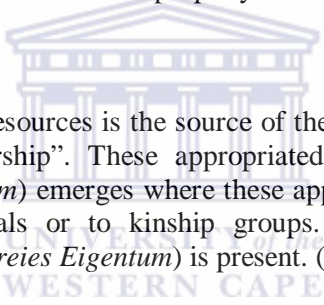
Family rights are not covered by any existing laws. It is a model which we have seen is not appropriately addressed by the common law and nor by customary law. New typologies of land tenure that stress ‘group ownership’, such as Communal Property Associations²⁵² (CPAs) do not capture the kinds of relationships described here, and exacerbate the disjuncture between the ownership model and family model. Less still the model transposable to ‘communal tenure’ under tribal authorities, with or without proposed modifications.

Family conceptions of ownership are present in contexts other than freehold title, in perhaps different degrees and formats. Legal recognition of family property would be a step towards bridging some of the normative and technical disconnections highlighted in this thesis. Reforms should be based on extensive consultation among ordinary people to gather evidence as to how they see the moulding of a potentially new regime of property rights. Consultation processes should be structured to get behind vested interests, e.g. traditional authorities, professionals with a vested interest in the Deeds system, or municipal managers of

²⁵² In terms of the Communal Property Associations Act, No 28 of 1996

urban townships. Such consultations would quickly reveal the necessity of linking land tenure reforms to appropriate succession rules and inheritance concepts.

Company and trust laws create property that is separate from its membership, and it should be possible to adapt it to private law. It is possible to have exclusionary principles in rules of access and disposal of land that are at the same time outside of a rampant market economy. Although private property concepts are intimately associated with the idea of marketability, this was not always so, not even in the European context where private property has become the norm. Weber gives us another etymology for property, from the word 'appropriate', which resonates with the model described here for the African freeholders. He suggested that processes of 'appropriation' historically resulted in the emergence of certain forms of property, which allowed for inheritance but not free disposal. A defining feature of his concept of appropriation is that it relates to the power to exclude, but not necessarily in the same sense as 'marketable and alienable'. By distinguishing between appropriation and proprietary rights, he draws a distinction between 'ownership' and 'free ownership'. The latter was a later development with the advance of capitalism in the west. The word 'proprietary' has become almost synonymous with 'property'. But it had not always been so, even in the west. Ford translates his ideas thus:


“Appropriation” of the valued resources is the source of the creation of “property rights,” including those characteristic of “Ownership”. These appropriated opportunities are defined as “rights” (*Rechte*). “Ownership” (*Eigentum*) emerges where these appropriated rights are transmitted through inheritance, either to individuals or to kinship groups. If the appropriated rights are freely transferable, “free ownership” (*freies Eigentum*) is present. (Ford 2010: 47-48)

It is possible to untangle these concepts, and demystify the ideologies and institutions that perpetuate them.

12.9 Conclusion

Title is assumed to banish the habits of 'custom' to the private realm of familial relationships, while neutral and rational forces steer property relationships in a suitably compatible relationship with state and market. These supposedly combine to provide both security of tenure, and the basis from which to accumulate assets and capital. The divisible and/or heritable attributes of land supposedly find correspondence with the individualistic habits of property owners who may independently own and transmit property, singly or jointly.

In contrast, unregistered 'communal' rights were constructed in the past by administrative fiat at the local level by a separate, subordinated, branch of the bureaucratic machinery of state, centralised in the native affairs department, or the 'native administration' as it was appropriately known. Here race, not property, was the defining criterion for recognition of rights, which were correspondingly localised and personalised in

scope. 'Customary law' as a whole is banished to the domestic and private realm, described by Moore as the 'residue' of what was left after colonial rulers established statutory or common law.

The evidence presented in this thesis suggests that these two realms are far more entangled than the dualistic regulatory regimes suggest. Public and private, individual and collective, alienable and inalienable, heritable and inheritable elements are to be found in all these spheres as ongoing arenas of struggle. Although 'African freehold' is unambiguously associated with recognition of rights in 'immovable property, landholders continue to invest in social units (such as customary descent groups), relationships and networks, which are the bonding agencies between land and social identity. Access to, and control over land and resources, including their transmission, accord with the graduating 'power relations' described by Okoth-Ogendo (see 2.5 above). These relationships do not result in exclusive powers vested in particular individuals, as implied by the legal concept of freehold, a paradox that I explore in this thesis

The disjuncture that arises from these mistranslations are not limited to 'African freehold'. The problems described for African freeholders in this thesis are compounded exponentially by the issuing of titles to urban township properties, including RDP houses. Difficulties similar to those described here have been widely reported by researchers and city authorities, but the latter find it hard to adjust their systems to find alternatives. Reports of registers losing currency within the first generation, new owners selling their RDP (state subsidised houses) informally, often below the value of production, and massive backlogs in issuing titles deeds are legion. The problems of application are only one side of the story. The other side is that tenure recognition is delayed for the vast majority in expectation of title, due to the complexities and expense (survey, arbitration, adjudication, layout planning, conveyancing and deeds lodgement, etc). This shows convincingly that the problems are widespread and that the findings in this thesis have a relevance beyond the 'African freehold' domain that I have described. There is clearly something fundamentally wrong with the paradigm, and yet it gets perpetuated.

The findings in this thesis suggest that the incongruities described and analysed, and which can have tragic consequences, are not necessarily premeditated or conscious, although they are frequently manipulated by dint of hardened ideologies. The legal anomalies are compounded by inability to translate linguistic concepts and symbols cross-culturally, or even within a cultural context. The narratives heard in the field sites revealed the difficulties people have with 'language' that struggles to cross over cultural divides and describe new phenomena. The problems are compounded when mere nuances solidify into conceptual and legal divides. Pierce uses the idea of 'radical translation' to portray missed communication. He suggests that it is not a question of one or other interpretation being 'wrong' as much as the way meanings are portrayed in language and text. He argues, drawing from linguistic studies, that meaning involves a whole network of related beliefs. "If language describes experience, it does so as a network, not sentence by sentence... [a belief or intentional understanding] takes shape in relation to social processes that provide meaning." He

goes on to suggest that in Northern Nigeria, from which he draws the material on colonial interpretations of 'land tenure', "[w]hat became invisible was precisely the social logic of production that codifying land tenure was supposed to bring into focus" (2013: 155)

We are reminded of Moore's invocation of 'law' and 'custom', not as separate institutional terrains, but as dynamics of power which are in a constant state of engagement, where the original situation is transformed by the process of engagement, influenced as much by structural constraints and opportunities as by forces of unpredictability and indeterminacy. This suggests that the mystique and inaccessibility associated with 'customary law' should be abandoned, and serious engagement embarked on to grasp the realities and the extent of the crisis. Chanock (2001: 356) reminds us of Z.K. Matthews' attempts to demystify customary law, to see it as a 'normal part of the present, something that should have a future'. Writing in 1934 from the perspective of a Western educated African who favoured integration of law systems, he declared, "there is ... after all ... nothing mysterious about native law".

Lund says something similar, but takes it further, arguing that it is important to move beyond the debates about what is 'authentic' and what is 'fabricated' about customary law, and to examine the arguments:

... early anthropologists' accounts of African land use documented system, structure and regularity as custom, later critical scholarship saw what colonialism had inscribed as 'customary law' as a colonial creation. Customary law came to be seen as a colonial imposition creating or entrenching privilege and despotism, and thus custom was adjudged to be entirely manipulable by the powerful [...] Rather than passing judgement on particular practices as either authentic or fabricated (and how indeed would we make that call?), I believe it makes more sense to investigate the arguments. In a certain way, the objects of study are not land or history, nor law or custom per se; it is the arguments people have about those things. While arguments are peddled as a 'natural order', the past is, in fact, used to imagine a future by justifying certain claims to political identity, to property, and to authority. Thus, when we look at the past as an argument voiced in the present in view of the future, the inevitability of history is unsettled. (Lund 2013: 30).

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- Wilson, M., Kaplan, S., Maki, T., & Walton, E. (1952) *Keiskammahok Rural Survey v 3: Social Structure*. Pietermaritzburg: Shuter & Shooter.
- Woodman, G. (2010) 'The Characteristics of Legal Pluralism'. Paper for Conference on Development, Pluralism and Access to Resources, University of Cape Town.
- Woodruff, C. (2001) 'Review of de Sotos' "The Mystery of Capital"'. *Journal of Economic Literature* , 39 (4), 1215-1223.

Wotshela, L. (2001) 'Homeland Consolidation, Resettlement and Local Politics in the Border and the Ciskei Region of the Eastern Cape, South Africa, 1960-1996'. D.Phil thesis, Oxford University, Oxford.

Wotshela, L. (1994) 'Transformation in Late Colonial Ngqika Society. A Political, Economic and Social History of African communities in the District of Stutterheim'. M.A. thesis, Rhodes University, Grahamstown.

Wright, J. (1996) www.hartford-hwp.com/archives/37/021.html.

Zimmerman, R., & Visser, D. (eds) (1996) *Southern Cross: Civil Law and Common Law in South Africa*. Oxford: Oxford University Press.

IV. ORAL SOURCES

(a) Research sites

- 2 February 2006. Hansel Panca. 6 C Street, Fingo Village.
6 March 2006. Reginald Sixaba. 47 Raglan Road, Fingo Village.
9 March 2006. B.B. Zondani. Brookshaw Home. Grahamstown.
9 March 2006. K.A. Qenge. 34 Raglan Road, Fingo Village.
15 March 2006. Thandeka Nkewana. Raglan Road, Fingo Village.
15 March 2006. Winston Clement Mabusela. 15 Raglan Road, Fingo Village.
15 March 2006. Mrs Makapula. Wood Street, Fingo Village.
16 March 2006. Mrs Leyi. 27 Wood Street, Fingo Village.
16 March 2006. Miss Fezeka Alice Mpolongwana. 8 "E" Street, Fingo Village.
16 March 2006. Patrick Ntshakaze. 46 Wood Street, Fingo Village.
11 April 2006. Margaret Spekman. Raglan Road, Fingo Village.
11 April 2006. Sandi Patrick Albany. 15 J Street, Fingo Village.
18 April 2006. Simpiwe Seti. Wood Street, Fingo Village.
4 May 2006. Mrs E. Mpande. 2 Raglan Road, Fingo Village.
9 May 2006. Bulelwa Antoinette Cintso. 7 Chapel Street, Fingo Village.
9 May 2006. Gloria Ndeya. 20 I Street, Fingo Village.
10 May 2006. Nofele Topsy Gumanda. 29 Wood Street, Fingo Village.
10 May 2006. Madinda family. 45 D Street, Fingo Village.
8 June 2006. Mr Kulati. D Street, Fingo Village.
9 June 2006. Gertrude Dikeledi Kadi (married name Mbete). 29 E Street, Fingo Village.
9 June 2006. Girlsie Bolewa Mona. 6 J Street, Fingo Village.
9 June 2006. Letitia Siziwe Mnyamana. Victoria Road, Fingo Village.
9 June 2006. Nellie Masoma. 42 Victoria Road, Fingo Village.
9 June 2006. Anglican Church properties (10 families). "E" & "D" Streets (Turpin St), Fingo Village.
12 June 2006. Nomatamsanqa (Tami) Ngqoyiya. 9 Victoria Road, Fingo Village.
12 June 2006. Nontombizakhe Edith & Nomhlaba Selina Antoni. 53 Wood Street, Fingo Village.
13 June 2006. Ntsikelelo Botha. 20 E Street, Fingo Village.
15 June 2006. Tyini Family (Sindiswa Christine & Nqabisa Thelma). Joza. Formerly 16 Victoria Road, Fingo Village.
19 June 2006. Rhodes Motsileo July. 2 Victoria Road, Fingo Village.
21 June 2006. B.J. Mani. 40 D Street, Fingo Village.
22 June 2006. Nomonde Hogu. 42 D Street and former owner 40 D Street, Fingo Village.
26 June 2006. Nongeni Teni Njokweni. 52 Wood Street, Fingo Village.
13 July 2006. Sylvia & Alvie Konze. Allotment 85 (PTO) Noxolo Village, Lower Rabula.
14 July 2006. Mrs Silwana. Rabula.
14 July 2006. Patricia Makuzeni. Rabula.

14 July 2006. Bongani Makuzeni (son of Patricia). Rabula.
 17 & 18 July 2006. Alasta Nkosentsha Finca. Rabula.
 17 July 2006. Mpambeli Plaaty. Noxolo Village. Rabula.
 17 July 2006. Zola Mayekiso and Mrs. PTO allotment. Noxolo Village, Rabula.
 18 July 2006. Mr Tsengiwe. Rabula.
 18 July 2006. Pamela Kwinana & Association For Primary Health Care, Amahlati. Noqolo Village, Rabula.
 18 & 19 July 2006. Daluvuso Devilliers Notshe. Rabula.
 19 July 2006. Miss Magenuka. Rabula.
 19 July 2006. Lina Majola. Rabula.
 19 July 2006. Mrs Silwana. Rabula.
 19 July 2006. Audrey Silwana. Rabula.
 19 July 2006. Sylvia Gcilishe. Rabula.
 20 July 2006. Mrs Miranda Jara. PTO allotment. Noxolo Village, Rabula.
 20 July 2006. Mr Ndumiso Magenuka. Rabula
 21 July 2006. Mr Mfecane. Rabula.
 2 August 2006. Mr Mxolisi "Cheap Cheap" Kwinana. Rabula.
 7 August 2006. Lilian Kate & family. Raglan Road, Fingo Village.
 8 August 2006. Lilian Kate. Raglan Road, Fingo Village.
 29 September 2006. Mpikazi Kanti (family name Ngxiki). Grahamstown.
 25 May 2007. Daluvuso Devilliers Notshe. Rabula.
 10 January 2008. Rhodes Motsileo July. 2 Victoria Road, Fingo Village.
 10 January 2008. Gertrude Dikeledi Kadi (married name Mbete). 29 E Street, Fingo Village.
 14 January 2008. Mona sisters: Monica Ntombizanele, Girls Bolewa, Violet Nonzwakazi, Eunace Ntombizodwa, Joyce Nomama. 6 J Street, Fingo Village.
 14 January 2008. Mavis Nkosinkulu. 27 Victoria Road, Fingo Village.
 23 January 2008. Margaret Spekman. Raglan Road, Fingo Village.
 24 January 2008. Mr Mathamo. Beadle Street, Grahamstown.
 24 January 2008. David Kulati. D Street, Fingo Village.
 29 January 2008. Nontombizake Edith & Nozuko Antoni. 53 Wood Street, Fingo Village.
 29 January 2008. Bulelwa Antoinette Cintso. 7 Chapel Street, Fingo Village.
 7 February 2008. Rev Mize. Joza. Grahamstown.
 16 March 2008. Mrs Makapula. Wood Street, Fingo Village.
 31 March 2008. Stewart & Virginia Ncanywa. Rabula.
 10 Jan 2008. Gertrude Kadi (married name Mbete). Fingo Village.
 1 April 2008. Maggie, Virginia & Ntsikelelo Ncanywa. Rabula.
 1 April 2008. Nimrod Ncanywa. Rabula.
 1 April 2008. Tembikile Davidson Jara. Rabula.
 2 April 2008. Mr Ndumiso Magenuka. Rabula.
 4 April 2008. Mlungisi Makuzeni. King William's Town.
 25 April 2008. Mortiana Jara & Kayaletu Mtyi. Rabula.
 14 May 2008. Siphon Ntsila. Rabula.
 14 May 2008. Makuze Njemla. Rabula.
 15 May 2008. Mandla Makuzeni. Rabula.
 15 May 2008. Adelaide 'Maduna' Makuzeni. Rabula
 16 May 2008. Lindelwa Nompoza. Rabula.
 16 May 2008. Mr G. Nkanjeni. Rabula.
 16 May 2008. Mlungisi Makuzeni, Rabula.
 16 May 2008. July Matyana. Trust land (*KwaSix*), Rabula.
 16 May 2008. Makuze Njemla. Rabula.
 18 May 2008. Mrs M. Mbopa. Rabula.
 18 May 2008. Mr Sikanti. Ngudle Trust land, Rabula.
 11 July 2008. Mlungisi and Siphon Makuzeni. Quzini, King William's Town.
 15 July 2008. Mrs N. Silwana. Rabula.
 15 July 2008. Sitilanga Caleb Jara. Rabula.
 16 July 2008. Nimrod Ncanywa. Rabula.

16 July 2008. Florence Majola. Mdantsane, East London.
 17 July 2008. Ndumiso Magenuka. Rabula.
 17 July 2008. Lina Majola. Rabula.
 17 July 2008. Mr Tsengiwe. Rabula.
 18 July 2008. Makuze Njemla. Rabula.
 19 July 2008. Daluvuso Devilliers Notshe. Rabula.
 22 July 2008. Virginia Ncanywa. Rabula.
 22 July 2008. Bapete Silwana. King William's Town.
 4 March 2010. Dorothy Mdlalana (family name: Mabusela). 15 Raglan Road, Fingo Village.
 5 March 2010. Mrs Leyi. 27 Wood Street, Fingo Village.
 9 March 2010. Sipiwo Baninzi. Fingo Village, Grahamstown.
 10 March 2010. Gertrude Dikeledi Kadi (married name Mbete). 29 "E" Street, Fingo Village.
 16 March 2010. Mavis Nkosinkulu. 27 Victoria Road, Fingo Village.
 18 March 2010. Soyisile Morgan Mati. Rabula.
 24 March 2010. Mavis Nkosinkulu. 27 Victoria Road, Fingo Village.
 1 April 2010. Dorothy Mdlalana (family name: Mabusela). 15 Raglan Road, Fingo Village.
 8 September 2010. Nkosinkulu family (Tenjiswa, Sylvia, Wellington, Ruth, Nompumelelo). I Street, Fingo Village.
 22 September 2010. Nkosinkulu family. I Street, Fingo Village.
 20 September 2011. Winnie Gotshela. Fingo Village.

(b) Focus Groups

11 May 2010. Women's Group. Rabula
 12 May 2010. Men's Group. Rabula



(c) Local Government officials/Councillors

7 February 2006. Sidwell Gxaba. Official, Makana Municipality, Grahamstown.
 7 February 2006. Kaiser Nxamleko. Official, Makana Municipality, Grahamstown.
 6 March 2006. Mxolisi Patrick Ntshiba. Ward Councillor, Makana Municipality, Grahamstown.
 11 May 2006. Charl Malan. ex-official, Makana Municipality, Grahamstown.
 11 May 2006. Elliot Mani. official, Makana Municipality, Grahamstown.
 20 July 2006. Mrs Jara. Ward Councillor Jara. Rabula.
 11 December 2008. Thuleka Ngeleza. PR Councillor, Makana Municipality, Grahamstown.

(d) Provincial Government

2 August 2004. Mr Moody. Master of the Supreme Court, Grahamstown, Eastern Cape.
 3 August 2004. Mr Mbewana. Assistant Master of the Supreme Court, Grahamstown.
 3 August 2004. Judith Roberson. Chief Magistrate, Grahamstown.
 5 August 2004. Mr Leon Keyter. Assistant Master of the Supreme Court, Grahamstown..
 6 August 2004. Mrs Marietjie Kotze. Senior Administrative Officer, Magistrate's Court, Grahamstown.
 2 August 2006. Enoch Deyi. Department of Agriculture, Keiskammahoek office
 7 October 2010. Mr Jonas. Official in the office of the Master of the Supreme Court, Grahamstown (with relevant family members)

(e) National Government

10 August 2007. A. Styles. Deeds Office. King William's Town.

(f) Non-Governmental Organisations

10 August 2006. Ashley Westaway, Director, Border Rural Committee

(g) Private consultancies

29 August 2013. N. Gysman, Grahamstown.

(h) Private Sector Land Administration

11 May 2006. Susan McNaughton. Conveyancer. Dold and Stone Attorneys, Grahamstown.

7 August 2006. Attorney at Whitesides Attorneys, Grahamstown.

(i) Academic: Rhodes University

3 March, 20 March, 19 March 2010. Prof A. Kerr, Faculty of Law, Rhodes University, Grahamstown.

12 March 2010. Prof R. Mqoke, Faculty of Law, Rhodes University, Grahamstown.

10 August 2012. Prof Jeff Peires, Cory Library, Rhodes University, Grahamstown.

V. CASE LAW SOUTH AFRICA

Bhe and Others v Magistrate, Khayelitsha and Others (2005) (10) SA 580 (CC).

Alexkor Ltd & another v Richtersveld Community & others 2003 (12) BCLR 1301 (CC)

VI. CORRESPONDENCE

Whitesides Attorneys to C.L. Kate, 25 July 2006.

R. Laing to R. Kingwill, email, 14 September 2010

M. Jara, email, 21 February 2013.

VII. MAPS

Makana Municipality, Eastern Cape.

Chief Directorate Surveys and Mapping, Mowbray, Cape Town.

State Archives, Pretoria. ACT v. 284

