

**‘It is our land’:  
Human rights and land tenure reform  
in Namaqualand, South Africa**

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## Abstract

### *'It is our land': Human rights and land tenure reform in Namaqualand, South Africa*

Secure access to resources is a universal condition of human well-being and is of considerable concern in contemporary human rights discourse, though often neglected in policy and practice. In this respect the South African constitutional guarantees and policies concerning land reform are of wide interest. The main goal of this study is to contribute to the theoretical and empirical understanding of land tenure as a human rights issue. The study (i) reviews human rights that affect land tenure; (ii) develops a theoretical approach to rights, institutions and human capabilities; (iii) analyses recent South African land tenure policy and (iv) documents and analyses a phase in the implementation of the Transformation of Certain Rural Areas Act, Act 94 of 1998 (Trancraa) in Namaqualand, Northern Cape Province during 2001 and 2002. Trancraa provides for land tenure reform in state-claimed rural areas, formerly 'coloured reserves', by returning ownership rights to residents or local institutions through a consultative process. It is the first comprehensive post-apartheid land tenure reform in state-claimed, communal lands. Trancraa emphasised the protection of land rights and local government accountability to land users, but did not address rights to gender equality, the constitutional and human right to redress, or wider economic rights. Trancraa was implemented through the networking action of civil society organisations, community-based Transformation Committees, local municipalities and state officials. The study documents the implementation in two Rural Areas, Pella and Komaggas. In Pella the consultation involved debates, studies, advocacy and community referenda on land ownership. The Transformation Committee defended and promoted some of interests in land and development within a pragmatic engagement with civil society and government. Claiming that *it is our land* reflected histories and discourses of community tenure but could also conceal conflicts and claims by different groups, such as enterprising farmers or leaders. In Komaggas, the Trancraa process was resisted by a community group that saw the Act as unduly assuming state ownership of land and the process as promoting the interests and power of a new municipality. In both sites, residents' diverse claims that *it is our land* made political claims for justice and development. However, the state's offer that *it is your land* changed over time, particularly affected by policies and discourses of market-based development and increasingly appearing as 'an opportunity for the state to bail out'. Limited guarantees of public support for the proposed new land holding organisations created uncertainty, so that Trancraa also displayed risks that the process would become a 'democratisation of disempowerment', characterised by debates, studies and drafting of rules rather than material and institutional change. The process illustrates the diverse normative relevance and possible empirical role of human rights. The study suggests that a social order in which human rights are respected will remove some sources of tenure insecurity, such as racial and gender discrimination; that rights to information, political participation and non-discrimination are important to enable a fair and effective land reform; and that secure land tenure contribute to the realisation of human rights such as rights to livelihood, work and substantial equality. The empirical role of human rights depends on many actors, processes and contextual factors, as the efforts by Trancraa committees and facilitators to promote land projects and human capabilities demonstrated. Human rights have made collective guarantees about supporting such struggles for human capabilities and social transformation, as also promised in South African land policy, hinted at in name of the 'Transformation of Certain Rural Areas Act' and claimed by residents with their assertion that *it is our land*.

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This thesis is dedicated to all who work for justice in South Africa and who insist that for millions of individuals in cities, towns and rural areas secure access to land for diverse purposes is a matter of human rights – rights yet to be fulfilled.



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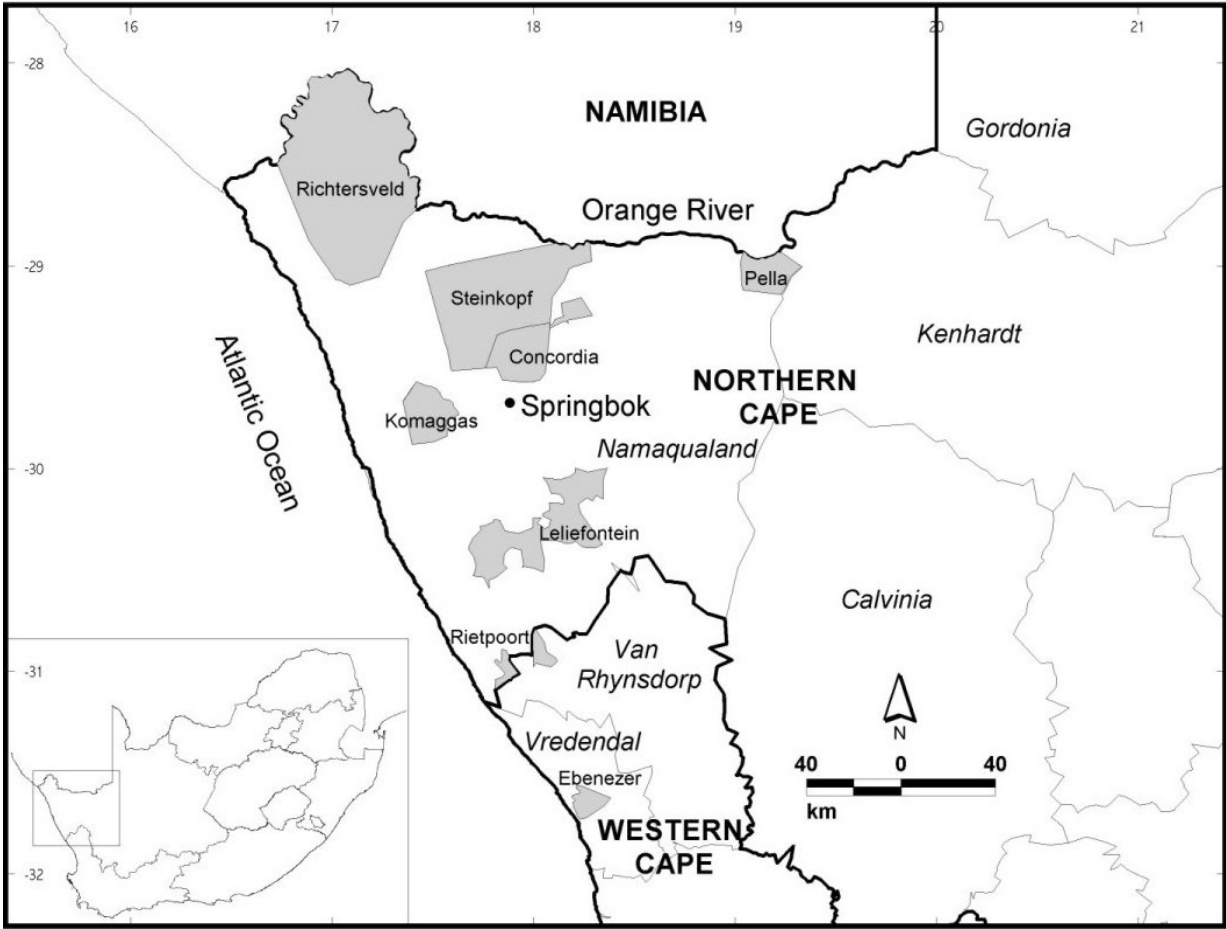


Figure 1: Namaqualand, Northern Cape Province, South Africa

Source: Timm Hoffman, University of Cape Town. Graphics Simon Todd



## Photos from Pella and Komaggas

Photos from Pella, Namaqualand

By the author



Pella, after completion of new road, June 2002



School girls, Pella, October 2000



Koker-boom, Quiver Tree (*Aloe dichotoma*), Pella, September 2002





Pella residents, discussing the history of Pella, November 2001



Discussion with members of household at Annakoppe, Pella, November 2002



Transformation Committee Members, Pella Referendum, 7 December 2002



Pella photos – stock farming



Interview, stock farmer, Rooiklippe, Pella, September 2002



Discussion, pensioner/stock farmer and young man from Pella, Rooiklippe, Pella, September 2002



Herd of goats, Rooipad, Pella, September 2002



**Pella photos – irrigation**



The Gariiep  
(Orange River)  
at Pella,  
looking west



Irrigable land  
at Rooipad,  
Pella, 2002



Discussing  
irrigable land  
at Mik, Pella,  
October 2002



Photos from Komaggas, Namaqualand

By the author



The road to Komaggas, 2002



Stockpost (*veepos*), on Komaggas common land, November 2001



Komaggas, 2001



Harvesting oats.  
Dryland plot  
(*saailand*),  
Komaggas,  
November 2001



Collecting firewood,  
on the *sandveld*,  
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September 2002



Wind-up discussion,  
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**PART I. APPROACH**

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## 1. INTRODUCTION

### 1.1 Land tenure as a human rights issue – research goal

'Human rights' are claims which every human being has by virtue of his or her humanity without distinction on such grounds as race, gender, religion, national origin or social group (An-Na'im 2003: 3). Few human rights documents mention 'land issues', perhaps because land and our uses of it are so diverse. Can human rights say anything that makes sense of the contrasting relationships to 'land' of a South African farm worker, a businesswoman in New York, and a Tibetan herder? The Universal Declaration of Human Rights of 1948 states that life, health, food, housing and property are human rights – norms that appear to touch on land tenure, the conditions under which we hold land. Yet we know there may be a long way to go from doctrines to everyday life: power relations, resources and skills determine whether individuals can realise their rights – getting enough food, moving freely, feeling and being equal.

The goal of this study is to contribute to the theoretical and empirical understanding of land tenure as a human rights issue. Sub-goals are (i) to review human rights that affect land tenure; (ii) to develop a theoretical approach to the interface between human rights, legal reform and land-based human capabilities; (iii) to analyse how the issue is reconstituted in recent South African land tenure policy and (iv) to document and analyse the interaction between human rights and tenure in a legal reform process. I pursue these goals by reviewing human rights statements and South African land tenure policy, and by studying the processes of debating and implementing the Transformation of Certain Rural Areas Act, Act 94 of 1998 (Tranraa) in 2001–2002 in Namaqualand, Northern Cape Province, South Africa.

### 1.2 Global context – losing sight of land?

#### 1.2.1 Inequality, poverty and development goals

Though this thesis is based primarily on a national and local case study, I briefly place it within global struggles for resource security. Amidst unprecedented economic growth in industrial and post-industrial societies, we as a 'world community' fail to provide basic material security to billions of people on earth. People in the rich world and elites in all countries are 'influential and privileged participants in a transnational scheme of social institutions under which some persons are regularly, predictably and avoidably denied secure access to the objects of their human rights' (Pogge 2002: 227). It has been estimated that every day 30 000 people on earth die from hunger and hunger related diseases and 10 000 from preventable diseases caused by unsafe drinking water (FAO 2002; UNDP 2003). Women earn and own disproportionately small fractions of total annual income property. The richest 1% earn as much as the poorest 57% earn together (UNDP 2003: 19). Since 1970 the global trend in economic inequality has been uneven, with rapid economic growth in

some regions and economic decline in others, but it remains at what UNDP called 'grotesque' levels. In sub-Saharan Africa during the 1990s per-capita income fell by 5%, and the proportion of people living on less than one dollar per day remained stable at around 50%, while their number increased from 240 to 300 million individuals (UNDP 2003: 18-19).

Policies aimed at eradicating poverty and hunger often fail to incorporate the land rights of women, men and children. The 'Bathurst Declaration' of 1999 called for 'a commitment on the part of the international community and governments to halve the number of people around the world who do not have effective access to secure property rights in land by the year 2010' (FIG 1999). However, the 'targets' and 'indicators' (UNDP 2002) that are to guide the realisation of the Millennium Development Goals did not include rural people's access to land and appeared to sever land rights from the objective of eradicating poverty and hunger ('Land' was only mentioned under 'Goal 7, ensure environmental sustainability', with two progress indicators: 'Proportion of land area covered by forest' and 'Land area protected to maintain biological diversity'.) This may be particularly unfortunate for Africa, where land is a major asset and source of livelihood, and where progress towards the millennium development goals is generally discouraging in rural areas (Sahn and Stifel 2003: 48). 'Land' is thus 'framed' differently in politics, development, environment or human rights discourses. Since human rights have increasingly been recognised as a measure of political legitimacy (Donnelly 1999), a human rights approach could perhaps lift land issues in global politics, although land could also lose status if moved out of the more powerful discourses of environment and economy. There is a need to clarify and strengthen state and international responsibilities for the productive resource base of individuals, families and communities.

### 1.2.2 Economy and formalisation of land rights

The World Bank (2003) has emphasised the importance of land resources for the poor and has argued in favour of public backing of property rights in land. It has criticised its earlier pronouncement on land issues (World Bank 1975) for *not* having addressed the land rights of the poor, governance issues and gender; for focusing almost exclusively on titling as a means of increasing agricultural productivity; and for recommending land reforms without following this up with criteria, guidelines or action (World Bank 2003a: xlv-xlvi). The document lists the expected effects of increasing tenure security, including: greater investment incentives, transferability and increased value of land, credit market access, more sustainable resource management, freedom from bureaucratic interference, less time spent on defending land assets, releasing labour for other purposes, better governance and devolved decision-making, protecting disadvantaged groups (for example women affected and discriminatory inheritance practices), and increased assets and spending by households for the benefit of children (World Bank 2003: xxv-xxvii). Thus, as we will see in South Africa as well, a very long list of desirable things is attached to the idea of secure land tenure. The



World Bank also noted that 'basic human rights considerations' may favour stronger rights and improved access for women, herders and other 'historically disadvantaged groups ... even if they do not imply an immediate increase in economic efficiency' – a generous concession indeed. Otherwise the document avoids a human rights perspective as the late apartheid government did when formulating land policy in 1991, which suggests there may be something demanding in human rights perspectives that holders of power prefer to avoid.

Contrasts and 'contested borders' between 'rights-based' and 'human rights-based' have become characteristic of land issues. Hernando de Soto (1989; 2000) has inspired an important high-level interest in legal rights to land and other resources in what one may call a rights-based approach. He has argued that 'the poor' have substantial assets but lack legal protection to turn them into capital.<sup>1</sup> Eighty percent of the population in poor countries cannot 'inject life into their assets and make them generate capital because the law keeps them out of the formal property system. ... So long as the assets of the majority are not properly documented and tracked by a property bureaucracy they are invisible and sterile in the market place' (de Soto 2000: 210, 211). Capitalism, in his view, links together elites of different countries who live in 'bell jars' because capitalism is not 'globalised' within each country (de Soto 2000: 207). Capitalism is 'an apartheid regime most cannot enter' (209) and is losing support among people because of the deep divide between the property holders and the dispossessed:

Capitalism has lost its way in developing and former communist nations. It is not equitable. It is out of touch with those who should be its largest constituency, and instead of being a cause that promises opportunity for all, capitalism appears increasingly as the leitmotif of a self-serving guild of businessmen and their technocracies. (de Soto 2000: 226–7)

In de Soto's vision 'this state of affairs is relatively easy to correct': by making it possible to own property legally national reformers can 'bring everyone into the social contract where they can cooperate to raise society's productivity' (de Soto 2000: 218). Capitalism is 'the only game in town': you play the game or perish outside the bell jar, and playing the game means to accumulate and transact with property, such as land.

### 1.2.3 The struggle for land – a connection

Social movements around the world are involved in a variety of struggles: against lasting class, racial and gender disparities in land ownership and land use; for safe dwellings and environmental health; for investments in land development; and for assistance to increasing numbers of people who lose their land through conflict, ecological change and population pressure (Shanmugaratnam, Lund, and Stölen 2003). Anti-globalisation protests from Seattle

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<sup>1</sup> Hernando de Soto's approach to formalisation of land rights has risen to a certain prominence within Norwegian development policy during the time of my study, reflected in the promotion of a 'Commission on the Legal Empowerment of the Poor'. Norwegian NGOs have been involved in protesting against the initiative and creating a 'deSoto.watch.net' (NPA and others 2005). Such policy dynamics closer to home have become part of the context of the study.

1999 to Johannesburg 2002, Cancun 2003 and Mumbai 2004 have tried to hold global institutions accountable to international rights. During the World Summit on Sustainable Development in Johannesburg (August 2002) the South African National Land Committee and the Landless People's Movement arranged a workshop that attracted some 5 000 participants. The invitation argued that land and landlessness should not have been severed from international poverty eradication strategies:

Despite their central significance in the fight to eliminate poverty and promote sustainable rural development in Africa (and many other regions of the world), land reform and land rights are glaringly absent from the agenda of the WSSD. This is not surprising since the WSSD is just one milestone in a long history of world governments and financial institutions breaking promises to end global poverty and inequality ... it is not possible to talk about ending poverty and promoting sustainable development without addressing the global problems of landlessness, unequal resource distribution and insecurity of land tenure. The solutions which world leaders offer to these problems – neo-liberal policies, market-led land reform programmes and globalisation – only deepen poverty, inequality and food insecurity. (NLC 2002)

The workshop prepared a declaration of African perspectives on land rights, attacking unequal distribution of land, undemocratic administration and discrimination against women and demanding government-led agrarian reform to protect and expand land rights, food security and resource control for the rural poor (NLC/LPM 2002). In South Africa, at the third democratic elections in April 2004, the Landless People's Movement threatened to occupy farms and advocated an election boycott, arguing that 'the poor and landless majority have little to celebrate since we still do not have the land that was promised us' and are 'sick and tired of being used as pawns by political elites who only "care" about us at election time, then expect us to suffer our poverty and dispossession in silence for the next five years' (Sapa 2004). At the same time their counterparts in Brazil, the Movement of Landless Rural Workers, the largest social movement in Latin America, were planning occupations of under-utilised farms in protests against slow land redistribution. Whether we keep or lose sight of 'land' and 'human rights' – and make the connection – partly depends on such struggles.

### 1.3 South Africa – towards healing a divided land?

#### 1.3.1 Our land: exclusion and protest

Perhaps it is because land is so many things – place, space, resources and practice – that it is also a powerful means of dominance and exclusion. A retired worker and stock farmer in Namaqualand gave an account of the colonial encounter in South Africa, saying: 'They asked the old Bushman for his land, and he took some with his hand and gave it.' Handing a handful of soil to the stranger could be a gesture of mockery or of sharing, but the coloniser did not want to share power and said that 'he did not want land in *that* way [and] bought a young ox and cut himself some *riems* [strips of leather], and then he said he wanted it like *that*, and *then* the Bushman gave the land', after which Bushmen were killed or chased away

(Retired farmer, Pella, Interview, November 2001). The claim that South Africa, or a piece of it, 'is our land' has a long history and contested meanings – to put it mildly. Colonial and apartheid rule continued to strengthen the links between national sovereignty and control over land. Legislation, forced removals and unequal development excluded the majority from most of the valuable farmland and from institutions of ownership. Solomon Plaatje, journalist, writer and the first General Secretary of the ANC, documented the politics, meanings and effects of the prime symbol of exclusion, the 'Black Land Act' of 1913. He wrote that in the 'grim struggle between right and wrong', the 'latter carries the day' and that the Act deprived Africans of 'the bare human rights of living on the land, except as servants in the employ of the whites' (Plaatje 1916: 32).

Many were confined to 'homelands' and other areas for racially defined groups.<sup>2</sup> In rural areas, tenure policy, development schemes and coopted local leadership institutions were 'the three pillars of apartheid' (Hendricks 1990: 1; Ntsebeza 1999). Racial inequalities in land endowments and property institutions were exacerbated through state-subsidised development of 'commercial' agriculture (Davenport 1987; Mbongwa, Vink, and van Zyl 2000). Unequal distribution and oppressive land governance motivated resistance. Nelson Mandela retold a famous speech made by Chief Meligqili at his initiation ritual, deploring the loss of land as an economic, social, military and emotional humiliation. As 'tenants on our own soil' all black South Africans have 'no strength, no power, no control over our own destiny ... and [young men] will cough their lungs out deep in the bowels of the white man's mines, never seeing the sun, so that the white man can live a life of unequalled prosperity' (Mandela 1994: 33-34). African protests and declarations included the 'African Claims in South Africa', the ANC's input to the Atlantic Charter in 1943, the 'Women's Charter' by the Federation of South African Women (1954), the manifesto by the Transvaal Women's Federation 'What women demand' (1955) and the 'Freedom Charter' of 1955. They all stressed land ownership and agrarian reform, in greatest detail in those by the women's organisations. President Thabo Mbeki (2003) held that 'the masses of our people did not meekly submit to these inhuman practices. Under the leadership of their organisation, the ANC' they fought against forced removals and the laws that 'sought to make blacks foreigners in their own country.' Mbeki took the title of this 'Letter from the President' from the Freedom Charter: 'Land shall belong to those who work it'.

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<sup>2</sup> South Africa's land area is about 1.2 million km<sup>2</sup>. About 84% of it is used for agriculture. About 13% can be used for crop cultivation but the major part only for livestock grazing. It was estimated that 40% of South Africa's population primarily depended on agriculture and related industries, including about one million workers on privately owned farms (11% of formal employment). Agriculture contributed about 4% of gross domestic product (13% when including agro-processing) and 10% of export earnings (Department of Agriculture 2002). Land owned by some 50 000 private farmers covers about 105 million hectares (70% of total area). Former 'homelands' comprises about 17 million hectares (14%) and 12 to 15 million people live here. (Kepe and Cousins 2002).

### 1.3.2 Torn and beloved

On this historical and political background it is self-evident that 'land' is a tormented and sensitive issue: 'Dis baie emosioneel' ('It is very emotional'), said many respondents in Namaqualand. There is much at stake. *Harvest of discontent*, a study of land issues in South Africa during the transition to democracy, has a cover image of the map of South Africa: the western three fourths of the country shows a Cape Dutch farm house surrounded by fruit-bearing vineyards, the eastern strip is a barren piece of land densely covered with tin-roofed sheds, and a gorge is opening between the two, threatening to split the country (de Klerk 1991).

Despite deep conflicts, groups appear to share views of that land as closely linked to freedom and identity. Thabo Mbeki illustrated the closeness of land and identity in his famous 'I am an African' speech: 'I owe my being to the hills and the valleys, the mountains and the glades, the rivers, the deserts, the trees, the flowers, the seas and the ever-changing seasons that define the face of our native land.' He noted the how closely land is linked to bodily suffering or well-being and asserted a closeness to the fragrances, plants and the animals, the 'citizens of the veld'. He declared: 'A human presence among all these, a feature on the face of our native land thus defined, I know that none dare challenge me when I say – "I am an African!"' (Mbeki 1996: 153-4). The idea of humans as 'a feature on the face of our native land' is powerful and full of tension: attached to land and proudly asserting identity.

In her memories of a white childhood in southern Africa Alexandra Fuller makes a just as forceful claim to closeness and dependence: 'In Rhodesia, we are born and then the umbilical cord of each child is transferred straight from the mother to the ground, where it takes root and grows. Pulling away from the ground cause [sic] death by suffocation, starvation. That's what the people of this land believe. Deprive us of the land and you are depriving of us air, water, food, and sex' (Fuller 2002: 153-4). Land as a human rights issue, indeed!

Antjie Krog writes about the Karoo that 'this is my landscape. The marrow of my bones. The plains. The sweeping veld. The honey-blond sandstone. This is love. This is what I am made of ... The land belongs to the voices of those who live in it. My own bleak voice among them' (Krog 1999: 319). Thus, she makes explicit the link between the personal and the political: claims to land are claims of being and of belonging to place and group. The farm, Krog writes, was once the source of childhood happiness but now the farm gate has a notice in English, Sesotho and Afrikaans saying that 'if you set foot on this farm without a specific appointment, expect to be met by an armed response' (Krog 1999: 412). Whenever they come back to the farm, every member of the family is on guard, men with rifle in hand: 'The first thing you check is whether the dogs are moving around naturally.' Krog's mother had said that land is 'the essence of the Afrikaner, because land brings freedom'. Krog

quoted her farmer brother who had experienced cattle thefts and defended the farm on nightly excursions with rifles and spotlights on the 'bakkie' (pick-up). He complained that 'he who is trespassing and breaking the law – by running away, forcing me to shoot him ... he is forcing me to point a gun at another human being and pull the trigger ... and I hate him for that'. He had explained in court that 'it is not the value of the things they steal, it is the value of my life they steal, the value of my farm, the value of my future plans, the value of my peace of mind' (Krog 1999: 17). However, in the history of conquest these values were not respected. Such words and experiences could lead to a reassessment of the past, and of the experience and claims of those who once lost land. However, to see that all share vulnerabilities and longings is only a small step when the land is actually divided and powerful forces resist change. Again referring to human relations on the land, Krog expresses the need for a shared normative reference:

This is in many ways a traumatised country – the violence of the past affects every single family. And we come from a past with a fractured morality. We have no coherent morality to say 'This is wrong, for all of us.' We've never had that – we are in the process of trying to establish a morality that we all agree on. (Antjie Krog quoted in Rosenthal 2003)

## 1.4 Land reform

### 1.4.1 'Land reform should be dealt with fundamentally and comprehensively'

Land reform is one of many efforts to make a shared morality materially possible and is guided by the Constitution of 1996 and steeped in history and politics. Resistance, a national economic crisis and international changes led to negotiations about regime change from the late 1980s (Mandela 1994; Sparks 1990; Sparks 1994). The last National Party government created a land reform policy for a 'new South Africa', allegedly aimed at bringing 'progress and prosperity to all its people'. It argued that repeal of discriminatory laws was not enough and that 'land reform should be dealt with fundamentally and comprehensively. Land is the most precious resource for the existence and survival of man' (RSA 1991: 1). It went on to reject a programme of restitution and redistribution of land – and was strongly criticised by the ANC and land organisations. During the transition, landless people assisted by organisations articulated their expectations and put pressure on negotiators. A Rural Charter, 1994, held that: 'We, the marginalised people of South Africa, who are landless and land hungry, declare our needs for all the world to know.' It said that stunted children, lack of food, water and sanitation, and soil blowing away in the wind were the direct manifestations of being 'forced into smaller and smaller places'. Therefore, 'in the new South Africa there will be nothing new until there is land and services and growth' (Rural communities 1994).

The Constitution of 1996 holds that 'South Africa belongs to all who live in it, united in our diversity', and resolves to 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'. Imagining South Africa as a shared land – our land – infuses the talk of land reform. A new coat of arms displays

'Khoisan' people, and carries the motto 'Ike E: /xarra //ke', meaning 'Diverse people unite', overlooked by a secretary bird, the killer of snakes. Section 25 of the Bill of Rights – 'the property clause' – commits government to ensure equitable access to land ('redistribution'), provide 'tenure security', and offer 'restitution' of land or compensation to those who lost land because of racial discrimination after 1913. A human rights lawyer called the land issue the 'the yardstick of measuring the worth of citizenship and how rights, freedoms and responsibilities are distributed in the new South Africa ... an essential component in the building and the sustainability of constitutional democracy in South Africa' (Gutto 2001b: 2).

#### 1.4.2 Experience and tension

South Africans know that demands for rights can express powerlessness. The Land Charter from 1994 was repeated almost verbatim in a Landless People's Charter from 2001 (Landless delegates 2001), when a Landless People's Movement was formed. A decade after the first democratic election, land reform had progressed with a range of legislation, activities, and significant achievements, but also frustration with the political priority, pace and socio-economic impact of land reform (Lahiff 2001; Hall, Jacobs, and Lahiff 2003). Government had allocated between 0.3% and 0.4% of public expenditure to land reform. By 2004 the estimated total restitution and redistribution of land amounted to about 3% of commercial farmland (over ten years) against the electoral promise and official policy of 30% (over five years) (Hall and Lahiff 2004). Government officials maintained that the state was committed to bringing social justice and economic development through 'inter-linked and coordinated interventions led by the state, in order to redistribute land and rights in land, as well as economic benefits, to disadvantaged sections of the society' (Mayende 2001: 2). Land is contested at individual, farm, community and national level. News of success stories in redistribution (I-Net Bridge 2003) mix with debate about the extent to which farm murders are racial, political or 'purely criminal' (Mail & Guardian 2003). The son of a white farmer in Transvaal denounced the land reform programme, saying that farmers 'get out their gun' when they hear the word. He pinpointed some power factors that slow land reform: 'Well, one thing you got to remember is that farmers own most of South Africa, and farmers are ready to fight for their farms. It is not going to be very pleasant when all farmers suddenly say they are not going to sell any products in this country ... You've got to give the farmers what they want, then you can get what you want!' (Informal discussion, Springbok, 2002 Chapter 7).

Zimbabwe's land resettlement programme from 2000 sharpened the awareness of stakes and risks in land reform in southern Africa (Lahiff and Cousins 2001; Cousins 2003). While in February 2000 4 500 'white farmers' owned a third of the land, including 70% of prime farmland, by 2004 only 400 were left, possessing about 3% of the land. The conflict made visible the human rights issues of both monopoly ownership of commercial land and the ad hoc and violent 'fast track approach' to redistribution. Zimbabwe invited other governments and organisations to share in its land reform experiences (Sapa-AFP 2004b). A

magazine cover story on *South Africa's ticking time bomb: Land* claimed that a similar turn of events 'could make Zimbabwe look like a picnic' and said that '[u]ntil Zimbabwe happened, white landowners in South Africa had taken Nelson Mandela's reconciliation project to mean keeping ill-gotten gains while blacks suffered' (Commey 2002).

#### 1.4.3 Tenure reform in state-claimed 'communal' land

Tenure reform can be a narrow or a comprehensive approach to land and agrarian problems. An inspired official wrote: 'Tenure reform is the mother of South Africa's land reform programs' (Sibanda 2001: 53). A land reform lawyer wrote that 'the ... overarching tenure legislation in compliance with section 25(6) of the constitution is the most important piece of land reform legislation yet to come. The promise of 'comparable redress' is needed to undo what the 1913 and 1936 land acts did – it has the potential of affecting people's lives on a far greater scale than restitution' (Kobus Pienaar, personal communication, November 2002). Tenure reform may give security to resources transferred under restitution and redistribution. But while land restitution and redistribution have proceeded slowly, the tenure reform for former 'homelands' and other state-claimed land has been virtually stuck, delayed by the size of the task and struggles over rural democratisation and gender equality (Ntsebeza 1999; Claassens 2000; Cousins 2002). In 1999 the newly appointed Minister of Agriculture and Land Affairs, Thoko Didiza, shelved a draft Land Rights Bill. The press expressed concern that policy delays were harming the vulnerable rural groups and argued that 'the interests of chiefs, who fear losing power over land allocation, cannot be allowed to eclipse those of their subjects. ... The present policy seems to put the rural and urban masses at the back of the queue. Whatever the political risks, the government must serve its prime constituency' (Mail & Guardian 2001). After consultations at the National Land Tenure Conference in Durban in November 2001, a new bill was published in August 2002 and passed into law in 2004 (Communal Land Rights Act, CLRA). Human rights organisations have challenged this bill as threatening the rights to democratic participation and to gender equality. Future implementation of the CLRA may ultimately affect twelve to fifteen million citizens in rural areas. That is one reason why it is worth trying to learn from Trancraa in Namaqualand.

#### 1.4.4 Trancraa in Namaqualand

The Transformation of Certain Rural Areas Act, Act 94 of 1998 (Trancraa), provides for land tenure reform in 23 Act 9 Areas governed under the Rural Areas Act 9 of 1987 and distributed throughout four provinces. The main stated purpose is to return ownership rights to the residents or local institutions through a consultative process. It is the first post-apartheid legal reform of land tenure in 'communal' areas. Women and men, civil society organisations, municipalities and government, what I will call the 'Namaqualand land reform

network', introduced Trancraa in Namaqualand during 2001 and 2002.<sup>3</sup> Here, about 30 000 individuals live in six areas (Richtersveld, Steinkopf, Leliefontein, Komaggas, Concordia and Pella) that cover some 14 000km<sup>2</sup>, or about 30% of the district. Many have suffered human rights violations and continue to face difficult circumstances as a result of past land policies (among other factors). Throughout the apartheid years land was 'held in trust' by the state and this is still the case in 2005. Despite this history and the state's claim to ownership, the areas are 'home' to many people: *dis ons grond, it is our land*. A land lawyer has called Trancraa, which was introduced seven years after the political revolution and two years after the Act was passed, the 'fast track approach'. It was fast (compared to the CLRA) and it was also, despite deficiencies that I will examine, part of efforts to achieve change through a law-based process, not a Zimbabwean 'fast-track'. Some value a law-based process with significant achievements through debate, awareness and advocacy, while others may see Trancraa as epitomising just the insubstantial approach that comes to justify or cause faster ways of fast-tracking. 'They can do it Zimbabwe, why can't we do it here?' a farmer asked in a meeting in Steinkopf in 2001. Yet, peace, poverty and the structure of land relations prevailed – by and large.

#### 1.4.5 Pella and Komaggas

I carried out fieldwork in two (of six) Namaqualand Rural Areas, Pella and Komaggas. (I explain the reasons for this selection in Section 4.2.3) These two areas turned out to illustrate contrasting responses to the legal reform. Pella is in the northeastern corner of Namaqualand, a rural town located near springs in magnificent surroundings of dry plains, rocky outcrops, awe-inspiring mountains and the Gariiep (Orange River). Once the land of San and Khoi and then early settlers around the many springs (Kamasfontein), Pella was for many years a Roman Catholic mission station, governed by the church till 1975. From 2001 Pella became the largest 'ward' and politically the main constituency of a new Khâi-Ma Municipality. On a burning hot Saturday, 7 December 2002, residents voted over future land ownership. Votes were counted in an atmosphere of tension. A political leader declared that the process was 'free and fair' (with new echoes from Zimbabwe), although the outcome disappointed his party. I had been impressed with the awareness campaign and debates but nevertheless wondered whether government would respect the referendum and whether, with time, the tenure reform would strengthen the land rights and human rights of men and women or be just another event in the dynamic processes of maintaining the status quo.

Just as significantly, in Komaggas the Trancraa process broke down because a group of well-organised residents resisted the Act. An experienced resident, and supporter, said that 'the old Act was really an old apartheid Act, that just kept us on one side. There was no economic growth and empowerment to the people of Namaqualand'. However, he explained

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<sup>3</sup> Surplus People Project (<http://www.spp.org.za/>), Legal Resources Centre (<http://www.lrc.org.za/>),



the fierce resistance by noting that 'most of our people have got this tunnel vision that *it is our land*, so nobody can come and do anything on it. They feel that the municipality will come and do things and that we will lose everything. ... It is a fear of payment, a fear of losing *baasskap* [power, the position of being a boss] over something' (Former chair, Land Committee, Komaggas, Nov 2001). The phrase *it is our land* kept reappearing in different ways during my work. Here it was presented as a kind of 'tunnel vision', barring out reality. For others this was indeed a vision of the most important reality: local rights to land and the power based on it. In late 2002, when other areas were preparing for the referenda, I visited Komaggas for the last time, only to have new separate meetings with groups who had not seen eye to eye over the legal reform. Thus, one paradox of Trancraa was that some residents experienced the 'offer' from the state that *it is your land* as threatening and disempowering. Probably, a state, or anyone, offering to 'grant' or 'formalise' rights powerfully claims to be the legitimate source and guarantor of rights.

### 1.5 Focus and overview for the following chapters

The study explored land tenure as a human rights issue from global doctrine to national policy and local debates with emphasis on (i) human rights in the national policy for 'communal tenure reform'; (ii) the local tenure reform process and politics of land; and (iii) a theoretical interpretation of human rights, capabilities and discourses in the construction of land.

Part I outlines my approach. I briefly discuss selected human rights relevant for land tenure in Chapter 2. Chapter 3 suggests a theoretical perspective on key concepts of capabilities, discourse and institutions. Chapter 4 outlines how I studied the issue through a policy review and a process-oriented case study, using group and individual discussions as the main learning method.

Part II outlines a national policy context. Chapter 5 briefly reviews rights in the historical construction of 'land' in South Africa. In Chapter 6 I review the development context of the democratic transition and persistent crises of poverty, inequality and HIV/AIDS. Chapter 7 examines the rights-based land policy and Chapter 8 the policy regarding tenure in state-claimed lands, with emphasis on Trancraa (1998).

Part III presents a case study of the 'transition phase' of Trancraa in Namaqualand during 2001 and 2002, with the emphasis on Pella. Chapter 9 sketches a history of the Namaqualand 'rural areas' and land reform after 1994. Chapters 10 to 18 document the Trancraa process in Pella and Komaggas in some detail, addressing participation and resistance, selected individual experiences and the conflicts or resolutions over land development. Civil society organisations promoted rights to information and participation and consultation, but the process had signs of a 'democratisation of disempowerment' (Aké

1995).

Part IV, 'Connections', elaborates the interpretation by discussing rights, entitlement/capability dynamics and the discursive construction of land. I interpret the way the government's offer that *it is your land* differed from and clashed with the residents' claim that *it is our land*. After the process of consulting, voting and reporting, key actors found that the tenure options and a transfer of land appeared risky without guarantees of public support.

We may profess concern about human well-being but often neglect one of their important bases, secure claims to streams of benefits, or property rights (Bromley 1991: 2). Respondents in Namaqualand came back to the idea that there is a minimum of which no one may be deprived. Some said that a man may have tenure to a well that he dug, but he could not sell it or deny anyone free drinking water from it. A police officer said that while collecting minerals was prohibited, he accepted the 'right to life' of individuals or families with no other income. A woman stock farmer in Pella said that 'those who own the most stock want to rule over those who have less, but we have all got rights here'. Protecting life, political participation and allowing individuals to flourish and contribute to the development of society – these may be key aspects of land tenure as a human rights issue. Yet to see that it may be rewarding to examine processes of listening, debating and strategising in which Namaqualand rural residents and land reform organisations were highly skilled. I suggest that there is a good deal to be learned from the civil society organisations and officials who in Namaqualand in 2001 and 2002 said that *it is your land*, and from residents who said *dis ons grond, it is our land*, and who may, for all I know, still be saying just that.

## 2. HUMAN RIGHTS AND LAND TENURE

### 2.1 Human rights

#### 2.1.1 From 'modern' to 'contemporary' human rights

Human rights are humanity's most elaborate attempt at formulating shared values and legal norms; they are also recent, marginal and poorly institutionalised. Upendra Baxi (2002: xi) says that 'we have as yet no historiography, nor an adequate social theory of human rights'. He suggests that we distinguish between 'modern human rights', formulated in a few European nations and North America from the late eighteenth century, and 'contemporary human rights' formulated and promoted through the United Nations since 1945 (Baxi 2002: 27–8). Rights rhetoric came centre stage through the political revolutions of the eighteenth and nineteenth centuries but the modern 'rights of man' generally excluded women, children, heathens and peoples seen as non-civilised (Chanock 2000). Rights declarations were made alongside 'practices of cruelty' by colonial powers that claimed a right to govern other peoples and often decided unilaterally which forms of tenure to recognise: 'modern human rights' were 'unabashedly relativistic', meaning relative to European civilisation and race (Baxi 2002: 30–31 and 102).

Baxi's 'contemporary human rights' responded to Europe's catastrophes of war and totalitarianism. It involved the creation of the United Nations Charter in 1945<sup>4</sup> and a series of later declarations and conventions.<sup>5</sup> Only four African states participated in the formulation of the Universal Declaration 1948 (An-Na'im 2003: 9) but the 'authorship' of human rights slowly diversified to reflect resistance to colonialism and racial discrimination, and was increasingly affected by social movements. Although narratives of origin still tend to make human rights the 'patrimony of the West', other justice traditions contribute to the human rights discourse (Sen 1999: 231–48; Baxi 2002: 25). In 1993, the Secretary-General of the United Nations, Boutros Boutros-Ghali, called human rights 'the Common Language of Humanity'. Baxi writes that 'never before have the languages of human rights sought to supplant other ethical languages ... the human rights sociolect emerges, in this era of the end of ideology, as the only universal ideology in the making, enabling both the legitimation of power and the *praxis* of emancipatory politics' (Baxi 2002: 5. Italics in original).

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<sup>4</sup> Requiring members to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion' (United Nations 1945 Article 55).

<sup>5</sup> See the end of the reference list for an overview of major instruments and South African ratifications. Universal Declaration of Human Rights (UDHR) (United Nations 1948); International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR); International Covenant on Civil and Political Rights (ICCPR) (United Nations 1966); Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965; African Charter on Human and People's Rights (ACHPR)(OAU 1981); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (United Nations 1979). Major source used: (UN-CfHR 1994a; UN-CfHR 1994b).

### 2.1.2 Claims to universality and practised norms

One may think of human rights as existing at different levels: (1) as inherent in every human being as universal moral claims; (2) as ancient and diverse histories of defending similar values and concerns;<sup>6</sup> (3) as codified in international and national law (a 60-year history); (4) as promoted through social struggle, learning, law, administration etc.; and (5) as fulfilled in individuals who enjoy secure access to the object of their rights.

Human rights are claimed to be ‘universal, indivisible and interdependent and interrelated’ (United Nations 1993: Vienna Declaration. Part 1, Art. 5). Human rights are ‘those claims which every human being is entitled to have and enjoy, as of right, by virtue of his or her humanity, without distinction on such grounds as sex, race, colour, religion, language, national origin, or social group’ (An-Na'im 2003: 3). They express what *must* be afforded and what *may never* be done to any human being. (Cranston 1973: 36). Thomas Pogge (2002: 54) has argued that human rights are the best available universal ethic in the struggle against global poverty: they are *weighty concerns* (that normally ‘trump’ other moral or non-moral concerns); *unrestricted* (do not depend on specific cultures and values) and *broadly shareable* (capable of being understood and appreciated everywhere). Equality with respect to human rights means that a) all individuals have the same rights and that b) the moral significance (or weight) of a right does not vary according to who holds it (Pogge 2002: 57). Human rights demand that we pay special attention to individuals whose rights are threatened or regularly unfulfilled.

Claims that human rights are universally valid may rely on a variety of arguments. One view is that that ‘all human rights derive from the dignity and worth of the human person’ (UDHR 1948, Preamble and Art. 1). Another view is that human rights are universalised through adoption by nearly all states of the world (Nyamu-Musembi 2002: 3). An-Na'im (1992) and Mutua (1995) have argued that human rights become representative of and legitimate in diverse cultures through long-term processes of debate and practice, including participating in the formulation of human rights standards, which ought to be open to revision. A scholar of South African customary laws holds that conflict between customary laws and practices and human rights is inevitable because these rights ‘betray at every turn their origin in western law and philosophy’ (Bennett 1999: 1). Mamdani (1989: 1-2) suggests that rights are linked to a universal phenomenon of oppression and resistance. And Shivji (1989) argues that ‘[h]uman rights talk constitutes one of the main elements in the ideological armoury of imperialism. Yet from the point of view of the African people, human rights struggles constitute the stuff of their daily lives’. Shivji rejected imperialist uses, yet recover another meaning of human rights in everyday practice. In an actor-oriented perspective, human rights interpretation is informed by priorities and experiences in social struggles.

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<sup>6</sup> As when Mandela (1994: 540–1) recalled Sophocles’ Antigone, ‘who symbolised our struggle; she was, in her own way, a freedom fighter, for she defied the law on the ground that it was unjust’.

People shape rights by using their various notions of justice, transcending cultural and legal limitations: 'They use an otherwise legalistic discourse of rights in a transformative manner that translates into an effective challenge against power inequalities' (Nyamu-Musembi 2002: 1-2).

Both universalists and relativists have neglected the way people negotiate and reformulate human rights in practice (Benda-Beckman 2001). Western propaganda has presented human rights as inherent in an evolutionary path of Western civilisation, while they were actually the outcome of social struggles (Chanock 2000: 15). The state must reach out to actors in more ways than through its authority-based legal system. Actors change through socialisation processes that involve bargaining, moral consciousness raising, 'shaming' and dialogue (Risse, Ropp, and Sikkink 1999: 11). Language is contextual and performative. Whether we respect human rights is partly a result of whether we trust the actors who claim to defend them, such as governments that go to war and corporations and agencies that incorporate human rights in their profiling. Thus, through networks of power relations and action, human rights may make certain ways of seeing human beings appear realistic. Baxi calls human rights 'protean forms of social action' against global and local inequality and exploitation.

### 2.1.3 Critical comments – 'the dead hand'

Human rights represent a relatively marginal tradition in political practice and scholarship. I have for better or worse not engaged the critiques, but here I will mention a few points and elaborate on one. Bentham rejected the natural law idea that rights can precede their legal formulation and guarantee. Marx suspected that law represents class interests. For decades human rights discourse neglected gender equality and used a male-biased language. Non-compliance cannot challenge the normative validity of human rights but it does weaken claims that adoption of the rights has proved that they enjoy widespread support or that human rights are backed by international power. There are many other questions I do not address,<sup>7</sup> except through the critical examination of whether human rights make sense in relation to tenure reform in South Africa. Baxi has declared his ambivalence about 'rights talk' that may blind us to the reality of poverty and suffering. 'Human rights arise and grow out of the power of social protest and movement ... dissociated from the matrix of human suffering and the powers of resistance, human rights discourse assumes forms of alienated knowledges leading only to what has been termed poignantly "democratisation of disempowerment"' (Baxi 2002: 96, referring to Aké 1995). That dissociation, I think, is an

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<sup>7</sup> For example, the production of rights statements may appear ad hoc and slow. The promoters believed that it was important to make the Universal Declaration (1948) legally binding, but it took eighteen years to produce the International Covenants. The Universal Declaration did not use categories of rights, but the 1966 Covenants split them into 'civil and political' versus 'social, economic and cultural' owing to the Cold War power relations. This has since been seen to cause a regrettable split and neglect of social, economic and cultural rights (Eide 2001: 3).

ever-present risk in human rights policy and research.

Harri Englund (2000) asked whether 'human rights talk enforces, like a dead hand, a particular understanding of human dignity', oppressing other discourses and the practices they support. By attributing legitimacy only to certain moral notions in public discourse, human rights define the acceptable and conceivable.<sup>8</sup> He found it important to 'appreciate the situational variation of religious and political beliefs but to indicate forms of social relationships and moral being which may become overshadowed by a single-minded interest in human rights'. Thus, it is important to consider whether 'rights talk' limits our understanding of social and political problems. This critique appeared relevant for my interest in the discursive construction of land tenure under a state-driven reform. Are human rights 'dead' or 'alive' in this sense? Local idioms of ownership are embedded and flexible and difficult to codify and protect by national states or international regimes (Scott 1998). A human rights based tenure reform in Namaqualand could strangle diversity through dominance or cause it to wither through irrelevance.

## 2.2 Land tenure as a human rights issue

### 2.2.1 Sceptical and favourable viewpoints

A fellow participant at a human rights course at the University of Oslo in 2000 found my proposed study of land and human rights interesting said that in her opinion 'land is not a human right, just so you don't forget that'. Her scepticism is understandable. Intuitively there are tensions between the ideas of human rights (that we all hold) and property rights held by defined individuals or groups. To have property rights is (to some extent) the freedom to disregard and reject some claims asserted by others. 'Land' can apparently not be one of the 'minimum threshold' values that human rights protect, and that give rise to international obligations. Land is not universally necessary for individual welfare: providing enough and suitable land for diverse human purposes should perhaps rather be regarded as a 'social goal'. Furthermore, local notions and practices of justice may be more appropriate than abstract rights when addressing land. Shivji, for example, evokes values of village democracy in a critique of individualist, contract-based justice in the 1999 Tanzania Land Act (2000: 38, 44).

Against these sceptical objections, I suggest that land tenure is affected by human rights in particular and interesting ways, involving different levels of policy and practice:

- *Access to land*. This refers mainly to rights to redress for past violations (restitution), life,

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<sup>8</sup> In a Malawian case, Englund saw Catholic leaders as promoting human rights, for example by stressing political mobilisation, while members of other churches challenged the democratic ideals and adhered to other experiences of spirituality and human dignity. He found their views valuable as a contribution to a 'true pluralism of moral ideas' and because 'they contain their own tools for an effective critique of power'. He believed Malawian leaders had 'embraced the discourse of rights with such vigour that it is becoming the only language that persons in public offices are able to speak' and that many NGO staff were more 'attuned to donor fashions than to social situations in rural areas'.

health, food and work, and a positive right to own property.

- *Protection of rights and interests.* This means protection against arbitrary violation of property; right to movement and residence; privacy, home and security
- *Equality, democratic procedure and governance.* These are rights to equality, non-discrimination, equality before the law, information and participation in governance, and respect for local tenure practices, for example under 'customary law'.
- *Provision of public support.* These are rights to public service, education, technology and finance.
- *International cooperation for development.* This refers to an international order protecting rights; people's rights to independence and control over natural resources; and rights to international cooperation and development support.

### 2.2.2 Allocation and access to land

In many contexts people make strongly felt and argued claims to obtain land. Human rights may provide arguments in support of such claims and give rise to duties to provide land to individuals, families or groups, depending on the context.<sup>9</sup> The context may be the present or past role of land for life, freedom or health. Everyone has rights to life, liberty and security of the person (UDHR 3, RC 6) and a 'standard of living adequate for health and well-being', including food, clothing, housing and medical care (UDHR 25). Land is not a 'basic need' but often plays a vital role in rural people's livelihoods.<sup>10</sup> 'Just and favourable remuneration' for work (UDHR 23.3, ACHPR 15) may also be impaired by insecure access or rights to land. CECSR<sup>11</sup> confirms the rights of everybody to an adequate standard of living and freedom from hunger (11, 13.1). For large groups, lack of secure access to adequate land may hinder realisation of their rights to well-being as per the UDHR and ICESCR. ICESCR (11.2.b) mentions the obligation to carry out agrarian reform to realise the right to food. Some 'soft law' emphasises rights to land resources, for example 'Agenda 21' (United Nations 1992) and the 'Beijing Declaration and Platform of Action'(1995).

Human rights may also be seen as providing a positive right to property (discussed by Banning 2002). Restitution is another argument for public provision of land. The guarantee of property rights combined with the right to redress for acts violating fundamental rights (UDHR 8 and CCPR 2.3a)<sup>12</sup> can establish a right to get (back) land, or other compensation. I have

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<sup>9</sup> 'Needs give rise to weighty moral demands. The object of these basic human needs is the object of human rights' (Pogge 2002: 58).

<sup>10</sup> 'As far as the logic of a rural agricultural population of smallholders is concerned, if you do not have a piece of productive land you do not have food and your family may die. The right to life in an agrarian society can be conceived as the right to access to land and all the inputs, such as water, necessary to make it minimally productive. Hence for the rural agriculturalists, the most urgent issue is not about human rights as a conception, but about survival in the here and now, and to whom to turn for some guarantee of security' (Moore 1998: 46).

<sup>11</sup> ICESCR is signed but not ratified by South Africa (UNDP 2005: 322).

<sup>12</sup> The UDHR (8) states: 'Everyone has a right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'. I take 'law' here to include international human rights law.

thus mentioned three distinguishable human rights that support the claim for access to land: right to livelihood or work; right to restitution; and property as substantive right (the last is discussed further below).<sup>13</sup>

### 2.2.3 Protection of rights and interests

UDHR 17 declares a general right to own property and protects existing individual and collective property rights against arbitrary dispossession.<sup>14</sup> It resembles the claim in the 'Bill of Rights' that the ANC prepared as an input to the Atlantic Charter five years earlier, in 1943.<sup>15</sup> The positive right to own property (17.1, against deprivation) must be seen in relation to other rights to welfare, work, non-discrimination and freedom of association. The negative right (17.2, against arbitrary dispossession) must take into account equality (non-discrimination), the rule of law and security of home and person, as well as the positive rights of others to own property. In the same way as the right to water (Committee on Economic, Social and Cultural Rights 2002), the right to property has a 'freedom' dimension (from arbitrary interference) and an 'entitlement' dimension (to a minimum level of resources, services and security). The African (Banjul) Charter on Human and People's Rights also guarantees rights to property.<sup>16</sup> UDHR 17 and the African Charter 14 require respect for property rights without holding certain property institutions (such as formal title) superior to others (such as rights of use).<sup>17</sup> The human rights basis for demanding changes in tenure is, then, not a specific institutional form (state, community or individual) but rather that tenure is linked to denial of or insecure access to the objects of human rights.

The right to freedom of movement and residence affects land tenure and governance (UDHR 13.1; CEDAW 15.4). The protection against unlawful attacks on family, home and integrity (UDHR 12; ICCPR 17) were violated during colonialism, through forced removals in 20<sup>th</sup> century South Africa, and again in ad hoc and violent farm occupations in Zimbabwe.

### 2.2.4 Equality, fair procedure and democratic governance

Human rights ban discrimination on the basis of race, colour, gender and religion (UDHR 1,

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<sup>13</sup> I make little reference to the ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries (1989). Land issues are central in the Convention, which provides for recognition of customs (8), protection of land rights (Articles 14 and 15), protection against removals (16), and the right to consultation (17) and provision of more land when 'necessary for the essentials of a normal existence' (19.a). (It creates a state obligation to protect and provide land in some cases.) The Convention is not signed by South Africa. The legal status aside, the political implications of using the Convention are controversial.

<sup>14</sup> Article 17.1: 'Everyone has the right to own property alone as well as in association with others'. Article 17.2: 'No one shall be arbitrarily deprived of his property'. UDHR, 1948.

<sup>15</sup> 'The right to own, buy, hire or lease and occupy land individually or collectively, both in rural and in urban areas, is a fundamental right of citizenship' (ANC 1943).

<sup>16</sup> OAU 1981. Article 14. Quoted section 2.2.5.

<sup>17</sup> However, the right to property is not mentioned in the 1966 Covenants (ICESCR and ICCPR), partly because of the different status of property rights within socialist and capitalist societies during the Cold War (Bugge 1998).



2, 7; ICERD 1,2 etc.; CEDAW 1, ACHPR 18<sup>18</sup>). Violation of rights to gender and racial equality may be a major source of tenure insecurity or exclusion. The right to gender equality includes equal treatment in land and agrarian reform, equal rights of spouses during marriage and its dissolution, including inheritance (CEDAW 14.1, 16). CEDAW (Article 4.1) holds that temporary special measures (affirmative action) to achieve equality shall not constitute illegal discrimination. CEDAW has the clearest international law link between human rights, land and agrarian reform.<sup>19</sup> The African Union has underlined its commitment to gender equality, which is relevant to further implementation of Trancraa and the Communal Land Rights Act.<sup>20</sup>

CERD<sup>21</sup> states that parties condemn and undertake to eliminate racial discrimination defined as:

... any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. (ICERD, 1.1)

To fulfil the right to equality is to secure the enjoyment of all rights and may require affirmative action<sup>22</sup> to remove the effects of institutionalised racism and patriarchy. Racial equality in land tenure and governance applies to land rights per se *and* to the effects of past discrimination.

Procedural rights include equality before the law and fair trial (UDHR 7, 10 CEDAW 15), participation in governance (UDHR 21.1) and the right to information (UDHR 19; ICCPR 19, ACHPR 9).<sup>23</sup> Human rights recognise the freedom of diverse ethnic, religious or linguistic

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<sup>18</sup> African Charter 18.3: 'The State shall ensure the elimination of all discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions'.

<sup>19</sup> In particular: 'States parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development.' Rights listed concern credit, access to markets and technology and 'equal treatment in land and agrarian reform' (CEDAW Article 14.2.g).

<sup>20</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (African Union 2003). The protocol stresses participation rights and equality before the law, including in marriage. The right to food is specified as including measures to provide access to water, energy and land (Article 15). The 'right to sustainable development' places on governments an obligation to 'promote women's access to and control over productive resources such as land and to guarantee their right to property' (Article 18). A widow has a right to inherit an equitable share of her husband's property and continue to live in the matrimonial house (Article 21.1). 'Women and men shall have the right to inherit, in equitable shares, their parents' properties' (Article 21.2). The protocol has been ratified by South Africa and entered into force (2005).

<sup>21</sup> Convention on the Elimination of All Forms of Racial Discrimination (adopted 1965, entered into force 1969) (United Nations 1965).

<sup>22</sup> Or, using a term I like, 'Regstellende aksie' (Afrikaans): action to 'make right', or 'restore justice'. ICERD permits special measures to secure for 'certain racial or ethnic groups or individuals' their 'equal enjoyment or exercise of human rights and fundamental freedoms'. However, such measures must not lead to maintenance of separate rights and shall be discontinued when the objectives have been achieved (Article 1, Subsection 4).

<sup>23</sup> Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law (African Charter 9.1-2).

groups to practise their culture, in so far as these are consistent with human rights (ICCPR 27).<sup>24</sup> In my view this includes cultural and religious values related to land tenure.

### 2.2.5 Public support

'Tenure security' and governance are constituted together. Some duties to provide public support are related to land ownership and use, including education (UDHR 26.1, ACHPR 17), vocational training (CEDAW 10a), equal access to public service (CCPR 25c; ACHPR 13, CEDAW10-15), positive steps to combat real inequality, with particular emphasis on women in rural areas and access to agricultural credit, marketing facilities and appropriate technology (CEDAW 3, 5, 14, 14.2), women in general (AC 18.3), the elderly and the disabled (AC 18.4) and children (AC 18.3, RC 4, 6). Groups who are in a weaker position have a right to positive discrimination and support (CEDAW 4.1, ACHPR 18, RC). The rights discussed throughout this sub-chapter are interdependent: The African Charter on Human and People's Rights interestingly links governance, property and work, a powerful combination of high relevance for land issues.

#### Article 13:

1: Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of law. 2: Every citizen shall have the right of equal access to the public service of his country. 3: Every individual shall have the right of access to public property and service in strict equality of all persons before the law.

Article 14: The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 15: Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work. (OAU 1981)

### 2.2.6 Rights to international cooperation and development

State Parties have committed themselves to developing an international order that encourages national self-determination and free disposal of natural resources and protects against deprivation of the means of subsistence (ICESCR, ICCPR 1.2, ACHPR 20, 21) and promotes engagement in 'international assistance and cooperation, especially economic and technical' (ICESCR 2.1). Recognising the 'right of everyone to be free from hunger', parties commit themselves to 'developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources' (ICESCR 11.2). Land tenure is clearly a feature of agrarian systems. The measure supports the right to food; 'efficiency' must be interpreted with regard to this and other human rights.

The UN Declaration on Social Progress and Development (1969) noted that all peoples and individuals have the right to social progress founded on human rights and justice (Article 1 and 2) and that this requires the 'promotion of democratically based social

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<sup>24</sup> ILO Convention 169, Article 8.2 provides that 'these peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the

and institutional reforms ... including land reform, in which the ownership and use of land will be made to serve best the objectives of social justice and economic development' (18.b). Again 'democratic agrarian reforms' were aimed at the production of food and 'its equitable distribution among the whole population' (18.c). These links reflected a political climate where key actors believed in public responsibility for the distribution of property rights to land. The more recent Declaration on the Right to Development (United Nations 1986) holds that states should undertake 'all necessary measures' to ensure 'equality of opportunity for all in their access to basic resources' (Article 8) but does not mention land and agrarian reform, by that time no longer central in development thinking.

### 2.2.7 Summary: A list of human rights relevant for land tenure

I have suggested a normative conception of the relationship between a democratic state and citizens in land affairs by mentioning selected articles and summing up a list of rights that constitute land tenure as a human rights issue (Table 1, page 22). One could argue that this is banal: simply stating that land affairs do not exist outside human rights. However, remembering rights in different sectors of society requires continuous effort: rights can be 'put to work' or abandoned. Human rights address universal human capabilities and vulnerabilities (such as the need for food, shelter and physical integrity) and may thereby provide arguments for expanded access to land; some state positive obligations regarding the democratic order and public services; some are about absolute bans on discrimination and violation of rights to life, health and liberty; and some are procedural requirements concerning how society may change property rights. Secure tenure for the individual is part of an institutional order that protects rights and freedoms (UDHR 28). To 'realise rights' is to address the vulnerability of individuals 'in the lived and embodied circumstance of being human in time and place' (Baxi 2002: 94), considering everyone, but vulnerable groups in particular. A review of human rights and land law in southern and eastern Africa argues that political rhetoric often exaggerates differences between the norms of different parts of the world, while it is common that both national and international law lack grounding in the lives of the women and men who use the land (Ikdaahl et al. 2005: 86). An integrated human rights framework for assessing links between property rights, livelihoods and broader social and economic rights can be used to balance individual and social justice concerns (Hellum and Derman 2004). States must respect, protect and fulfil these and other human rights. 'Respect' requires that states do not take action that interferes with the achievement of the object of the right, such as food; 'protect' means that the state takes measures to ensure that other actors do not deprive individuals of access to their rights; 'fulfil' includes to 'facilitate' and to 'provide'. 'Facilitate' means that: 'the State must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure

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national legal system and with internationally recognized human rights'. The general thrust of the ILO Convention 169 is to actively promote and fulfil cultural rights, including through land policy.

their livelihood' ... whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly' (Committee on Economic, Social and Cultural Rights 1999: Article 15). Theoretical definitions or lists of human rights are 'wishful thinking' if we do not clarify how they are to be achieved (An-Na'im 2003: 3). If human rights are to be more than just 'manifesto rights', we must make them effective through institutionalised practices.

Table 1: Rights that constitute land tenure as a human rights issue.

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1. Rights to redress for past violations of human rights (UDHR 8; ACHPR 20, 21).
  2. Rights to livelihoods and welfare with particular emphasis on vulnerable groups (UDHR 25; ICESCR 11.2, RC 4 and 6).
  3. Right to work and to just and favourable conditions of work, including equal pay and human dignity (UDHR 23; ICESCR 6, 7).
  4. Right to hold property; the state must acknowledge and register individual, family and community use rights as a basis for present and future protection (UDHR 17.1; ACHPR 14, 18). The state must protect individuals against changes in rights other than by legal procedures consistent with human rights (UDHR 17.2; ACHPR 3, 14).
  5. Rights to privacy, home, security and freedom of movement (UDHR 3, UDHR 12, ICCPR 17, ACHPR 6, 12).
  6. Rights to democratic governance (UDHR 2, 21.1; ACHPR 3, 9, 10, 11, 13; ICCPR 26).
  7. Rights to real gender equality in access, ownership and governance of land (UDHR 1, 2; CEDAW 1, 3, 5, 14, 14.2; ACHPR 18).
  8. Right to real racial equality in access, ownership and governance of land (UDHR 1,3,7; ICERD 1, 2; ACHPR 2,4,5).
  9. Rights to practice land tenure as a cultural freedom (and related values and experiences of dignity) when consistent with human rights (ICCPR 27; ILO 169, 8, 12, 14, 15).
  10. State obligations to carry out agrarian and land reform where it can lead to more efficient use of natural resources (ICESCR 11.2).
  11. States parties' obligations to provide international assistance and cooperation in support of welfare and livelihood objectives and to provide redress for past injustice (ICESCR 2.1, 11; ACHPR 21, 22; UDHR 8).
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Universal Declaration of Human Rights, 1948 (UDHR); International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR); International Covenant on Civil and Political Rights, 1966 (ICCPR); Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965; African Charter on Human and People's Rights, 1986 (ACHPR); Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW); Convention on the Rights of the Child, 1989 (RC).

### 3. INSTITUTIONALISING RIGHTS: PROPERTY, POWER AND DISCOURSE

#### 3.1 Land tenure reform: Negotiated change?

##### 3.1.1 Land tenure and property rights

Webster's Dictionary defines land as, 'any part of the earth's surface which can be owned as property, and everything annexed to it whether by nature or by the hand of man': seeing land as owned, or waiting to be owned, through the eyes of an institution of property, as it were. Tenure is 'the terms on which something is held: the rights and obligations of the holder' (Bruce 1998: 1). Property means rights to streams of benefits, a triadic relationship between right-holders, others and resources (Bromley 1991: 2). Land tenure may be seen as a bundle of rights – to access, use, exclude others, manage or alienate (Schlager and Ostrom 1992). 'Security of tenure' is about the breadth of rights (resources and types of rights), duration and assurance (Roth 2002: 1). However, a human rights perspective opens up wider issues of equality and governance. Men and women maintain and change land tenure by asserting, contesting and enforcing rights, which may be key to gendered power relations among individuals and groups (Berry 1993; Agarwal 1994; Nyborg 2002). The struggle over land tenure as a human rights issue is partly about whether it shall include individual equality, democratic participation and public support or merely giving people legal proof of what they own.

Cousins (2000: 7) suggests that 'land reform' is the redistribution of land to change the structure of land holdings and the character of land rights. 'Agrarian reform' is a fundamental transformation in the social and political relations which underpin systems of production, changing the balance of power between different classes in the countryside. Bruce (1998: 2) defines 'tenure reform' as 'legal reforms of tenure whether by the state or local communities' but leaving holders with the same land. However 'tenure reform' is 'potentially' nested within an agrarian reform for more comprehensive social change – here lie political tensions and empirical questions about the social depth of legal reform.

##### 3.1.2 'Seeing like a state'?

Users, policy-makers and researchers interpret changing African land tenure systems in unstable ways. Academic debates have often been linked to changing external interests, including colonial rule, promoting cash crop production, developing a class of 'yeoman farmers' in the 1940s and 1950s, post-liberation reforms in the 'land reform decades' of the 1960s and 1970s, and rural crises of 'resource degradation' and 'inadequate food production' in the 1980s (Peters 2002b: 45). Land tenure is a field of tension between governance and economic policy from 'above' and agency, resistance and evasion from 'below' (Scott 1985). Many land tenure reforms, both socialist and market-oriented, have failed (Toulmin and Quan 2000: 2). After a history of focusing on law as a rule-based order that determines and

explains social practice, Sally Falk Moore shifted the focus of socio-legal research from 'law as rules' to 'law as process', 'a peculiar mix of action congruent with rules ... and other action that is choice-making, discretionary, manipulative, sometimes inconsistent, and sometimes conflictual' (Moore 1973: 3). Land rights are rooted in knowledge, human relations, ecological flows, technology, markets and power – 'the place, the setting, the history and the moment all matter' (Moore 1998). She challenged top-down approaches, showing with life stories from Tanzania and the Sahel how people resisted and transformed legislation, guided by their knowledge and needs (Moore 1998: 37, 44).

James Scott has argued that centralist land reforms involved 'seeing like a state'; simplified readings of 'exceptionally complex, illegible, and local social practices, such as land tenure customs' (Scott 1998: 2). The 'great utopian social engineering schemes' had in common four elements that are 'necessary for a full fledged disaster': 1) administrative orderings, 2) modernist ideology and an uncritical faith in science, 3) authoritarian states using coercive power and 4) a civil society without capacity to resist centralist plans (Scott 1998: 4–6). The 'planned orders' failed because they ignored features of 'functioning social orders', particularly informal practices and improvisations that cannot be codified (Scott 1998: 6). Therefore, the existence of diverse tenure practices favours the idea of decentralised negotiation. Yet, in a situation of inequality the state must provide leadership and resources – and employ officials who are able to 'read' the reality of tenure practice.

I assumed that a legalist human rights perspective could be too top-down for analysing local tenure practices. On the other hand studies in 'legal pluralism' show that there may be 'more than one legal order, based on different sources of ultimate validity and maintained by forms of organisation other than the state, within one political organisation' (Benda-Beckman 2001: 48). Actors combine different sources of law, in for example local court practice and interaction with local officials (Hellum 1999). This view challenges legal centralism, the view that state law 'is the most important normative order and all other norm creating and enforcing social fields, institutions and mechanisms are either illegal, insignificant or irrelevant' (Bentzon et al. 1998: 31). It is different from 'lawyer's legal pluralism', which recognises plural legal systems, but only as defined and controlled by statutory law (Bentzon et al. 1998: 33).

### 3.1.3 Interpreting negotiability

A global review found that land reforms have often been exploitative but could be improved through decentralised negotiation.

Whenever a reformer (such as a king, a government or a junta) has changed the land tenure system by fiat, he, she, or it has retained a substantial portion of the rights instead of yielding them to the peasant. This observation applies universally, from the ancient world to the Third World today, in 'capitalist' and socialist countries alike. But it cannot apply where there is no 'reformer': where land reform occurs instead by negotiation among the many parties concerned. (Powelson 1988: x)

This raises the question of whether 'reform without a reformer' can change highly unequal agrarian relations without firm public policy. In the South African case, land tenure is the result of considerable 'social engineering' that transformed the geography and local institutions (Hendricks 1990). A democratic state aiming to undo what an authoritarian state created will meet resistance; yet, '[t]he state must do something, for to do nothing is to side with the party protected by the status quo property arrangement. One party's government interference is another party's liberation' (Bromley 1991: 20).

Peters (2002b) suggests that there are three major views of the link between negotiability and security of land tenure. One view holds that the ambiguity and negotiability of land rights under 'communal tenure'<sup>25</sup> creates uncertainty and disincentives for resource conservation and investments. Within a market-oriented development strategy, negotiation occurs instead between actors who hold and transact with legal rights. A second view sees 'negotiability' within communities as the key to the redistribution of rights and access for poor households (Berry 1993). Negotiability of tenure systems is both a product of and a condition for production systems suited to ecological, economic and demographic uncertainty (Peters 2002b: 46). Correcting a focus on 'institutions as rules' (North 1990), some studies argue that social and ecological uncertainty requires flexible, often non-codifiable policy and legislation (Mehta et al. 1999): property and governance regimes work because they are characterised by ambiguous rules, changing memberships and contested boundaries. Institutions 'reduced to rules' are too narrow to understand social practice and must include meaning, power, conflict and contestation (Peters 2002a). People use diverse idioms of residence, life history and kin to justify claims to land and capability practice (Gore 1993; Leach, Mearns, and Scoones 1999: 233). This challenges property rights theories that assume or prescribe that development requires formalisation of rights, primarily in the form of individual title. Other normative points raised against 'titling' approaches are that they generally favour richer, powerful members who can control bureaucratic processes; register primary rights and ignore secondary and seasonal rights that may be safety nets for the poor (Platteau 2000; Woodhouse 2003: 1713); are gender biased in their exclusion of women from de facto rights (Walker 1998); have not led to projected productivity gains (Migot-Adholla et al. ; Sjaastad 1998); involve risks of losing land through distress sales or defaulting on loans, and result in loss of flexibility (Berry 1993). These points have been raised against Hernando de Soto's approach to the 'formalisation' of property rights (1.2.2) (Mathieu 2002; de Soto 2002b).

As a 'third' position, Peters (2002b) argues that while negotiability may support security and redistribution these functions are in some cases eroded by commodification, centralisation and class formation, particularly where water sources, peri-urban location or

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<sup>25</sup> Bruce (1998: 2) holds that 'communal' is not a legal term but an invention by western social scientists to label tenure practices they did not recognise. However, In South Africa the 'Mission Stations and Communal Reserves Act, 1909' gave the term legal status quite early.

development projects create high land values. Then informal flexibility may no longer protect access for the poor: 'ambiguity may be a cloak for privilege and class as much as a space for action by the powerless' (Peters 2002b: 56). From either perspective the 'negotiability' of tenure institutions, within and between levels of society, appears key to tenure reform in a human rights perspective.

Yet, protection or exclusion from property is not always complete: to some extent it is a fiction that the state is the sole source of 'rights' (maintained by those who control and benefit from it). Narratives and persuasion are involved: property may be a position one has talked oneself into and maintained through discourse (Rose 1994: 6-7). However, it matters greatly who is doing the talking and what power and sanctions they command. In South Africa the state used property rights to exclude the majority from equal participation in economic, social and political life (Plaatje 1916). Presumably the democratic state provides a better framework for negotiations. However, one cannot just set about negotiating 'among the many parties concerned' (Powelson 1988). Cousins has stressed how tenure reform may involve a 'protracted process of negotiations, investigations and group decision-making' so that 'to develop viable common property regimes must be recognised as time-consuming, messy and contested in character' (Cousins 1995: 12). There are many questions about whether and how redefined rights can give effective command over resources (Cousins 1997). Thus, historical experience did not point towards, and South African expertise did not expect, plain sailing in tenure reform.

## 3.2 Social justice and rights

### 3.2.1 'Not simply a matter of law'

Land tenure is 'not simply a matter of law but an issue of justice' (Shivji 2000: 37). Social justice assesses institutions and the general institutional order and has a substantive dimension (justness of outcome) and a procedural dimension (fairness of process) (Rawls 1971; Jacobs 1995: 156-7). Ideas about justice may refer to human dignity, honour, affluence, happiness, power or freedom. Most approaches to social justice apply a concept of equality in some 'space' or dimension, such as resources, income, liberties and reward for effort or basic need fulfilment (Sen 1980; Sen 1992: 17; Sen 1992: 2). Pogge (2002: 33-4) has argued that we need 'a single, universal criterion of justice' as the basis for judging and reforming global institutions because interconnections 'render obsolete the idea that countries can peacefully agree to disagree about justice, each committing itself to a conception of justice appropriate to its history, culture, population'. However, he suggests that to respect the diversity and autonomy of individuals (avoiding paternalism), a universal social justice must focus on solid minimum thresholds for essential means (such as food, shelter and basic freedoms). It must be non-exhaustive (societies can add more demanding criteria) but preeminent (not outweighed by national and local criteria) (Pogge 2002: 36-7).



John Rawls's (1921–2002) work on 'justice as fairness' focuses on the challenge of balancing liberal and egalitarian principles. Justice is the first virtue of social institutions, as truth is for thought (Rawls 1971: 3). Laws and institutions *must* be reformed or abolished if they are unjust. Rawls argues that 'institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life' (Rawls 1971: 5). His concept of justice involves a principle of equal liberty (about freedom of speech and conscience, and so on, which belong equally to all and may be limited only when incompatible with the liberty of others) and a principle of fair equality of opportunity, with two requirements: (i) Opportunities to achieve desirable positions should be distributed equally to all and (ii) Socio-economic advantages or primary goods (income, wealth, power, the social base of self-respect) should be distributed with primary concern for the least advantaged as expressed in the 'maximin' principle): if there is an alternative arrangement that makes the least advantaged better off without making anyone worse off than the least advantaged now are, then that change must be implemented (Rajan 2002).

Rawls wrote (normatively, I suggest) that the 'background institutions of property-owning democracy, with its system of (workably) competitive markets, tries to disperse the ownership of wealth and capital, and thus to prevent a small part of society from controlling the economy and political life itself' (Rawls 1990: xiv-xv). This is in contrast to a welfare state that relies on redistributing income to prevent individuals from 'falling below a decent standard of life': he believed that system might allow large inequalities to persist. Instead, he advocated 'widespread ownership of productive assets, and human capital (educated abilities and trained skills) against a background of equal basic liberties and fair equality of opportunity'. He believed that 'it is simply reasonable to offer fair terms of cooperation to other free and equal citizens, and it is simply politically unreasonable to refuse to do so'. If citizens were instead amoral or even 'incurably cynical and self-centred', it might not be worthwhile for humans to live on the earth (Rawls 1999: 88, 128). And, for many, it might not be possible.

### 3.2.2 Rights

#### *Language of dignity and protest*

Nelson Mandela wrote that prison was a microcosm of apartheid society, a struggle to preserve dignity and fight oppression. Even though the racist rules – such as prescribing different amounts and kinds of foods for different racial groups (Mandela 1994: 466) – were a mockery of his ideals, he used his knowledge of regulations and procedural law to fight for better food, the right to study etc. He maintained and inspired a precarious sense that even in the face of oppression one could use rights to achieve things and preserve dignity (Mandela 1994: 464). Having won a fifteen-year degrading struggle for equal food rations, he

also noted that, 'justice delayed is justice denied, a reform so long postponed and so grudgingly enacted was hardly worth celebrating' (Mandela 1994: 598). Playing the game of rights and regulations involved adaptation and concessions, as Mandela was reminded when younger Black Consciousness Movement members responded to silly orders with an irreverent 'What for?' 'I could hardly believe what I had just heard. It was a revolutionary question. What for?' Mandela sympathised with the question but also thought that he as an 'elder statesman' should help the young become less sectarian and join the more inclusive ANC and its programme of action (Mandela 1994: 577–8).

Rights can enrol you in a system where others define the rules. Rights can get you on the defensive; you may instead ask, exactly, 'What for' – demand that rules, particularly constraining or discriminatory ones, are well justified (Daniel Bromley, personal communication, December 2003). Thus, the step from 'social justice' to 'rights' is not self-evident. Mamdani has suggested that a woman in KwaZulu, Khartoum or Paris, may protest against violence by saying that it violated, respectively, her 'custom', her 'dignity' or her 'rights' (2000: 1). The language of protest relates to the language of power: rights talk is appropriate (and sometimes effective) against the power that claims to guarantee rights, just as the language of 'custom' and 'dignity' may be effective against those who claim to protect these values. Whatever the definitions of rights (discussed below), it matters very much how powerful actors use the terms. A right may be defined as a socially sanctioned claim. A holder of a right is entitled to a type of 'right' (claim, freedom, authority or immunity) to a 'good' (advantage, benefit) against an 'addressee' (holder of the correlative burden) in virtue of a 'source of justification' (legal or moral) (Gewirth 1998).<sup>26</sup> To 'make rights real' is to know the basis for a claim, to assert it, justify it, be heard and be able to enforce the right socially, legally or physically. Rights, like game cards, draw their 'value' from systems of meaning. However, cards only change their meaning when the game changes, whereas in politics and practice rights change through less transparent processes of conflict and consensus making.

### *Rights or welfare*

Dworkin argues that individual rights may support laudable social goals but may also be political trumps used to block democratic policy (Dworkin 1977: xi).<sup>27</sup> No one may harm individual rights, and that sets limits to politics.<sup>28</sup> The distinction between welfare goals and rights identifies the problems and potential of (human) rights-based approaches. If property

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<sup>26</sup> Presented by Lindholm, Tore. 2000. *What kind of animal is a right? – The nature of rights. Lecture note for course on Human Rights and Conflicts of Norms, University of Oslo, November 2000.*

<sup>27</sup> And: 'If one never has rights to more than a general theory of welfare stipulates, then rights are "silly" and only confirm, rather than trump, collective justifications' (Dworkin 1977: 366). Dworkin (1977: 365) defined human rights as those that carry weight against 'collective justifications' under any circumstances (Dworkin 1977: 365).

rights are seen as inviolable rights, land reform must be justified by other individual rights (I suggested in 2.2 that such human rights are relevant). I sympathise with Dworkin's idea that the basic individual right to equal concern and respect underlies both welfare concerns and other individual rights (1977: xv, 368); yet perhaps he underestimates the policy push that rights could offer in relation to development issues which are seldom clear-cut cases of 'rights' or 'welfare'.

#### *Traction or not*

A pragmatic view of rights emphasises enforcement and end result: 'a right is the capacity to call upon the collective to stand behind one's claim to a benefit stream' (Bromley 1991: 15). 'Rights talk only gets its traction' when the coercive state comes to the aid of the rights-bearers (Daniel Bromley, personal communication, December 2003). A right is a claim that a state or other form of authority has agreed to uphold (Moser and Norton 2001). According to a legal positivist view, rights are constituted by law.<sup>29</sup> However, law is plural and as such there are several sources of rights. Households, communities, states and international communities may be sites of rights struggle and social sanctioning (Nyamu-Musembi 2002: 10; Nyamu-Musembi 2002: 10). The state is not the only means of realisation. Yet one must distinguish between fighting for a good – getting food, land or education – and having access 'as of right'. There must be backing; the talk must have traction. A 'right', then, is a claim that attains legitimacy and impact – traction – through human relations, power relations and material conditions.

In 1988 South African lawyer Geoff Budlender<sup>30</sup> expressed a cautiously optimistic view that legal rights can empower people and give protection against abuse:

It is plainly simplistic and naive in the extreme to place legal representation at the centre point of any strategy for an attack on poverty. However, in recognising this one should be careful not to lose sight of the truth in one of the premises of the 'access' approach: In a society governed by law, the legal system can be a means for people to protect themselves from the bureaucratic abuse, commercial exploitation, and official lawlessness which are generally the lot of the poor and powerless. ... Many clearly unlawful and exploitative practices are the product of cost calculations which change dramatically when complainants have the means to pursue their grievances. (1988: 3)

Lawyers who struggled against apartheid were aware that rights could change the diverse 'cost calculations' underlying political, bureaucratic and commercial decisions and practices.

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<sup>28</sup> Whether the majority prefers a sports stadium to an opera house may matter but 'the fact that the majority thinks that homosexuality is immoral or that cruelty to children is wrong should not, in my view, count as an argument for anything, although, of course, the different fact that cruelty harms children does count very much' (Dworkin 1977: 358).

<sup>29</sup> 'A right has been well defined to be a well-founded claim, and a well-founded claim means nothing more nor less than a claim recognized or secured by law' (Stayton, J. quoted in Hohfeld 1966: note 32a, p. 38). 'The obligation [of a right, duty, contract etc.] is the creature of law' (Hohfeld 1966: 31).

<sup>30</sup> Director-General of the Department of Land Affairs of the Ministry of Agriculture and Land Affairs from 1996 to 2000. During the time of my field work he was Director of the Constitutional Litigation Unit, Legal Resources Centre, South Africa.

There is something 'essentialist' about the idea that the individual brings with him or her 'a right' from meeting to meeting, practice to practice, discourse to discourse. But sometimes it holds, perhaps owing to good lawyers, some of whom become great leaders.

### 3.2.3 Human capabilities

As mentioned, the 'space' in which we measure well-being and equality is not self-evident. An influential perspective on social justice and development is the capability approach (Sen 1985; Sen 1999; Nussbaum 2000; Shanmugaratnam 2001). In judging human well-being Amartya Sen learned from the liberal principles of Rawls but also from an Aristotelian tradition of seeing the good of human beings as deriving from their nature, what they are 'good at'. According to Aristotle the lowest level of ethical behaviour is to follow rules because one expects a reward or punishment, a higher level is to act correctly out of respect for rules *per se*, and the highest level is to do so based the critical awareness of 'the human good' as an end (Stigen 1983: 158).

Sen defines *entitlements* as the 'command over commodities', 'functionings' as 'what a person succeeds in doing with commodities ... [such as] being well-nourished, well-clothed, mobile, taking part in the life of the community'. *Capabilities* are 'the freedom that a person has in terms of the choice of functionings ... it reflects the various combinations of functionings (beings) he can achieve' (Sen 1985: 10–14). Among different 'informational bases' for making judgements, he suggests that we focus on 'freedom, seen in the form of individual capabilities to do things that a person has reason to value' (Sen 1999: 56). He urges us to consider how individuals vary in their need for and ability to make use of resources. An untrained individual needs such additional support to make use of an economic opportunity. The ability to judge, debate and choose are important human capabilities: this is one reason why Sen refrains from specifying lists of functionings and capabilities and procedures for prioritising between them (Alkire 2002: 184).

An application of Sen's ideas, the *environmental entitlements framework* explores how people turn *endowments* (such as land, livestock and labour) into entitlements (effective command over resources), and human capabilities (Leach, Mearns, and Scoones 1999). The framework focuses on how resource users interact with their environments and a political economy of institutions. Legal reform may work by affecting how land endowments are converted through entitlements to capabilities. To promote tenure-related human rights (say, to gender equality and fair work conditions) one must strengthen entitlements at many levels (legislation, policy, discourses and practices).

Martha Nussbaum has developed the capability approach to analyse human rights and agency in women's lives under unequal social and political circumstances (Nussbaum 2000: 1). She advocates individual capabilities as universal criteria of justice and rejects ethical relativism as an indiscriminate sanctioning of local values and practices, thus often reinforcing dominant groups and perspectives (2000: 49–59). Individuals are born with

universal and pre-social 'basic capabilities' for sensing, growth, emotional attachment, and language (2000: 84), and we develop them through learning, interaction and individual growth. We combine 'developed individual abilities', such as freedom of thought, with external conditions, such as means of communication (Nussbaum 2000: 85). 'Central (or combined) human capabilities' include life, health, bodily integrity, senses, thought, emotions and affiliation with other people; the ability to live with concern for other species, to play. One central capability is to control one's environment: it has a 'political dimension' (being able to participate effectively in political choices that govern one's life; having rights of political participation, free speech and association) and a 'material dimension' (being able to hold property, both land and movable goods, in terms of real opportunity; having property rights and the right to seek employment on equal basis with others) (Nussbaum 2000: 78-80). 'Being able to' and 'having rights' are complementary. Having property is crucial for identity and valuable functionings:

Thus all citizens should have some property, real or movable, in their own names. ... [L]and is frequently a particularly valuable source of self definition, bargaining power, and economic sustenance, so one might use the list [of central human capabilities] to justify land reforms that appropriate surplus land from the rich in order to give the poor something to call their own. (Nussbaum 2000: 80, fn. 86)

We may thus see secure land tenure and farming, or other land uses, as functionings directed to maximise human capabilities. 'The more crucial a functioning is to attaining and maintaining other capabilities, the more entitled we may be to promote actual functioning in some cases, within limits set by an appropriate respect for citizen's choices' (Nussbaum 2000: 92).

In stressing individual needs, hopes, life plans, emotional capability and human interaction (302), Nussbaum goes beyond 'rights' as legal rules. Still, below certain thresholds capabilities are not worthy of a human life, which places absolute obligations and prohibitions on government and other actors, for example to alleviate poverty.

In certain core areas of human functioning a necessary condition of justice for a public political arrangement is that it delivers to citizens a certain basic level of capability. If people are systematically falling below the threshold in any of these core areas, this should be seen as a situation both unjust and tragic, in need of urgent attention – even if in other respects things are going well. (Nussbaum 2000: 71)

Here Nussbaum emulates a policy oriented rights perspective. Capabilities 'root' rights in the lives of individuals and may be articulated as demands on society. Poverty may undermine the ability to understand, pursue and enjoy rights and freedoms, including to freedom of movement, health and access to justice or informed political participation (Gutto 2001b: 237). Therefore, liberal policies of non-interference are seldom enough to enable individuals to realise capabilities as positive freedoms (Shanmugaratnam 2001: 271). Focusing on capabilities – what individuals can do in practice in the situation in which they live – may counter the tendency of liberal political philosophy to overlook material and power

imbalances. I return to the differences and complementarity between rights and capabilities in the discussion (Part IV).

### 3.3 Institutions, power and discourse

#### 3.3.1 Institutionalising human rights fulfilment

##### *Institutional schemes of protection or violation*

I noted Rawls' requirement that institutions must be just. Thomas Pogge has elaborated an institutional perspective on human rights. He challenges the view that a 'human right to X' necessarily requires a 'legal right to X', that is, protection in national law (Pogge 2002: 45). Pogge thinks the demand for juridification is partly too strong (because the objects of some human rights, such as food security, may be secure without legal protection) and partly too weak because legal rights commonly coexist with non-fulfilment. 'A human right requires its own juridification only when it is empirically true – as it may be for some civil and political rights – that secure access to its object presupposes the inclusion of a corresponding legal right in the law or constitution' (Pogge 2002: 45). He suggests that human rights are claims about institutional schemes (as stated in UDHR 28).

A human right to X is tantamount to the demand that, insofar as reasonably possible, any coercive social institutions be so designed that all human beings affected by them have secure access to X. A human right is a moral claim *on* any coercive social institutions imposed upon oneself and therefore a moral claim *against* anyone involved in their imposition (46). ... The pre-eminent requirement on all coercive institutional schemes is that they afford each human being secure access to minimally adequate shares of basic freedoms and participation, of food, drink, clothing, shelter, education and health care. (Pogge 2002: 51)

Legal rights may be important but often have a different content from a human right. To secure the 'right to food' we may rely on factors such as dispersed land ownership, education, unemployment benefits or sharing (Pogge 2002: 46–7). The same applies to land ownership, use and governance which emerge from a range of factors not all of which are determined legally.

Pogge also shifts the focus from the single rights-violating act to the responsibility for systemic and widespread and prevalent conditions (Pogge 2002: 47). Stealing someone's car, or even their food, although against property and livelihood rights, is not a human rights violation (Pogge 2002: 57). Human rights violations must be in some sense official: capability failures become human rights issues when they are systemic, repeated and condoned or encouraged by official institutions. We are responsible for human rights violations through the institutions that we participate in and/or benefit from. 'Each member of society, according to his or her means, is to help bring about a social and economic order within which all have secure access to basic necessities. This unspecific demand may have quite specific implications in a given social context' (Pogge 2002: 69). Pogge assumes that powerful actors

will respond to rational challenge by committed citizens.

### *Human rights and the imagined state*

Human rights theory generally assumes that states have the capacity to enforce rights through the administrative and legal system. In the state-centric perspective, national states are the providers and violators of human rights through a 'vertical' development of rules through the state administrative and justice systems (Hellum 2000: 44; Cook 1994: 229). Human rights partly reflect a view that people need protection against states as 'predators' (Mutua 2002: 22), but they also rely on courts, written law and education systems typical of state-governed societies. 'Juridically at least, human rights norms are essentially statist in character' (Odinkalu 2003: 1). However, against the doctrine that states are the primary subjects of international law, transnational corporations, financial institutions, non-government organisations and social movements also make the nation state 'the locus for constant renegotiation, realignment and reassignment of jurisdictional powers' (Klug 2000: 55). States may be weak actors even on home turf and they are fragmented by diverse interests. Claude Aké (1995: 73) argues that colonial politics 'was a struggle to capture the state and press it into the service of the captor' and that African nationalists continued to use it this way:

The state is in effect privatised: it remains an enormous force but no longer a public force; no longer a reassuring presence guaranteeing the rule of law but a formidable threat to all except the few who control it, actually encouraging lawlessness and with little capacity to mediate conflicts in society. Politics in Africa has been shaped by this character of the African state. It is mainly about the access to state power and the goals of political struggle are the capture of an all-powerful state, which the winner can use as he or she pleases. The spoils, and the losses, are total. African politics thus puts a very high premium on power. Because power is overvalued, the struggle for it is intense and tinged with lawlessness. (Aké 1995: 73)

Such rather stark and essentialised assessments still affect the prospects of human rights. Odinkalu mentions that An-Na'im (2001: 89) argued that it may be unrealistic to expect post-colonial states in Africa to protect human rights effectively. Odinkalu also expressed a disillusioned view and questioned the tendency to attribute failures only to the 'unwillingness' of states.

The considerable international attention that the human rights project in postcolonial Africa has attracted since the last decade of the 20th century assumed as a given the juridical, empirical, and experiential viability of the African State to sustain the obligations inherent in international human rights norms. Within this framework of analysis, the appalling human rights record of the continent remains liable to be explained as owing essentially to the unwillingness or refusal of the African State to exercise its presumed capacities. (Odinkalu 2003: 3–4)

An-Na'im (2003: 1–2) explores the paradox that under national sovereignty states have the main role in committing and redressing human rights violations while oppressed people are almost by definition unable to demand state accountability. Many African national states lack

resources and effective presence in major parts of their territories and therefore 'ruling elites tend to focus on controlling the government apparatus and patronage system and to strive to retain the support key ethnic leaders, instead of seeking genuine legitimacy and accountability to the population at large' (An-Na'im 2003: 13). Statutory legal systems are inaccessible to large groups and often no more effective in protecting human rights than customary law. Yet An-Na'im nevertheless puts a strong emphasis on statutory law (more than Pogge apparently does), arguing that,

In the present context of state societies in Africa, as opposed to what they may have been in precolonial times, no entitlement can be claimed as of right without legal mechanisms for its implementation or enforcement. That is, whatever other strategies one may adopt for the promotion and protection of human rights, there has to be ways and means for legal protection if human rights are rights at all. (An-Na'im 2003: 10)

An-Na'im argues that the main challenge to human rights in Africa is not inherent cultural values but weak links between states and civil society. He places the onus on citizens themselves to deal with the problem and suggests a criterion of legitimacy in local cultures. Proponents of human rights must 'demonstrate to their local communities the legitimacy and tolerance of international standards in their own immediate context' (An-Na'im 2003: 10). He firmly asserts that, 'the cultural authenticity or practical expediency of customary law should never be upheld at the expense of effective protection of human rights, especially those of women who suffer the most under various customary and religious law systems' (An-Na'im 2003: 25). An-Na'im thus straddles the contradiction between the state's de facto lack of authority in many rural areas and the principled view that local authority systems must be modified to conform with human rights.

Thus, these observers stress the tensions between the 'imagined state' of human rights thinking and the acute lack of capacity of some states. Without projecting either of the two views on a South African society shaped by a powerful state, one may expect uneven capacity for different sectors and geographical areas.

### 3.3.2 Power and discourse

#### *Public power versus the power that produces reality*

We exercise physical power to move a thing; purchase power to buy what we want; political power to influence decisions; knowledge to define a problem or convince; bargaining power to get it our way. Power 'makes sense' to us. Yet moving, buying, influencing and defining are so different that the term 'power' makes little analytical sense. We may need concepts of different forms of power as they work in context. Lukes holds that the common core to 'all talk of power' is the notion that 'A in some way affects B', particularly when 'A affects B in a manner contrary to B's interests'. He argues that we must move beyond a 'one-dimensional' view of power that focuses on observable behaviour, transparent decision-making, formulated issues and overt conflict and include struggle over the political agenda, potential



issues, latent conflict and real, unarticulated interests (Lukes 1974: 25-6). In functionalist sociology, power 'in its legitimate form' is seen as justified authority aimed towards collective goals, while use of coercive measures without legitimacy should not be called 'power' (Parsons 1967 summarised by Lukes 1974: 27-8). Similarly, Hannah Arendt makes legitimacy a defining criterion of 'public power':

It is the people's support that lends power to the institutions of a country, and this support is but the continuation of the consent that brought the laws into existence to begin with. Under conditions of representative government the people are supposed to rule those who govern them. All political institutions are manifestations and materializations of power; they petrify and decay as soon as the living power of the people ceases to uphold them. (Arendt 1970: 41)

Therefore, power corresponds to the human ability to act in concert, depending on group coherence: 'without a people or a group there is no power' (Arendt 1970: 44). Power derives its 'legitimacy' from an initial coming together and its 'justification' from the ends that it pursues (Arendt 1970: 52). (In South Africa, the Freedom Charter and the ANC also say that 'the people shall govern'). However, this emphasis on a constructed community also makes Arendt susceptible to arrogance vis-à-vis people whose institutions and universal rights she cannot recognise, as for instance where she comes close to condoning the killing of indigenous people in southern Africa during colonial conquest (Arendt 1950: 192; Auestad 2005: 269). However legitimate a government in 'the coming together', it remains accountable to individuals who have deeper rights than those of the political community.

Foucault criticises the 'juridico-discursive' conception of power as centralised, sovereign and exercised by identifiable institutions (the king, the state, the individual) (Deacon 2002). This notion disguises other forms of power through knowledge, organisation and regularised practice, perhaps concentrated but not centralised, formalised and visible: 'We must cease once and for all to describe the effects of power in negative terms: it "excludes", it "represses", it "censors", it "abstracts", it "masks", it "conceals". In fact, power produces, it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production' (Foucault 1986: 194). Despite Foucault's critique, 'the king has kept his head' in many political discourses (Deacon 2002), notably those of rights, which focus on the state and the individual rather than the scattered and productive power practices between them.

Some implications are that we must consider how and whether individuals can challenge other forms of power than 'the king' (visible, formal institutions). In addition to the ideal notion of democratic power as accountable to rights, we need a conception of the capacity of groups and individuals to defend their rights and interests. I assume that power is also manifested in material, discursive and geographical conditions (including the distribution of land) that enable or constrain agency. To promote rights, the state must have resources and sanctions to control official behaviour; citizens must be organised to demand and realise

rights as power relations. Public power is then the capacity that emerges from the clashes and cooperation between state and citizens. This conception combines the ‘public-ideal’ notion of power with more dispersed powers of human agency to get traction in socio-material reality through a dialectical process.

### *Discourse and institution-making*

The concepts of ‘discourse’ and ‘institution’ are useful to address how rights talk ‘gets traction’. ‘Discourse’ has a rich etymology and usage, extending from statement, to debate and discussion, to all statements within a reasonably coherent universe of meaning (Kaarhus 1992). Discourses are maintained and changed through communicative practice, where actors have to seek a common understanding of intentions, of the context, creating a sense that there is a point in communicating at all (Kaarhus 1992: 107, reviewing Gumperz 1982). One may emphasise the regulatory power of discourse as a ‘truth regime’. ‘Discursive domination’, and its strong form ‘hegemony’, is the ability to dominate thinking and control its translation into institutional arrangements and practice (Hajer 1995: 60-1). It may be ‘related to a specific social phenomenon or practice’, such as environmental change (Adger et al. 2001). As mentioned in Section 2.1.3 above, Englund (2000) suggests that human rights discourse aspires to be a kind of moralistic truth regime.

One may also emphasise the dynamics of individuals and groups actively using and maintaining discourse (Long and Long 1992). I assume that individuals and other actors with different interests and resources negotiate and change their knowledge in encounters shaped by institutions and power (Arce and Long 1992: 214). I assume that individuals can draw upon discourse to frame their interests and claims, to encourage action or to justify or exclude action. Thus, discourse and agency are closely linked.

Issues, events and things can be ‘framed’ within a variety of discourses; and there may be a struggle over which discourse will dominate (Neumann 2001: 178). Citizens must be able to frame their claims in discourses that help them achieve positions, goods or services – or institutional change that may turn claims into rights (to water supply, housing subsidies, or participation). Neuman defines ‘discourse’ and ‘institution’ thus:

*A discourse* is a system for production of a set of statements and practices that, by being inscribed in institutions and appearing as more or less normal, constitutes reality for its carriers and has a certain degree of regularity in a set of social relations. An *institution* is a symbol-based programme that regulates social interaction and has a material dimension. Thus, to institutionalise a discourse is to formalise the set of statements and practices. (Neuman 2001: 177. Author’s translation)

I find these definitions useful, although I am sceptical of seeing institution as a ‘symbol-based programme that regulates’. I understand the relation between institution, interaction and

discourse as dynamic.<sup>31</sup> One dimension of power is the capacity of actors to mobilise or affect discourse; we can also see power as built into the discourse by pointing towards or eliminating action, factors that individuals can only change in interaction and depending on their position.

Emery Roe (1991) reflects on how development narratives, grand blueprint stories, affected rural development policy and practice, particularly through reducing uncertainty by offering 'broad explanatory narratives that can be institutionalised into standard approaches with widespread application' (1991: 288). One can also imagine that they are not institutionalised. Carol Rose argues that property is never self-evident and is sometimes a matter of persuasion. Even individual property is 'a kind of collective property, a metaproperty; a private property regime holds together only on the basis of common beliefs and understandings'. Property systems are characterised by tensions between individual and collective interests and between individualist and communitarian interpretations. Stories and other discursive means can create 'narrative communities' within and across property boundaries (Rose 1994: 5-6). In South Africa, the Constitution and land reform tell stories about creating a shared land – in its double meaning of a natural resource and nation. To be persuasive they must change the 'narrative communities' that follow racial boundaries, which are often tenure boundaries as well, where individuals tell stories of property, some that seek to preserve and others that seek to transform.

### 3.3.3 Human rights and development

'Development' is one of the central ideas of the 20<sup>th</sup> century institutional arrangements and practice that is achieving a status of 'discursive domination' (Hajer 1995: 60–61). The Universal Declaration (1948) called human rights a common standard of achievement. Human rights reflected and promoted an optimistic narrative of progress and gained their foothold alongside the post-World War II 'development project' to spread technology, growth and institutions from developed to 'developing' or 'underdeveloped' countries. (Sachs et. al. 1992). However, translating commitments in the declarations and conventions into development policy has been a slow, contested process (Sengupta 2000). For many decades, human rights and (economic) development discourses and programmes were separated (Donnelly 1999; Nelson and Dorsey 2003).

Towards the end of the 1990s major policy documents began to advocate a human rights-based approach to development (UNDP 1998; UNDP 2000; DFID 2000; UNDP 2003). The approach has been adopted by 'development agencies' and, at least at a level of debate and policy formulation, by some governments including the Norwegian (NORAD 2001). A human rights-based approach requires that individual rights as guaranteed in international law are the measure and normative framework for development and global governance

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<sup>31</sup> In 1999 lawyers and others involved with Trancraa proposed a set of amendments that were partly

(Nelson and Dorsey 2003: 2024). It challenges the Structural Adjustment and 'good governance' policies of the 1980s and 1990s, which extended the control and conditionalities of rich nations and financial institutions without any backing in international law (Uvin 2002: 5). Human rights could perhaps replace discretionary, fashion-ridden development policies and constitute a more predictable legal framework over which governments have at least a degree of influence. However, 'redefinitions' of the terms may also create a spurious link between 'rights' and 'development' and shift the focus from the accountability of states to a vague development process that obscures such accountability (Donnelly 1999). There are risks that government, corporate and civil society actors will ride the 'moral high ground' by adopting rights rhetoric with little substantial policy change (Uvin 2002). As Uvin suggests: 'As the development community faces a deep crisis of legitimacy among both insiders and outsiders, the act of cloaking itself in the human rights mantle may make sense, especially if it does not force anyone to think or act differently' (Uvin 2002: 4).

In chapters 1 to 3 I have briefly noted various economic, legal and environmental discourses used to 'frame' land tenure. 'Human rights-based development' may be an alternative or supplementary discourse. In Section 2.2 I noted how complex a human rights approach to a 'development issue' may be: many rights are relevant and the institutionalisation of each involves numerous actors and practices. However, human rights did not 'invent' the diversity of our lives nor of development processes that involve values, ecology, actors and networks and diverse resources. Human rights measures of human well-being as reflected in the Human Development Reports pioneered by Mahbub ul Haq and Amartya Sen (Sánchez 2000; Sen 2000).

Sen (1999) links rights with a theory of development as the expansion of human capabilities: 'Development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency' (Sen 1999: xii). In his vision, social justice and development converge in theory and practice because rights as freedoms are 'constitutive' and 'instrumental' of development.

Freedom is central to the process of development for two distinct reasons. 1) The evaluative reason: assessment of progress has to be done primarily in terms of whether the freedoms that people have are enhanced; 2) The effectiveness reason: achievement of development is thoroughly dependent on the free agency of people. (Sen 1999: 4)

Economic and political freedoms reinforce one another through causal linkages; the freedoms mentioned by Sen as instrumental of development are (1) Political freedoms, (2) Economic facilities, (3) Social opportunities, (4) Transparency guarantees and (5) Protective security (Sen 1999: 10). Sen's political freedoms include negative rights (freedom from limitations and interference) and positive rights to public provisioning (Shanmugaratnam 2001: 268). The 'participatory capabilities' of individuals are the foundation of democratic

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motivated by the view that the Act placed too much emphasis on 'rules' and too little on 'institutions'.

institutions. These institutions in turn guarantee the political freedoms and welfare measures necessary to enhance other individual rights. This dialectics of individual freedoms and facilitating social arrangements is central to Sen's conception of rights-based development. Governments and international organisations ought to invest in education, health, infrastructure and market regulation in order to create the social and economic space for individuals to realise rights.

Baxi (2001) finds that 'Development as Freedom' is a 'provocative monograph' and implausible in a world of regression, global inequality and persistent failures of poor people to achieve health, resource control and fair treatment. He argues that Sen's thesis does not problematise who is suffering and who holds the power to defend and expand their rights. Uvin thinks Sen does not provide a 'politically grounded analysis of what stands in the way of his approach [and does not] move beyond the level of broad paradigmatic insight'. Therefore, agencies that have adopted the development paradigm 'have committed to little more than improved discourse' (Uvin 2002: 8).

These, I think, are challenges that apply to most rights-oriented approaches: questions of constraints, 'how to', and of power. However, Sen's efforts to link the political-normative and economic development processes (more richly conceived than the conventional) are valuable. In many ways that was also what Trancraa in Namaqualand was about: the links it forged, and the gaps that remained, between the rights-based political-legal intervention and the struggles for economic development and capability expansion.

#### *Concluding remarks*

In summary, human rights express claims that we have by virtue of being human. Human rights are concerned with ends (life, food, health) and processes (law, fair governance). A range of rights contribute to constituting 'land tenure as a human rights issue': rights to life, food, health and fair work conditions; to redress for past violations; to democratic and non-discriminatory land governance; to proactive measures for vulnerable groups; to property. Thus, land-related human rights are about equality in many different 'spaces' (health, life, income, participation). It includes negative obligations (not to encroach upon the rights of others, not to harm) and positive obligations (public efforts to provide land, legal protection and services). Human rights require (costly) support and institutional development, for example to register and protect land rights. Attention must be directed to those for whom it is most difficult to protect their land related human rights.

The rights and obligations listed cannot be put in a hierarchy but may in specific cases be more or less threatened. My interpretation indicates a very broad space for policy choices and compromises (for example protection of existing rights versus redress for past violations). Human rights do not appear to provide general arguments against land and agrarian reform, although they make requirements about due process and outcomes (promoting rather than endangering access to the right to food, etc.). Human rights demand

that social institutions be so designed that all human beings have secure access to the objects of their human rights, including food, water, clothing, shelter, education and health care (Pogge 2002: 51). Applying human rights to land tenure involves tensions between the need for state backing of rights, on the one hand, and the risk of simplified readings of land tenure that are inappropriate for complex and fluid land holding systems (Cousins 2002).

I have suggested three major perspectives for addressing such tensions. First, a perspective on human rights as they relate to land tenure; secondly, an entitlement approach to land use and the human capabilities based on it; and thirdly a view of discourse and power that may be used to analyse the institutionalisation of new rights, such as the constitutional guarantees of equal access to land and secure tenure in South Africa.

## 4. A DIP IN THE RIVER: CASE STUDY AND METHODS

### 4.1 Goal and approach

#### 4.1.1 Research goal

The goal of this study is to contribute to the theoretical and empirical understanding of land tenure as a human rights issue. Sub-goals are (i) to review human rights that affect land tenure; (ii) to develop a theoretical approach to the interface between human rights, legal reform and land-based human capabilities; (iii) to analyse how the issue is reconstituted in recent South African land tenure policy and (iv) to document and analyse the interaction between human rights and tenure in a legal reform process. I pursue these goals by reviewing human rights statements and South African land tenure policy, and by studying the processes of debating and implementing the Transformation of Certain Rural Areas Act, Act 94 of 1998 (Trancraa) in 2001–2002 in Namaqualand, Northern Cape Province, South Africa.

#### 4.1.2 The construction of land

Land is in some senses ‘socially constructed’. A constructionist theory holds that ‘reality is not independent of, but constituted by, the perceptions and knowledge taking it as its object’. It rejects the idea that the ‘substance’, ‘content’, ‘structure’ or ‘essence’ of people and nature is independent of language and thought (Burr 1995). ‘Social constructs’ are public and contested ways of seeing that emerge and take shape in a matrix of people, decisions, proceedings, rules, activities and material infrastructure (Hacking 1999). When I use the expression ‘construction of land’ I intend this multidimensional sense, integrating ecology, economy, practice and law. ‘Land’, like other hybrid phenomena, is reproduced in social processes ‘simultaneously real, like nature, narrated, like discourse, and collective, like society’ (Latour 1993: 6). Land is composite, in many ways not reducible to its component parts, as a river is not reducible to water molecules or a forest to trees. Hacking (1999: 47) writes that the ‘constructing attitude’ is ‘sceptical’ and ‘humanist’ – it is not a rejection of ‘out-there-ness’, but pays attention to how diverse organisations, networks and practices are involved in maintaining and using representations: ‘Hence by constructionism ... I shall mean various sociological, historical and philosophical projects that aim at displaying or analysing actual, historically situated social interactions or causal routes that led to, or were involved in, the coming into being or establishing of some present entity or fact’ (Hacking 1999: 48). After reviewing numerous titles containing ‘the social construction of...’, Hacking mentions the relief of coming across a book on ‘Constructing a five-string banjo’ which told the reader how to build something, step by step. ‘Anything worth calling a construction was or is constructed in quite definite stages, where the later stages are built upon, or out of, the product of earlier stages. Anything worth calling a construction has a history. But not just any history. It has to be a history of building. There is no harm in one person stretching a metaphor, but when many do it, they kill it’ (Hacking, 1999: 50). This study tries to connect smaller ‘histories of

building': the making of a dualist tenure system in South Africa; the making of discourses of rights and protest; recent efforts to use them in land policy; the making of an Act and a few steps in 'consulting', or making it into a governance framework; or trying to use or fight it. These are the micro-processes of 'constructing land', where one larger story about rights-based change in South Africa either gets traction or loses it.

#### 4.1.3 Policy process – 'policy does not move neatly'

Definitions of policy reflect general understandings of society, for example whether government is rational and committed to welfare and rights. Policy 'ideally' has to do with 'prudence or wisdom in the management of affairs' or 'a definite course or method of action selected ... to guide and determine present and future decisions' or 'a high-level overall plan' (Merriam-Webster Online ). From such a perspective we may imagine makers of land policy drawing on human rights in a linear process from 'agenda-setting' (land is a human rights issue) to 'decision-making' (legislation, resource allocation and programme formulation) and 'implementation' (such as land redistribution).

From post-structuralist perspectives the 'state' is not a neutral arbiter of conflicts but fragmented by policy-making actors. One may see policy as a process in which power relations, networks and norms contribute to shaping social change (Keeley and Scoones 2003: 4-5). 'Specific histories of state and society interaction are significant in shaping the emergence of a given policy path in a particular setting. Policy does not move neatly' (Keeley and Scoones 2003: 22). While Keeley and Scoones examine 'scientific knowledge' in environmental policy-making, my concern is whether and how actors who shape land tenure policy integrate a concern about the human rights of land users in some way. To be aware of diversity in the process may help us hear voices and stories that challenge power relations and point towards alternative agendas (Keeley and Scoones 2003).

The long 'chain' of policy levels<sup>32</sup> shows how ambitious the human rights project is. While broadly concerned with human rights 'positions', my study focuses on the national and local making of policy through social interaction. I assumed a historical connections between (i) the history of anti-apartheid rights struggle, (ii) the new political constitution and (iii) international human rights and have paid little attention to other aspects of global policy contexts than human rights.

My review of land tenure reform was based on selected policy documents, supported by a few national level interviews and participation in the National Land Tenure Conference in Durban in 2001. I analyse and present these as a story of major changes in how human

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<sup>32</sup> Human rights doctrine ⇔ Global policies of rights-based development ⇔ National constitution ⇔ National development policy ⇔ Land reform policy ⇔ A tenure act ⇔ Namaqualand ⇔ Pella ⇔ Social differentiated community groups ⇔ Households ⇔ Individuals. I used different metaphors for this 'chain' or 'long network' (Latour 1993). One could see it as 'vertical', 'horizontal', or 'bottom-up'. During the study I moved from assuming a downward flow or 'operationalisation' of human rights to one more about multi-level networking.



rights have been rejected or used in land policy: from the anti-apartheid struggle, to the de Klerk government in 1991, to official policy in the mid 1990s, to renewed tension around the turn of the millennium, to a clash between government and civil society over the Communal Land Rights Bill in 2003. Naturally, I see Trancraa as a pivotal moment and the key to unlock this story. Policywise, Trancraa may be a side issue (different in its approach to 'Certain Rural Areas') but it involves interesting tensions between government and civil society; between rights and regulations; between justice ('a new social contract', a lawyer said) and pragmatic compromises; between demands for change and the inertia of land as a matrix of power, fences, law and resources. On a critical note, I approached the 'case' and the 'field' through the very legislation that had 'constructed' Certain Rural Areas or Act 9 Areas (ref. 1.4.4), for example, not including landless people in nearby towns.

## 4.2 The Namaqualand case study: Study area, sites and methods

### 4.2.1 A case of what?

The study was based on a critical, interpretative single case study. I regard the Trancraa process in Namaqualand as a 'rich' case that can be interpreted in different ways to explore links between practice, policy and theoretical ideas (Ragin 1994: 101-3). I chose a flexible case study approach to let questions evolve together with the reform process and my learning. Flyvbjerg (1991; 1998) suggests a methodology of the 'particular', the 'context-dependent' and 'narrative' over the universal, context-independent and explanatory. He argues that, 'the research method must take account of the complex and unstable process through which discourses may be an instrument and effect of power, but also an obstacle, a point of resistance, the starting point of a counter strategy' (Flyvbjerg 1991: 165). It may be difficult to summarise a case in general statements but this is partly because of the method's ability to capture a complex social reality – attention to details of a diverse phenomenon can counteract biases towards verification (Flyvbjerg 1991: 164).

To examine a social phenomenon in a case study is to compare and develop 'ideas' and 'evidence' in a back and forth movement (Ragin 1994: 55-76). Ragin uses social theory to formulate 'analytic frames' that give a tentative sketch of a phenomenon and guide exploration. My 'analytical frame combines ideas about (i) human rights; (ii) discourses and institutions; and (iii) land-based entitlements supporting human capabilities. Critical interpretation involves a dialogue between 'frameworks' and 'images', summaries of evidence, which in my case are drawn from policy documents, meetings, and dialogues. Ragin generally posits a more confident separation of 'ideas' and 'evidence' than constructionist accounts that are more sensitive to how analysis may be involved in the politics of rights and reform (which I find relevant in my case).

Saying what the case 'is a case of', is to define an analytical frame for it. Ragin (1994: 63–66) distinguishes between 'framing by case', naming the category of things to which it

belongs, and 'framing by aspect', to describe the case within a broad category. The 'case' is a short stage (2001–2002) of a tenure reform process in Namaqualand, South Africa. It is 'characterised by' networking interaction between residents, civil society and government in land reform. In a policy perspective I 'frame by case' by seeing it as a case of tenure reform in state-claimed community-held lands in South Africa and at a 'higher' level land tenure as a human rights issue. I do not think it is possible or fruitful to delimit the policy context to one 'level'; indeed the work is more about cross-cutting connections. Theoretically, I use the case to consider land tenure with the mosaic of conceptual approaches mentioned (rights, discourse, institution capabilities).

#### 4.2.2 'Rural areas', Namaqualand

South Africa has twenty-three 'rural areas' that at the transition to democracy fell under the Rural Areas Act 9 of 1987. They are scattered in four provinces, cover about 18 000km<sup>2</sup> and about 70 000 people have their homes here (Catling 1996). Namaqualand, in the sense used in this study, encompasses the municipalities Kamiesberg, Nama-Khoi, Richtersveld and Khâi-Ma and covers about 48 000km<sup>2</sup> (a bit bigger than my country of birth, Denmark) and is home to about 80 000 people (NDMT 2000). It is in the northwestern corner of Namakwa District.<sup>33</sup> Namaqualand is an arid and semi-arid mountainous rangeland and borders on the Atlantic and Namibia.<sup>34</sup> It is named after the Namaqua, one of several pastoralist groups who together with the San (or Bushmen) were the indigenous inhabitants of the area. The economy is based on mining, agriculture, tourism and trade or services, and seriously affected by downscaling in mining.

Six of the 23 Act 9 Rural Areas are found in Namaqualand. Around thirty thousand people live in six 'rural areas' – Richtersveld, Steinkopf, Concordia, Komaggas, Pella and Leliefontein – that make up 14 000km<sup>2</sup> or 1.4 million hectares or about 30% of the land (increased by about 25% through land redistribution from 1996 to 2001).<sup>35</sup> Less than seven hundred private farmers, almost exclusively white, own about 52% of Namaqualand (DoA 2001). The Transformation of Certain Rural Areas Act 94 of 1998 (Tranraa) provides for

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<sup>33</sup> Namakwa District (DC6) has been created through the amalgamation of the 'old' Namaqualand district with those of Hantam and Karoo, and covers an area of about 100 000 km<sup>2</sup> (8% of South Africa) and has a population of about 110 000 (0.3% of the total population of 45 million). Low population density of about 1 per km<sup>2</sup> reflects the arid, mountainous environment, permitting mainly extensive livestock rearing.

<sup>34</sup> The major part falls in the 'Succulent Karoo' plant geographical region, a desert shrub land, with foggy, mainly winter rainfall of 200–400mm and a high diversity of plant life with about 3 000 species, one third of which are succulents (Cowling, Pierce, and Paterson-Jones 1999). The eastern part (including Pella) is a desert shrub land with lower and more erratic summer rainfall.

<sup>35</sup> It is difficult to name the areas because the categories of the past have become discredited. 'Landelike gebiede' ('rural areas') appears neutral but does not convey the specific meaning to outsiders. In Komaggas some residents rejected the category of 'landelike gebied' and regarded their historical and legal status as different than that of other areas. I generally prefer 'rural area', with the specific Namaqualand implication, or the proper noun, say Pella or Steinkopf. None are 'innocent', however. Pella remembers the Bible, Steinkopf a missionary. Of the six 'rural area' names, only 'Komaggas' remembers a Nama name, as do now the municipal names of Nama-Khoi and Khâi-Ma.

transferring land ownership to residents or accountable local institutions and was implemented in Namaqualand from 2001 to 2002 by the experienced land NGO, Surplus People Project (SPP), working (on contract with government) with locally elected Transformation Committees, municipalities, public interest lawyers from the Legal Resources Centre (LRC) and the Department of Land Affairs (DLA). At the time of my study, implementation had only started here. Trancraa in Namaqualand offered a special opportunity to document land rights in transition, experiences that may be relevant for land tenure reform in the former 'homelands' in South Africa.

The commonly spoken language is Afrikaans. It is estimated that some 6 000 individuals speak Nama (Kokh and Maslamoney 1997) and the Nama language and environmental knowledge are closely linked to land (Crawhall 1997). Ethnic classification has been and remains an inherent aspect of society and land governance in Namaqualand. It is difficult to account for land history and distribution without using ethnic or racial categories but ethnic categories also tend to impose an unrealistic order on individuals and groups, in continuation of the political project of apartheid.<sup>36</sup> Governments employed different categories for different purposes and it was never a consistent system, and could not be, given the blurred and evolving character of populations and group membership. In 1950 the Population Registration Act classified people into 'White', 'Native' (members of indigenous African groups) of 'Coloured', and 'Coloured' was defined as a residual group of individuals who were 'not a white person or a native'. Some people in Namaqualand were first classified 'Native' and later reclassified as 'Coloured'. In practice, many residents became classified as 'Coloured' because settled within 'Coloured Reserves' (Boonzaier et al. 1996: 128).

#### 4.2.3 Selection of sites

I studied Trancraa in Pella and Komaggas for about 14 months. When selecting the two areas, I considered that I wanted to be able to follow the process over time and to interview several actors: I had therefore decided in advance to limit the number of sites to one or two.<sup>37</sup> I saw it as an advantage that both sites were less researched than for example Richtersveld (because this area has a national park, among other factors) and Leliefontein (because of its relative proximity to Cape Town, some say). Pella and Komaggas appeared to make an interesting contrast: Pella is situated in Boesmanland (Bushmanland), now Khâi-Ma Municipality in the eastern part of Namaqualand (it has about 95 000 hectares of land and some 4 000 inhabitants). Komaggas is a Rural Area situated in central Namaqualand 70km

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<sup>36</sup> Population classification in official censuses has been rather consistent in South Africa from 1865 to 2001 (Christopher 2002). In the latest (2001) census, Statistics South Africa (2003b: viii) states that classification is used to monitor progress away from the apartheid past and that membership is based on self-ascription, not on a legal definition. The five categories used are: 'Black African', 'Coloured', 'Indian/Asian', 'White' and 'Other'. I occasionally use these categories, often linked to a source or a contextual usage. It is common to use 'black' to denote all groups discriminated against under apartheid (whether, coloured, African or Indian/Asian) and I follow this usage.

<sup>37</sup> Long travel distances in Namaqualand were a consideration (and a challenge in tenure reform).

west of Springbok, straddling the mountains and the coastal *sandveld*, and has about 90 000 hectares of land and some 5 000 inhabitants. The two areas represent about 12% of the land and close to 30% of the population in the six Namaqualand Act 9 Areas. Pella was regarded as 'peaceful', while it was known that in Komaggas there was a conflict related to Trancraa. No one tried to influence my choice. I compare the two field sites but they are complementary rather than parallel because the two different responses, participation versus resistance, partly forced me to work in different ways. I spend more time and space on the Pella case, because I could follow tenure reform action here.

#### 4.2.4 Field research: time, movements and methods

From September 2001 to December 2002 I made 19 research visits to Namaqualand.<sup>38</sup> I worked closely with Francios Z. Jansen from Concordia (originally from Rehoboth, Namibia), who helped with arranging meetings and practical preparations, translated from Afrikaans to English and was my main discussion partner. I mainly learned about the tenure reform process through meetings and interviews, most of them in one of the two field sites. They involved a two-way process, often with several individuals present; the categories below cover considerable variation (number of events in brackets).

1. Focus group discussions/learning exercises (resource map, local history, interest groups and field visits). Pella (7) and Komaggas (10).
2. Participation in meetings arranged by others, such as community and committee meetings regarding Trancraa: Pella (15), Komaggas (1).<sup>39</sup>
3. Semi-structured qualitative interviews with randomly selected households in Pella (34) and Komaggas (23), mainly with the purpose of learning about variation in household situations and individual perspectives.<sup>40</sup> The interview recorded household members, income and farming activities and discussed land tenure and the legal reform. Interviews were conducted in Afrikaans (with interpreter, Francios Z. Jansen).<sup>41</sup>
4. Semi-structured qualitative interviews with 'resource persons' known to have special roles, knowledge and/or interest in land reform. The respondents were official leaders (Pella: 18, Komaggas: 12) and other resource persons (Pella: 13; Komaggas: 24). Some were repeat interviews. I generally used a check list in a discussion of one to one and a half hours. Others

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<sup>38</sup> Thirteen visits to Pella (effective work time equivalent of 9.5 weeks) and ten to Komaggas (equivalent of 6.5 weeks) and meetings in Springbok/other areas (equivalent of five weeks).

<sup>39</sup> Owing to conflict, there were no Trancraa meetings in Komaggas. I also attended district level meetings about Trancraa in Steinkopf (3) and Concordia (3).

<sup>40</sup> Pella households: 24 were stated to be male headed and 10 female headed. Among respondents 14 were men, 9 women and there were 11 couples. Komaggas: of 23 household heads seven were female, twelve male and the rest unrecorded (by me). Respondents were 8 women, 11 men and 4 couples.

<sup>41</sup> Most individual interviews were recorded (using a mini-disk recorder), and most of these again transcribed and translated, by someone who did not participate in the interview. Interviews were written up in Word files with parallel columns of Afrikaans and English text. I took notes from all interviews. Quotes are from these recordings. I reviewed the translation of the selected parts, based on my understanding of context and language. Quotes from recordings are in some cases lightly edited to remove for example repetitions. In a quote, ellipses (i.e. ...) indicate that I have left out some text.

were shorter follow-up discussions of specific points or recent developments. These generally took place in the offices or homes of the respondents, but in Pella sometimes at the Koffiekroeg Guesthouse where I stayed.

5. Outside Pella and Komaggas. Semi-structured qualitative interviews with politicians, administrators and other resource persons at municipal level in Khâi-Ma (2) and Nama-Khoi (6); a few commercial farmers (4) and representatives of the mining industry (2); leaders of the Namaqualand District Council (4); and administrators at provincial (3) and national (1) level; (repeated) interviews with staff of Surplus People Project (9); Legal Resources Centre (4) and other national NGOs (2). These interviews were in most cases in English.

I used checklists for interviews, although I adapted them to the situation. I did not use a system for tabulating answers. I mainly selected households by choosing scattered houses in different parts of town, but also selected some during field visits to common land, giving an over-representation of 'farmers'. In Pella there is almost an equal number of men and women among 'official leaders' but a bias towards men among 'other resource persons'. This reflects a relatively gender-balanced participation in politics. My selection of 'other resource persons' appears biased, men being over-represented in my Namaqualand and national level interviews.<sup>42</sup> I did few national level interviews; priority for the 'local' case and time constraints played a role, as did inaccessibility at district, provincial and national level, where about ten appointments with political leaders and bureaucrats failed because they had in the meantime made other commitments (there were no rejections at the lower level). I relied mainly on meetings and interviews although resource inventories and quantitative study of production and household economies would be relevant for the issue.

### 4.3 Interpreting and representing process and voices

#### 4.3.1 Role and links

I had contact with the Surplus People Project (SPP) and the Legal Resources Centre (LRC) throughout the research period, and therefore access to information and experience.<sup>43</sup> This was linked to participation in Trancraa workshops and community meetings. I was allowed to participate in and record from Transformation Committee meetings in Pella. I appreciated this openness to a foreign researcher, based on a state-guaranteed freedom (no formal research approval was required, but the University of Western Cape provided me with a letter of support). I admire the work by and SPP and LRC and this may be considered a bias. As with

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<sup>42</sup> Municipal leaders in Khâi-Ma (Pella) (M: 2) and Nama-Khoi (Komaggas) (6 M) and Namakwa District municipality (F: 1, M: 3). Other interviews in Namaqualand, but outside the two municipalities (M: 12 and F: 2). These included mining (3) and agro-enterprise (1), a lawyer, Department of Agriculture, two tourist. At provincial (M: 5 and F: 1), including Department of Agriculture, DLA and a land NGO. At national level I interviewed 12 men and 5 women; here I include Department of Land Affairs (1), LRC (3), SPP (9), the Human Rights Commission (1), the National Land Committee (1).

<sup>43</sup> Although I frequently met SPP staff in Pella I worked independently. In Komaggas I did not meet representatives of organisations from outside, partly because the Trancraa process was stalled.

some other 'respondents', I face a dilemma of wanting to recognise personal contributions (what I saw as extraordinary commitment) and yet not expose individuals unfairly in a context that I dominated.

The role of 'student' gave protection and freedom and I respected its limitations. I think people regarded me as a 'different kind of outsider'; a foreigner, partly associated with 'the West'. My main experience in Pella and Kommagas was to be welcomed both by officials and by individuals in their homes. My being white and male affected the research in some ways. I have noticed (particularly afterwards) how residents sometimes included a small apology ('it is a shame that I have to mention it') when they talked about the unfairness of past abuses, land distribution and fears of continued exploitation. In both Pella and Komaggas, the arenas of socialising, residence and meetings were politically loaded.<sup>44</sup> I socialised privately with a local 'white farmer'; this gave access to information and viewpoints, but could be seen as an alliance in a very polarised social situation (and raised further issues of confidentiality). Some residents used household interviews to air grievances about discrimination by the local ANC governments (in public employment and housing policy etc.). This was so common that it appeared difficult to reconcile with the relatively strong position of ANC in elections. I wondered whether it was affected by a past practice of bringing grievances to bureaucrats or priests.

#### 4.3.2 'Ek praat nie Afrikaans nie': Distance and language

Farmer Johny Simboya said in an early meeting in Pella that 'before you can get to the truth, you will have to listen to all our lies' (Group discussion, Oct 2001). It was a wonderful invitation to a researcher interested in 'discourse'. A strength in my approach was getting to know issues over time through repeated visits and meetings, perhaps reaching beyond a few of the alleged lies. I could compare perspectives by drawing on formal meetings, interviews with leaders and with residents. A weakness is that I spent a relatively short time at each research site (about ten weeks in Pella and six weeks in Komaggas). I did not develop an active command of Afrikaans (but some understanding) and this hampered communication, slowed the learning and may have given rise to errors of interpretation. Discovering and working with Afrikaans was nevertheless an important part of my research. My Scandinavian background makes me 'recognise' but perhaps also 'misunderstand' words. For a Scandinavian it is important to note that *kommunal* pertains to the community, not the municipality. Residents would use *reg* and *regverdig* to describe what they saw as right and just, *rettferdig* (Norwegian). Some things are lost in translation, inevitably, and I may unwittingly have added a bit here and there.

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<sup>44</sup> In Komaggas, staying in an ANC home first gave us problems with talking with the opposition. Shopping in an 'opposition' food store was part of mending relations.

### 4.3.3 The dip in the river and the construction of a story

During field research in Pella I occasionally cooled down with a swim in the river. It reminded me of Heraclitus's dictum: 'Everything is in a flux, you never step into the same river twice'. Land reform in Namaqualand is like a whirl in a river called 'development'; my work like a short dip into it: people, meetings and words were rushing by at a great pace while I made observations and notes. Replicability of this tenure reform is out of the question – hence the importance of accounting for the 'methods' used to construct a story. In addition to the river of daily life and social change, there is the river of information. The main source of 'material' or 'text' is interviews with men and women, some of whom took part in the tenure reform process and some of whom did not. The volume of the material caused delayed analysis and forced me to skip parts of it. I have drawn information and minor points from many interviews but used only about twenty-five for quotes and more in-depth analysis. Writing was an active attempt to relate concepts to experiences. Thus the text is an 'orchestration of multi-vocal exchanges occurring in politically charged situations', both a 'constructed domain of truth' and 'serious fiction' (Clifford 1988: 10).

Kelly suggests that there is a continuum from 'insider' perspectives that involve empathic, context-bound and phenomenological description, on the one hand, to 'outsider' perspectives including constructionist methods such as discourse analysis (Kelly 2002: 399). I tried to balance experience-distant theory (Chapters 2 and 3), contextual information (Part II), and experience-near case study (Part III). Within the case, the account is structured around i) the reform process and events, including some resource management and conflict issues; ii) individuals and household situations that illustrate land use and entitlements, paying some attention to social differentiation, including gender; iii) 'discourses' that actors appear to draw upon, examining 'text' (here speech, dialogues and written documents) as instances of larger discourses as systems of statements (Terre Blanche and Durrheim 2002: 156).

Constructing a story, crafting a thesis, was undoubtedly the largest and most difficult task. This was related to field approach methods (the river syndrome) and to the broad theoretical approach that points towards different stories. Van Maanen (1988) suggests that field research accounts typically fall into different categories, including realist tales, confessional tales, impressionist tales, critical tales and formal tales. No doubt I was affected by several ambitions: to be realistic about place and process; be confessional on with ideals and frustrations; be impressionist in telling about experiences of land and people; be a critical advocate of groups in a difficult situation; and apply 'formal' theoretical concept and make the 'material' speak to them. A story including the dimensions mentioned by Van Maanen is difficult to tell. The result combines i) a concern, ii) a policy iii) a practice and iv) some connections. Part I is dominated by the 'formal' (conceptual), but also suggests a political and critical project. Part II is historical and political, dominated by optimism of the liberation

struggle but also notes disappointments and vulnerable human capabilities. Part III is a realist account with impressionistic elements: images, events and stories in the tenure reform process. Part IV connects theoretical concerns, policy and experiences.

#### 4.4 Some ethical issues – ears, no hands

Land and rights matter to people. A widow may not exercise her land rights because she has not got the money to buy sheep. A former miner is without work, and invests part of his 'retrenchment package' in goats to relieve his family's deprivation. Nussbaum argues that a 'vivid perception of concrete circumstances' is necessary to understand human rights and capabilities because 'formal modelling and abstract theorizing ... fails to come to grips with the daily reality of poor people's lives' (2000: xv). On the other hand, we have no untheorised access to such situations: 'We experience nothing from the lives we encounter if we do not bring to our experience such evolving theories of justice and the human good as we have managed to work out till then' (Nussbaum 2000: 300). A resident in a Namaqualand 'rural area' once told a researcher: 'What does it help me to speak of our people's needs? I have spoken until I have no more voice left. Those who have ears to listen, have no hands. And those who have hands to do something have no ears to listen.'<sup>45</sup> My research was all ears and no hands. People in Pella and Komaggas did not confront me with the fact that the project brought no material benefits to them. Towards the end of my stay a municipal leader in Springbok argued that research projects – not specified – have been carried out in Namaqualand without bringing or leading to substantial improvements in people's lives. After years of reflection and writing that remains a challenge.

##### 4.4.1 Research conduct and confidentiality

Regarding research conduct, I feared that my involvement could exacerbate conflicts over land. I was uncertain about how to handle participant confidentiality and informed consent. My first meeting in Pella was with the Mayor of Khâi-Ma who thanked me for going through the 'correct channels', since some previous researchers had made field visits without informing the community or local government. At an early meeting with two land committees, one member (a police inspector) suggested that I write a statement of my purpose and affiliation. Here I made a commitment to working independently of private and government institutions, using knowledge for the purpose of my training and sharing research findings before leaving the areas.<sup>46</sup> I shared research goals and asked respondents for permission to

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<sup>45</sup> 'Wat help dit tog ek praat oor ons mense se behoeftes. Ek sal praat tot ek stom is van praat. Die mense wat ore het, het nie hande nie, en die mense wat hande het, het nie ore nie.' (Namaqualand farmer quoted by de Swardt 1993: 26).

<sup>46</sup> I held a presentation in Komaggas in May 2002. A similar event in Pella was cancelled due to poor turnout on a party night. I wrote a report on a local land issue at the request of the Pella Transformation Committee invited members for a final discussion. However, I have so far provided little feedback after leaving South Africa, although, for example, a policy brief was used at an information meeting in Springbok in May 2003 (Wisborg and Rohde 2003).



interview (only about five individuals refused). I always asked for permission to record interviews (this was refused by some ten individuals). In almost all cases I asked for permission to quote with name (this was refused by a few). I have sometimes quoted with name in order to acknowledge individual contributions, but protected many beyond those who requested it (where I find the views could be sensitive). I also acknowledge that most individuals could not envisage what being quoted in a study like this would mean. Although I have shared various minor publications, I have not shared the thesis for prior comment, owing to time constraints.

#### 4.4.2 Fairness and respect

Remembering again Krog's suggestion that 'the land belongs to the voices of those who live in it. My own bleak voice among them' (1999: 319) and the idea that we can talk ourselves into owning things (Rose 1994), one must acknowledge that speaking about land is a political act. I do not claim to own land but the distant voice re-presents voices of residents and leaders, so I have tried to be fair and balanced in the inclusion of actors and representation of their views. During the research several respondents mentioned freedom of speech as a major benefit of the changes in 1994, and a few said that in the past they would not have chosen to get involved in research with a white outsider. Asked whether she obtained stronger rights in 1994, a pensioner and small-farmer said:

It is a beautiful question and I want to be honest. There has been a big change. People are stronger. They now have freedom to speak. Doors are open that were closed. People's rights are affected by land reform. I would like to know more and influence more. If I can, and have the health, I will apply to farm on the new farms, or maybe at Mik [part of Pella land]. I will also start paying fees after the referendum. People should. Everything must be paid for. But it is difficult when you only have 600 rand and the children do not make money. (Pensioner/stock farmer, 60, Pella, 2002)

A young leader asked whether the study would give a balanced picture of South Africa or contribute to negative publicity:

Sorry, only for interest sake, is the research you are doing only for your doctorate? Okay, you hear on television or read in newspapers about students from Canada or America who present South Africa negatively, the crime here is so high etc. They do their research here but overseas they portray us, our government, in a negative light. It is nothing personal, I am just asking. In their countries they also have problems but they focus only on our country. It angers me sometimes. We see for example in the region that you call Texas, it is an industrial area. If you look at your map, you see how many people have been alienated from their property and their land. Really alienated. They have been pushed back to small 'islands'. We don't want to make a noise but only ask that people look at these things and give it the attention it deserves. (Deputy Chair of Pella ANC, Group Meeting, October 2001)

He indicates that although policies of segregation deserve critical attention, segregated areas are not unique to Namaqualand or South Africa with an implicit warning against 'victimising' residents. I responded that I would try to be balanced in my research and assured him that my interest in land reform was also linked to my admiration for the past struggle, for political changes and for the Constitution. That critical question was present in my mind, as when I

describe (Chapter 6) South African crises of poverty and HIV/AIDS, which may draw a similar response: I was reminded by such warnings as: 'Our political opponents, echoed and supported by "Afro-pessimists" from the developed world of the North, have worked hard during and before the 2004 elections to propagate the dishonest view that problems that could not be solved in the United States for two centuries, could be solved in South Africa in one decade' (Mbeki 2004). I continue to find it difficult to 'balance' the interpretation of a society as full of contrast as South Africa with the tension between democratic renewal and continuing crises of poverty and AIDS; and closer to the study, the gaps – as I see it – between the rhetoric and practice of land reform.

#### 4.4.3 Giving voice?

Skotnes (1996: 9) laments the fate of people who became 'the most brutalised people in the history of southern Africa – victims of genocide and slavery, stripped of their land and the fabric of their lives and their culture'. Films and literature have reconstructed voiceless scenes of peaceful existence, eminently adapted to nature and 'cast out of time, out of politics and out of history' (Skotnes 1996: 17). Certain Rural Areas, on the contrary, were constructed *in* time through specific histories and politics. Johnny Simboya, Pella farmer and leader, said the 'real history', people's history, has not been written, only that of the missionaries (often by them). Recognising voice is part of recognising humanity and rights. Extracting and dislocating voices was a problematic aspect of my research. Giving voice is central in a tenure reform and politics more widely. This study should contribute policy-relevant knowledge but it is neither local history written for residents nor a political channel. Listening to and sometimes quoting individuals was a method of learning and substantiating or illustrating points in my argument. I had to consider when quoting was justified, what the risks were and how it could be done respectfully. There was a tension between using voice in my argument and recognising voice as expressing the concerns of speakers. Still, using and reproducing voices may be justified when at least some of the individual's concerns are given attention, and their rights and dignity respected. I aimed for human equality in the dialogues, although there can be none in the construction of the text.

In summary, the research addressed a theoretical problem about how people constitute land tenure as a human rights issue. To link the theoretical problem to experience, I carried out a study of the Transformation of Certain Rural Areas Act implemented in Namaqualand in 2001–2002. The study primarily draws on interviews and meetings with individuals and organisations engaged in the practice and politics of tenure reform. I analysed my material by constructing an account of the events and process of discourse and institution-making and an analysis of how this process may be seen to connect, or fail to connect, human rights and the diverse achieved human capabilities that are in part based on land and land use.

**PART II. CONTEXT**

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## **Half a century of land struggle: Charters, claims and rights**

1955

The Land Shall be Shared Among Those Who Work It!

- Restrictions of land ownership on a racial basis shall be ended, and all the land re-divided amongst those who work it to banish famine and land hunger;
- The state shall help the peasants with implements, seed, tractors and dams to save the soil and assist the tillers;
- Freedom of movement shall be guaranteed to all who work on the land;
- All shall have the right to occupy land wherever they choose;
- People shall not be robbed of their cattle, and forced labour and farm prisons shall be abolished. (The Freedom Charter, adopted by the Congress of the People, Kliptown, 1955)

1994

We, the marginalised people of South Africa, who are landless and land hungry, declare our needs for all the world to know. We are the people who have borne the brunt of apartheid, of forced removals from our homes, of poverty in the rural areas, of oppression on the farms and of starvation in the Bantustans. We have suffered from migrant labour which has caused our family life to collapse. We have starved because of unemployment and low wages. We have seen our children stunted because of little food, no water and no sanitation. We have seen our land dry up and blow away in the wind, because we have been forced into smaller and smaller places. These are the biggest difficulties facing our country in the future. We look forward to the birth of a new South Africa. But for us there will be nothing new until there is land and services and growth.

(Extract from the Land Charter. Adopted by 353 rural and landless communities at the Community Land Conference in Bloemfontein, 1994)

2001

We continue to suffer under these conditions because the legacy of colonialism and apartheid has not been defeated in our areas. We continue to suffer from forced removals from our homes, from evictions – legal and illegal – from the farms we have worked for generations, and from gross violations of our basic human rights through abuse at the hands of the farmers who own these lands. We continue to suffer widespread injustices due to the racist criminal justice system that prevails in our areas. We are the people who still bear the brunt of the colonial and apartheid legacy and the neo-liberal policies which today require us to buy back our stolen land and pay for services we have never enjoyed, while taking away our jobs and driving our young people into the cities. These are the biggest problems facing our country today.

(Extract from The Landless People's Charter. Adopted by landless delegates at the Landless People's Assembly held in Durban August 2001 with amendments by Landless Rural Women meeting in Kimberley in October 2001)

2004

As the country celebrates 10 years of democracy, we as the poor and landless majority have little to celebrate since we still do not have the land that was promised us in the 1955 Freedom Charter and the 1994 Reconstruction and Development Programme ... We are sick and tired of being used as pawns by political elites who only 'care' about us at election time, then expect us to suffer our poverty and dispossession in silence for the next five years.

(Landless People's Movement, April 2004 (Sapa 2004))

## 5. MAKING LAND A HUMAN RIGHTS ISSUE

### 5.1 Constructing the divided land

#### 5.1.1 'A long and tragic history'

The quotes on the preceding page suggest that Govan Mbeki's famous statement may still be of relevance that 'the more that policy changes in South Africa, the more it is the same' (1964: 23), and indeed it was quoted by critics of land tenure policy in 2003 at the end of the period covered by this study. However, the political changes in the 1990s are also rightly seen as historic. The 1998 National Action Plan for Human Rights states that 'South Africa has a long and tragic history of: colonial conquest, racial domination, social injustice, political oppression, economic exploitation, gender discrimination and judicial repression' (Government of South Africa 98: 14-15). It describes a struggle for justice and human dignity 'fought by ordinary women and men and at great personal sacrifice, often with the loss of many lives'. It says that 'the non-racial democratic elections in April 1994 brought this history to an end and ushered in the beginning of a new era – the building of a united non-racial, non-sexist South Africa founded on democratic values, social justice and fundamental human rights and freedoms'. In a 'Letter from the President', Thabo Mbeki writes that 'the history of land dispossession in our country is inseparable from the brutal system of colonialism and apartheid. ... Thus, the new Union government [from 1910] was a government by white people, for white people. Not even some pretence was made that the political and other rights of the black majority would be respected' (Mbeki 2003). The view of 1994 as a turning point, of government responsibility for restoring justice and the significance of land, is linked to a strong historical awareness. This chapter sketches a few moments in diverse histories of land. It explores an ambiguity in the phrase 'making land a human rights issue': in one sense defined by international law and in another constituted by a particular history. If we refrain from reducing history to a story of teleological progress from past calamities to present triumphs, we may gain a sense of the conflicts and the discourses of power and protest that were involved in constructing the land that remains a basic condition of rural life.

#### 5.1.2 Colonial conquest and land tenure

Diverse African peoples have occupied southern Africa, some of them since the first presence of human beings on earth. San were the earliest. For a couple of thousand years, Khoi people lived along the coast from Namibia to trans-Kei and along the Gariep (Orange River), herding cattle and fat-tail sheep and trading copper, iron and livestock with other

African groups (Davenport and Saunders 2000: 7-8).<sup>47</sup> From the 1480s they had to deal with Europeans making stops along the coast to obtain water and livestock, and who sometimes violated the land rights and integrity of groups and individuals, for example by using natural resources without negotiating the terms (Boonzaier et al. 1996:54). Indigenous people of the Cape asserted their land rights and protested against dispossession from the first encounters (Carey Miller and Pope 2000: 7-8).

After the Dutch East India Company established a station at the Cape in 1652, military conquest, trade and gradual expansion of farming by European settlers gradually dispossessed Khoi and other groups. A myth that African peoples other than Khoi and San came to South Africa about the same time as European settlers is refuted by archeological evidence (Davenport and Saunders 2000: 9). The company generally assumed or asserted title 'based on the capacity to exercise dominating control – a de facto feature of the South African land scene until at least the late twentieth century' (Carey Miller and Pope 2000: 5). 'Raw might', not 'institutional frameworks', shaped the competition over occupation of land (Van der Merwe 1989: 666). Migrating livestock herders of European descent (*trekboers*) increased the area of occupation tenfold from around 1700 to 1780. From 1834 to 1840 about 15 000 *trekboers* left the Cape Colony and settled new areas to the north and east, including Namaqualand. A sense of racial superiority was manifest in the brutality with which these settlers fought for land, water sources and livestock (Keegan 1996: 27). From the 1770s the colonial government and farmers were engaged in conflicts with Xhosa farmer-pastoralists on the eastern frontier, involving violence and extreme racist justifications (Sparks 1990: 63-65).

The Company partly expanded the colonial frontier to regulate *trekboer* land tenure and to control livestock trade (Fredrickson 1981: 29, 33). Annexed land was often regarded as Crown land unless otherwise claimed and recognised. On the other hand, Bennett argued that during its colonial venture Britain's policy was partly guided by 'a self-denying ordinance that indigenous rights in colonial territories were to be respected, unless and until extinguished by the Crown'. This principle was confirmed in court cases, but with the proviso that aboriginal law should be sufficiently 'civilised' to warrant recognition (Bennett 1999: 149). With a quasi-government status and military backing, the Company introduced a form of free hold title (*eigendom*) only to housing plots and farms near Cape Town. Some settlers held farms under freehold, some under 'quitrent' (renewable leases). Yet, 'loan places' (which gave temporary access to grazing land) amounted to 80% of the land 'given out' by the end of the 18<sup>th</sup> century when 'a form of legalized squatting' was the major European form of tenure (Van der Merwe 1989: 667, quoting Duly 1968). Initially settlers preferred informal

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<sup>47</sup> *Khoi* or *qua* is derived from the word for 'person' and was used to refer to various pastoralist groups in the western parts of southern Africa who would have referred to themselves by their clan or tribe names, such as *Nama(qua)* (Boonzaier et al. 1996: 2).

forms of tenure (occupation, loan farms etc.) because of their flexibility, low cost and independence of the state. During the 18<sup>th</sup> century the government increasingly discriminated against individuals of mixed descent in allocating loan farms (Carstens 1966: 15). From the early 19<sup>th</sup> century the British colonial government tried to stimulate investment by converting loan places to perpetual quitrent tenure, but the scheme broke down because farmers were unable or unwilling to pay, felt they had adequate security already and feared control by the far-off capital. Centralist tenure reforms – and resistance to them – have a long history. Van der Merwe (1989: 670) writes that the British Government's 'unimaginative and half-baked attempts to exercise her dominium over the land in a way that would make Boer and Khoikhoi a tenant of the state' reflected its limited interest in the resources of the interior – until minerals were discovered.

Cultural and economic dependence and interaction between different groups were common, partly because of the dependence of all *trekboers* on San, Khoi and other groups' indigenous knowledge, livestock, labour and techniques of survival (Carstens 1966: 16, 232). Indigenous groups often resorted to employment on farms as a temporary measure, but settler control of land and weapons made a return to independent pastoral economy more and more difficult, and finally impossible (Fredrickson 1981: 38). There was an intimate relationship between control of land and the creation of differentiated status and rights. Keegan wrote that Khoi 'were not granted any of the privileges of burgher [citizen] status, most notably the right to lay claim to land. ... informal practices designed to keep Khoi bound to the farms and in employ evolved long before they were inscribed in law' (Keegan 1996: 26). 'Loan farms' converted to ownership became instruments of exclusion and a source of identity, linked to the fixed property, no longer the mobility of the *trekboer* (Keegan, 1996: 28).

In the Cape, the traditions of enlightenment liberalism and land dispossession have existed alongside each other for almost two centuries. The Ordinance 50 of 1828 and the abolition of slavery in 1833 extended a formal equality before the law to free, male members of African groups in the Cape Colony, including the formal right to own land (Boonzaier et al. 1996: 108-110). Nevertheless, missionary spokespersons held that 'without land their newly won legal equality did not seem of great consequence' (Keegan 1996: 117). In 1838 a missionary said that indigenous people 'had only one-half of their wrongs redressed; they were restored to liberty and freedom of action, but they were not placed in the possession of land or other property as some compensation for the whole colony and the numerous flocks taken from their ancestors' (quoted in Boonzaier et. al 1996: 113). Some missionaries applied for land on behalf of indigenous people, but the government rejected this on the grounds that land at the Cape should be held under individual tenure.

Thus major phases in the construction of land tenure in South Africa may be crudely summed up as: (1) a pre-colonial phase where diverse African peoples practised different

forms of tenure, ranging from individual to family and group rights; (2) Colonial Conquest (1652–1880s) through physical occupation and exclusion combined with various forms of formalised or informal tenure or squatting by settlers of European descent ('loan places' etc.); (3) the assertion of Roman-Dutch Common Law notions of ownership as exclusive and inviolable, increasingly from the mid-1800s; and (4) the legalisation and consolidation of dispossession and exclusion from ownership institutions through late 19<sup>th</sup> century legislation, including the 1913 and 36 Land Acts, and intensified through, among other things, forced removals from the 1950s (Drawing on Carey Miller and Pope 2000: Chapter 1). Dispossession was an important factor in building a nation with an inferior position for the majority.

### 5.1.3 Consolidating exclusion

It is estimated that the government disposed of about 566 000km<sup>2</sup>, about half of the present South Africa, between the 1850s and 1914 (Pienaar 2002). The 1881 Pretoria Convention and the 1891 constitution of the Orange Free State banned land ownership by 'black Africans', although 'coloureds' could own land on conditions of residency and good conduct (Van der Merwe 1989: 677). However, African family farm owners and tenants were responding to demands from new mining centres and competed with settler farming. 'This accumulation of capital and wealth caused the Native Affairs Commission to comment that Africans were becoming wealthy, independent and difficult to govern' (Mbongwa, Vink, and van Zyl 2000: 6, 8). In 1910 the Union of South Africa merged the Republics of the Transvaal and Orange Free State and the Natal and Cape Colonies under a whites-only government that promoted geographical segregation and economic exploitation of black Africans (Davenport and Saunders 2000: 270-1). Doctrines of racism and cultural superiority powerfully informed the taking of the land and nation-building. 'I contend that we are the finest race in the world, and that the more of the world we inhabit, the better it is for the human race', Cecil John Rhodes wrote, claiming that 'Anglo-Saxon influence' would bring improvements to 'the parts inhabited by the most despicable specimens of human beings' (quoted in Sparks 1990: 45).

In June 1913 the Union Parliament passed the 'Natives' Land Act', 'known among Blacks as the law of dispossession' (Baloyi 2000: 146). It had been announced four months earlier in response to demands for legislation to prohibit blacks from 'wandering about without a proper pass', 'squatting on farms', 'sowing on the share system' and purchasing or leasing land. The Act stipulated that outside certain 'scheduled native areas' a 'native shall not enter into any agreement or transaction for the purchase, hire, or other acquisition from a person other than a native, of any such land or of any right thereto, interest therein, or servitude there over' (Section 1). The Act set aside about 8% of the land for 'scheduled native areas' while a Land Commission was established to recommend further allocations (see Table 2).



Table 2: Proposed land allocation. Report of the Lands Commission 1913

	Morgen (million)	Hectare (million)	Percent	'Natives'	'Europeans'	Ha/capita
'English or urban areas'	1.8	1.5	1%	800 000	660 000	
'Native areas'	18.3	15.6	13%	4 000 000		4
'European rural areas'	123.0	105.0	86%		660 000	159
Total	143.1	122.1	100%	4 800 000	1 320 000	

Source: (Plaatje 1916: 409). Column with ha per capita added.

The 1913 Act was only one of many measures of dispossession (Klug 1993: 1) but it formalised, and came to symbolise, the exclusion of the majority from rights of use, ownership, contract and governance and it formally governed land ownership in South Africa till 1991, and in effect beyond. Davenport (2000: 271) writes that the Act 'imposed a policy of territorial segregation with a very heavy hand' and that its primary aims were to eliminate features of African tenure (ownership and sharecropping) that white farmers found annoying. A major measure was the banning of access to privately owned land through sharecropping, leasing and other tenancy arrangements, affecting about one million, or a quarter of the black African population (Davenport & Saunders 2000: 271–2; Plaatje 1916: 21). This also limited the contractual rights of landowners who had profited from tenancy arrangements, for the 'greater cause' of segregation and other forms of labour exploitation.

#### 5.1.4 'Separate development': Not the sword, but the benevolent hand

Between 1910 and 1935 the Union Government introduced a broad range of measures to support commercial farming, including subsidies, loans, land redistribution and legislation and a total of 87 acts.<sup>48</sup> Five-year renewable leases with options to buy on soft loans created an average of 700 new white owned farms per year, increasing the total number from 81 000 in 1921 to a peak of 119 500 in 1952 (Mbongwa, Vink, and van Zyl 2000: 12-13). The state used legislation, public investment, infrastructure-development and geographical zoning to construct property rights for white farmers.<sup>49</sup> South Africa's modern land system is therefore the product of a state-led land reform programme that concentrated resource-control and market access within a small class of property owners.

In 1948 the National Party came to power on a programme to consolidate racial class interests and segregation. The South African system of exclusion was special in that it took place against the background of a tradition of political liberalism in the Cape (Robertson 1971). Apartheid policies were therefore partly explained in terms of the rights of the minority

<sup>48</sup> Such as the Land and Agricultural Bank Act 1912, the Land Settlement Act 1912 (about settling white farmers on state land) and the Cooperative Societies Acts 1922 and 1939.

and the explicit rejection of rights to equality and political participation for the majority. However, more important was the ideology of race, the nation and development. After 1948 'liberals' put up some resistance to rigid apartheid legislation, but often expressed support for the underlying goal of segregation. The National Party brushed liberal concerns aside by referring to the goal of protecting the 'white nation' (Robertson 1971: 45–46). H.F. Verwoerd<sup>50</sup> stated in his first speech as a senator that development for the black majority should derive not from their rights and agency but from the benevolent elite:

South Africa is a white man's country and ... he must remain the master here ... We are prepared to accord to non-Europeans the right to their own opportunities and development, where we bring it about not by means of the sword, but through the benevolent hand of the Europeans who are in the country. Then we do not arouse the suspicion of the world outside ... that there is oppression but show them that there is a policy which seeks right and justice toward all. (Quoted in Wilkins and Strydom 1979: 199–200)

From the 1950s onwards, Verwoerd emphasised the idea of 'separate development', *aparte ontwikkeling*, a term first conceived by the Afrikaaner Broederbond<sup>51</sup> in 1935. In 1968 Prime Minister Vorster presented the policy of separate development as ultimately concerned to protect the different ethnic identities: 'The basis of the policy of separate development is not a denial of a person's right to be a human being. It is the maintenance of the identity of everyone, the creation of opportunities which did not exist before and which would not exist under any other policy.' He also envisaged South Africa's leading role in addressing the worldwide failure to design 'practical arrangements to remove friction between the races'; something neither the English nor the Americans could do at home (quoted in Wilkins and Strydom 1979: 202). 'Separate development' included visions of urban planning and agricultural development through making 'economic units' for fulltime farmers in the 'Reserves' (Davenport and Saunders 2000: 389).

In 1959 the 'Bantustan policy'<sup>52</sup> was presented as comparable to African decolonisation and a response to international human rights criticism (Dugard 2000: 447; Klug 2000: 40). Mandela wrote that 'the scheme gave us neither freedom in white areas nor independence in what they deemed "our" areas.' They did not engender 'goodwill', as Verwoerd had envisaged, but brought turmoil to rural areas (Mandela 1994: 270). Alan Paton (1981: 279-81) referred to Verwoerd as an 'economic illiterate' who was dreaming of Separate Development without regard for the spatial and economic constraints within the

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<sup>49</sup> The system was not financially sustainable and from the early 1980s subsidies were drastically reduced. Agriculture became more commercial, capital-intensive and less 'politically vulnerable' (Lodge 2002: 71). An estimated 1.6 million workers left or were forced away from white farm areas between 1980 and 1985 (Mbongwa, Vink, and van Zyl 2000: 71).

<sup>50</sup> Minister of Native Affairs 1950 and Prime Minister 1958–1966.

<sup>51</sup> A secret organisation with close ties to government. Established in 1928 to promote Afrikaner domination, at the height of apartheid it was thought to have '12 000 scrupulously selected members' (Wilkins and Strydom 1979: 1).

'homelands' and who used police and bulldozers to crush resistance. As the government continued to pursue segregation through legislation and forced removals,<sup>53</sup> the demand for labour in the capitalist economy caused increasing integration in a growth period that lasted till 1981 (Seekings 2000Chapter 1). Desmond Cosmas wrote in the foreword to the study of forced removals by the Surplus People Project that, 'anybody who is tempted to believe the Nationalist government's propaganda that South Africa is peacefully progressing towards a more equitable and humane society, complete with a new enlarged Constitution, needs only to glance at this book to be disillusioned. No amount of cosmetics can disguise the true face of apartheid which is revealed by the evidence accumulated by the Surplus People Project'. The evidence showed the costs black South Africans had to pay for national and global prosperity: 'Particularly guilty partners are those foreign investors whose capital-intensive and high-technology ventures are rendering more and more black workers "surplus"' (Desmond 1985: xvii).

Policy shifts and ad hoc implementation of land tenure legislation was part of a disabling dispensation. The Tomlinson Commission (1955) recommended an intensified development programme, including relocation, soil conservation measures and livestock controls and privatisation of land. The government rejected the recommendation about individualising land tenure. It was estimated that food production in the 'reserves' provided 45% of subsistence requirements in the period 1918 to 1955, but dropped to 20% of requirements as a result of relocation, population growth and neglect (Mbongwa, Vink, and van Zyl 2000: 11). During the later years of apartheid the massive economic failures and human suffering caused by 'Bantustan' policies became evident, leading the government to promote land tenure reform in the form of titling programmes in the 'homelands' while rejecting the extension of property rights into 'white areas' which could lead to demands for political participation.<sup>54</sup> Letsoalo (1987) criticised the limited 'tenure reforms' and argued that they showed that government remained more interested in extracting labour than in securing access to resources for the majority. She held that '[n]othing can be more detrimental for the majority of the Blacks than privatisation of rural land. There is nothing inherently

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<sup>52</sup> The Promotion of Bantu Self Government Act from 1959 provided for separate 'self-governing' Bantustans and the Bantu Homelands Citizenship Act 1970 aimed to make every African a citizen in a Bantustan. By 1990, four Bantustans were presented as 'independent' and six as 'self-governing'.

<sup>53</sup> The Group Areas Act of 1950 empowered the government to establish areas for exclusive occupation by racial groups. Between 1960 and 1983 about 3.5 million people in cities, towns and rural areas were forcefully removed from their places of residence, including farm evictions (32%), removal of farmers from so-called 'black spots', i.e. properties in 'white areas' (19%), and urban relocations (24%), informal settlements (3%), development schemes, consolidation of reservation lands and others (Platzky and Walker 1985).

unprogressive in the indigenous land tenure system of the Blacks. The problem in South Africa is the unequal distribution of land between the races' (Letsoalo 1987: Preface).

#### 5.1.5 International human rights rejected

In the era of 'contemporary human rights' (Baxi's (2002) term for the period after 1948), South Africa insisted on the modern principle of state sovereignty. South Africa had played a prominent role in the establishment of the United Nations in 1945<sup>55</sup> but from 1946 Mahatma Gandhi challenged discrimination against Asians in South Africa<sup>56</sup> and South Africa abstained from voting when the Universal Declaration on Human Rights was adopted in December 1948 (Dugard 2001: 240). During several decades apartheid governments rejected criticism by referring to domestic jurisdiction. The UN Charter was not adopted into national law and attempts to use it to challenge the laws prescribing racial zoning failed (Dugard 2001: 24). Thus during the apartheid era the Slavery Convention of 1926 and the Forced Labour Convention of 1930 were the only human rights treaties valid in South Africa (Dugard 2001: 254). In 1952, thirteen Asian and African countries demanded that South Africa's apartheid policy be placed on the agenda of the UN General Assembly. The United Nations (1973) condemned apartheid as a 'crime against humanity', with only the USA, the UK, Portugal and South Africa voting against this motion. The 1977 arms embargo became the first action against a member state under Chapter VII of the UN Charter (Klug 2000: 198, fn. 55). The Harare Declaration (OAU 1989) condemned apartheid and insisted that 'this scourge and affront to humanity must be fought and eradicated in its totality'. Violence and repressive measures, such as the Sharpeville massacre in 1960, led more and more states to criticise South Africa's assertion of domestic jurisdiction; land policy was seen as a prime example that legality per se could establish legitimacy. South Africa therefore made an 'enormous, although unintended contribution to the international development of human rights' (Dugard 2000: 20). Yet South Africa also illustrated the limited reach of human rights, because major states in the north continued to trade and cooperate with the South African government during the period of human rights formulations and condemnations by the United Nations. Instead, human rights were mobilised in the long-standing national rights struggle and in a younger global anti-apartheid movement.

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<sup>54</sup> An official argued against black property rights in white areas, saying that 'if those concessions are granted, such a population will not be satisfied with social rights only, but will certainly insist on the franchise and make further demands ... My department would view the alienation of White land as a nail in the coffin of the White nation and of the fundamental principle of apartheid. We shall therefore be only too glad to assist those Bantu who are interested in buying land in towns in their respective homelands' (Onselen, Secretary for Bantu Administration and Development, 1972, quoted in Murphy 1977: 262)

<sup>55</sup> Prime Minister J.C. Smuts was central in drafting the Preamble of the United Nations Charter (Anker 2001: 175).

<sup>56</sup> Protesting against the 'Asiatic Land Tenure and Indian Representation Act' of that year, which prohibited citizens of Indian descent from acquiring land and curtailed their political representation (Anker 1999: 213; Klug 2000: 52).

## 5.2 Protest, rights and land

### 5.2.1 Plaatje's protest

Solomon Plaatje, the first General Secretary of the African Native (later National) Congress established in 1912, protested that the 1913 Black Land Act would 'reduce them forever to a state of serfdom, and degrade them as nothing had done since slavery was abolished at the Cape'. He sent delegations and submissions and requested time to distribute and consult the bill among African communities but complained that and it was passed hurriedly into law after efforts to induce the government to circulate translations of the Act had 'proved fruitless' (1916: 59).

The Natives' Land Act of 1913 ... decreed, in the name of His Majesty the King, that pending the adoption of a report to be made by a commission, somewhere in the dim and unknown future, it shall be unlawful for natives to buy or lease land, except in scheduled native areas. And under severe pains and penalties they were to be *deprived of the bare human rights of living on the land*, except as servants in the employ of the white. (Plaatje 1916: 31-2, emphasis added)

Plaatje's 'bare human rights of living on the land' vividly evokes the sense of home, belonging and nurturing. It focuses on the loss of livelihood and use rights on private land when thousands of tenants were forced onto the roads seeking other employment. He describes women's hardship and protests against the displacement. After the passing of the Act men 'saw their women-folk throwing off their shawls and taking the "law" into their own hands'. Hundreds of women marched to the municipal offices in Bloemfontein and other towns where they were imprisoned under appalling conditions (113). He warns against the 'commercial traffic in black girls' that he believed would increase within the 'enclosures' (418) and against any attempt 'to protect the comfort of black men by degrading black women. God knows that the lot of the black women in South Africa is bad as it is' (118).

Plaatje's comprehensive study reproduces reports from the debates about the 1913 Land Act in Parliament. These reports starkly illustrate the racist views that reduced indigenous groups to economic assets. A Mr Keyter expressed the view that exclusive control and ownership of land was essential for the 'white nation' and asserted that settlers and the Government of the Orange Free State had 'always treated the coloured people with the greatest consideration and the utmost justice':

They told the coloured people plainly that the OFS was a white man's country, and that they intended to keep it so. (Hear, hear.) They told the coloured people that they were not to be allowed to buy or hire land, and that they were not going to tolerate an equality of whites and blacks; and he said that they were not going to tolerate that in the future, and if an attempt were made to force that on them, they would resist it at any cost to the last, for if they did tolerate it, they would very soon find that they would be a Bastard nation. His experience was that the native should be treated firmly, kept in his place and treated honestly. They should not give him a gun one day and fight him for it the next day. They should tell him, as the Free State told him, that it was a white man's country, that he was not going to be allowed to buy land there or to hire land there, and that if he wanted to be there he must be in service. (Parliamentary debate reported in Union Hansard 1913, as quoted by Plaatje: 45)

This linking of race, land, law and rightlessness is a sharply formulated counter-thesis to a human rights view. It was perhaps an extreme view, but one that was further institutionalised through the Act. A few parliamentarians tried to represent African voices, referring to mass meetings and 'native protests from all parts of South Africa [which] should receive fair consideration from members' [of Parliament]. A member argued that, 'No man, and the native was just a man like the rest of us, liked the old arrangement to be disturbed' (53). However, most of the critical comments were practical and utilitarian, concerned mainly with the difficulty of achieving segregation. A member asked if the reserves 'would not result in injury to agriculture and cattle breeding? The farmers would suffer from lack of labour ... neither could he agree to the principle of expropriation of land belonging to whites in order to increase the size of native reserves' (Plaatje 1916: 47). Sir Berry warned that 'the greatest dangers that could threaten us was to give the natives anything in the shape of a common grievance. Divide and rule had been a wise precaution in the government of the natives' (50).

Plaatje documents two major competing views of land ownership as either reserved for the minority or as an instrument of integrating Africans as participants in the economy. A Mr Merriman spoke against the bill and emphasised 'a brighter side to the question, and that was to point out that the natives, if they were well managed, were an invaluable asset to the people of this country'. He argued against the exclusion of the African majority because the Bill would set up 'a sort of kraal in which all the natives were to be driven, and they were to be left to develop on their own lines. To allow them to go on their own lines meant barbarous lines, their own lines were cruel lines. All along they [the Europeans] had been bringing them away from their own lines'. Thus, he said, a 'policy more foredoomed to failure in South Africa could not be initiated. It was a policy that would keep South Africa back, perhaps forever' (39). Mr Merriman noted that 'every civilized man was becoming an owner of land outside native reserves, and therefore he was an asset of strength to the country. He was a loyalist. He was not going to risk losing the property. He was on the side of the European' (Plaatje 1916: 39).

These debates ignored historical and current rights to land, fundamental rights to a livelihood, to be informed and to participate in decision-making. The cruelty of the Act and the implementation that followed support Lindquist's (1997) claim that there was a deep European racism and willingness to radically exclude others from rights. Plaatje wrote that the plan was 'to herd us into concentration camps, with the additional recommendation that besides breeding slaves for our master, we should be made to pay for the upkeep of the camps' (435–6). He appealed to the 'liberal policies' of the former Cape and Natal and headed a delegation to England to request the British government and public to intervene, but to no avail. There was no international law or agency to which to appeal. Africans were

'hapless, because voteless', lacking either president or king and 'with a governor general without constitutional functions, under task-masters whose national traditions are to enslave the dark races' (Plaatje 1916: 76). In the end he found hope only in a vision of divine intervention combined with women's violent agency:

We remember how African women have at times shed tears under similar injustices, and how when they have been made to leave their fields with their hoes on their shoulders, their tears on evaporation have drawn fire and brimstone from the skies. But such blind retribution has a way of punishing the innocent alike with the guilty, and it is in the interest of both that we plead for some outside intervention to assist South Africa in recovering her lost senses. (Plaatje 1916: 436)

### 5.2.2 'Tenants on our own soil'

Chief Meligqili's speech to Nelson Mandela's batch of initiates showed how the loss of land pervaded the sense of economic, political and physical marginalisation:

There sit our sons, young, healthy and handsome, the flower of the Xhosa tribe, the pride of our nation. We have just circumcised them in a ritual that promises them manhood, but I am here to tell you that it is an empty illusory promise that can never be fulfilled. For we Xhosas, and all black South Africans, are a conquered people. We are slaves in our own country. We are tenants on our own soil. We have no strength, no power, no control over our own destiny in the land of our birth. They will go to cities where they will live in shacks and drink cheap alcohol, all because we have no land to give them where they could prosper and multiply. They will cough their lungs out deep in the bowels of the white man's mines, destroying their health, never seeing the sun, so that the white man can live a life of unequalled prosperity. Among these young men are chiefs who will never rule because we have no power to govern ourselves; soldiers who will never fight for we have no weapons to fight with; scholars who will never teach because we have no place for them to study. The abilities, the intelligence, the promise of these young men will be squandered in their attempt to eke out a living doing the simplest, most mindless chores for the white man. These gifts today are naught, for we cannot give them the greatest gift of all, which is freedom and independence. (Mandela 1994: 33-34)

Mandela's memory of chief Meligqili's speech is a political economy analysis of the link between land and human capabilities, dispossession and capability failures. More than just an economic asset, land was a manifestation of injustice and a means to restore lost dignity and autonomy.

### 5.2.3 Women demand equal rights (1954-5)

Various anti-apartheid groups gave a prominent role to land in various rights declarations. The ANC's 1943 'Africans' Claims in South Africa' contained a 'Bill of Rights' which, as equal citizenship and democratic participation, also demanded a fair redistribution of land and state assistance to African farmers, stating that 'the right to own, buy, hire or lease and occupy land individually or collectively, both in rural and in urban areas, is a fundamental right of citizenship' (ANC 1943: 7).

The Federation of South African Women (FSAW) was formed in 1952 (ANC Women's League 2004) at a conference that brought together 230 000 women from all over South Africa, including trade unionists, nurses, teachers and peasants who formulated a Women's

Charter on 17 April 1954 (FSAW 1954). It held that 'the level of civilisation which any society has reached can be measured by the degree of freedom that its members enjoy. The status of women is a test of civilisation. Measured by that standard, South Africa must be considered low in the scale of civilised nations'. The Women's Charter shared the philosophy of a universal standard of progress enshrined in a statement of rights, and stressed the unity of struggles for racial and gender equality. It spelled out the threatened capabilities of women, in a gendered supplement to Chief Meliqili's speech to and about men:

We women share with our menfolk the cares and anxieties imposed by poverty and its evils. As wives and mothers, it falls upon us to make small wages stretch a long way. It is we who feel the cries of our children when they are hungry and sick. It is our lot to keep and care for the homes that are too small, broken and dirty to be kept clean. We know the burden of looking after children and land when our husbands are away in the mines, on the farms, and in the towns earning our daily bread. We know what it is to keep family life going in pondokkies [sheds] and shanties, or in overcrowded one-room apartments. We know the bitterness of children taken to lawless ways, of daughters becoming unmarried mothers whilst still at school, of boys and girls growing up without education, training or jobs at a living wage. (Women's Charter, FSAW 1954)

The Charter called for the enfranchisement of men and women of all races, equality of opportunity in employment and equal pay for equal work, and demanded 'the removal of laws and customs that deny African women the right to own, inherit or alienate property'. It held that the 'the ancient and revered traditions and customs' once served a purpose in providing land and security to men and women as 'partners in a compact and closely knit family unit'. However, it held, 'those conditions have gone. The tribal and kinship society to which they belonged has been destroyed as a result of the loss of tribal land, migration of men away from the tribal home, the growth of towns and industries and the rise of a great body of wage-earners'. Laws and practices derived from a past society are out of tune with the role of women as wage-earners and heads of families. The Charter demanded paid maternity leave, childcare for working mothers and a free and compulsory education for all South African children, but first and foremost full civil, political and economic equality. It frankly stated that 'the intolerable condition would not be allowed to continue were it not for the refusal of a large section of our menfolk to concede to us women the rights and privileges which they demand for themselves'. It resolved to 'teach the men that they cannot hope to liberate themselves from the evils of discrimination and prejudice as long as they fail to extend to women complete and unqualified equality in law and in practice.' (FSAW 1954).

The Transvaal branch of FSAW (1955) demanded that state benefits offered to the white minority should become citizen rights for all South Africans, including through services, redistribution of land and agricultural support for improved food security:

We demand the right of *all* people to own and work their own farms. The development of all uncultivated land. The fair distribution of land amongst *all* people. The mechanisation of methods of food production. The scientific improvement of land by: Irrigation and intensive farming. Control of soil erosion and improvement of the soil. Supply of seed to all people producing from the land. Efficient organisation of the distribution and marketing of food. *We*



*demand sufficient food for all people.* (Transvaal FSAW 1955)

The demand for more and better land was linked to social issues of schooling, maternity, medical and social services, controlled prices and planned agricultural development. The Charter demanded that 'the reserves become food producing areas and not reservoirs of cheap labour'. While the Charter was controversial for possibly accepting the existence of 'reserves', it addressed agrarian reform by demanding the 'transfer of trust farms to the ownership of the African people', abolition of convict farm labour, minimum wages for all men and women on farms, the abolition of child labour on the farms, the abolition of the 'tot' system of paying farm labourers in alcohol, free compulsory education for all children in rural areas, paid holidays for farm workers, and inclusion of farm workers in industrial legislation. 'We demand these rights for all people in the rural areas' (Transvaal FSAW 1955). It was thus a comprehensive, rights-based empowerment strategy, and the only one I have seen to place a prominent focus on children in relation to land. Like the FSAW Women's Charter 1954, it demanded 'equal rights with men in relation to property, marriage and children' and 'the removal of all laws and customs that deny women such equal rights'.

#### 5.2.4 The Freedom Charter (1955): The people shall govern

The Freedom Charter adopted in Kliptown on June 25–26 1955<sup>57</sup> advocates a non-racial, unitary South Africa with 'equal human rights' for all (Mandela 1994: 199). The document was formulated by an alliance of anti-apartheid organisations and with 'thousands of demands from grass roots meetings around the country' (Turok 2002). The Charter holds that just government is based on the will of the people, who had till then 'been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality'. It demands that all shall enjoy equal rights irrespective of colour, race, sex or belief, expressing its vision of a future society under ten headlines:

The People shall Govern! All National Groups Shall have Equal Rights! The People Shall Share in the Country's Wealth! The Land Shall be Shared Among Those Who Work It! All Shall be Equal Before the Law! All Shall Enjoy Equal Human Rights! There Shall be Work and Security! The Doors of Learning and Culture Shall be Opened! There Shall be Houses, Security and Comfort! There Shall be Peace and Friendship! (Congress of the People 1955)

The Charter advocates that 'all bodies of minority rule, advisory boards, councils and authorities' should be substituted by 'democratic organs of self-government' and every man and woman shall have the right to vote and run for election to law-making bodies. However, it apparently abandons some aspects of the critical, proactive approach to gender equality (beyond non-discrimination) expressed in the women's charters and does not challenge institutions and practices that inhibit women's enjoyment of equal rights.

The section on land reform emphasises redistribution among the users of land, the removal of legal restrictions on ownership, state support for farming, and freedom of movement. As in the women's charters, individuals and family welfare are central: the right to be 'decently housed' and live in 'comfort and security', to food and freedom from hunger. The Charter defines a strong state responsibility for health: 'A preventive health scheme shall be run by the state; free medical care and hospitalisation shall be provided for all, with special care for mothers and young children'. Health is linked to the quality of the rural and urban places where people live. 'Slums shall be demolished, and new suburbs built where all have transport, roads, lighting, playing fields, crèches and social centres ... Fenced locations and ghettos shall be abolished, and laws which break up families shall be repealed' (Congress of the People, 1955).

The Charter thus focuses on state responsibility and accountability through control over the economy, service delivery and democratic institutions. From a position of hindsight, Mandela explained that it 'endorsed private enterprise and would allow capitalism to flourish among Africans for the first time ... [who would] have the opportunity to own their own businesses in their own names, to own their own houses and property; in short, to prosper as capitalists and entrepreneurs' (Mandela 1994: 205). In his view it only advocated nationalisation of the means of production for key sectors if this was necessary to break the monopoly of white business. However, he called the Freedom Charter revolutionary because 'the changes it envisioned could not be achieved without radically altering the economic and political structure of South Africa. It was not meant to be capitalist or socialist but a melding together of the people's demands to end oppression' (Mandela 1994: 206). Mandela's comments show this rights statement, as all others, is open to interpretation but the Freedom Charter has been said to remain 'the principal statement of African National Congress policy to this day. No one has ever challenged it' (Turok 2002).<sup>58</sup> The Department of Land Affairs has recently stated that the charter is a basis for land policy (DLA 2005).

The chiefs' protests, the women's struggle for gender equality, the nationalist rights struggle all addressed the oppressive land regime. Community organisations and land NGOs have renewed and elaborated social justice demands the Land Charter 1994, the Rural People's Charter 1999 and the Landless People's Charter 2001 (quoted as epigrams to Part II). The Land Charter 1994 addresses an imagined caring world – 'we declare our needs for all the world to know' – and focuses on state responsibility for suffering and environmental

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<sup>57</sup> Kliptown was a multi-racial village a few miles outside Johannesburg. About 3 000 delegates attended the convention, including different racial groups, a 'rainbow of colours'. It succeeded in its deliberations but was broken up by security police on the second day (Mandela 1994: 201–3).

<sup>58</sup> The ANC announced that 2005, the 50<sup>th</sup> year of the Charter, would be devoted to 'local action to advance the vision of the Freedom Charter'. The first quarter of the year was to be devoted to education, health and service provision; the second to poverty and job creation; the third to educating communities about rights; and the fourth to good governance, participatory democracy and ANC victory in local elections (to take place in 2006) (ANC 2005).

injustice: 'we have seen our children stunted because of little food, no water and no sanitation. We have seen our land dry up and blow away in the wind', repeated in the Landless People's Charter from 2001.

A glimpse of South African land history supports the theoretical reading of land tenure as a human rights issue (as argued in Chapter 2). Settlers of European descent largely monopolised agricultural land and mineral wealth based on superior power and set a precedent for seeing land as an ethnic privilege and political good. Colonial and apartheid governments violated the human rights of the majority, including (i) the right to own property and be protected against arbitrary dispossession; (ii) the right to home, security and freedom of movement; (iii) the right to livelihood, food and fair conditions of employment; (iv) the right to non-discrimination on the basis of gender and race; and (v) the right to democratic participation in land governance. The rule of law became, for many, synonymous with the experience of exclusion and material deprivation. Solomon Plaatje evoked the 'bare human rights of living on the land', but worked in a situation where local protest and international appeals had little impact. In the freedom charters of the 1950s the South African state was a focal point for demands for equal rights yet only by the end of the 1980s had national and global economic and political changes brought political change and created space for land reform, or at least for land reform policy.



## 6. DEVELOPMENT CONTEXT

### 6.1 A new political constitution

This chapter briefly outlines the political and social context of land reform, starting with the national, negotiated settlement at the transition to democracy and its key expression in the Constitution, then returning to the persistent crisis of poverty, inequality and widespread capability failures, partly related to the HIV/AIDS pandemic.

The anti-apartheid struggle was led by the ANC from 1912. During later years when many ANC leaders were in exile the United Democratic Front and other organisations and individuals pursued the struggle (Seekings 2000). From the late 1980s Thabo Mbeki and other ANC leaders had meetings with representatives of the apartheid government and from 1988 Nelson Mandela engaged in 'talks about talks' (Hadland and Rantao 1999). In February 1990 President de Klerk unbanned the ANC and other parties in a speech that 'was to race relations everywhere what the collapse of the Berlin wall was to communism. It signalled the end of the world's last racial oligarchy' (Sparks 1994: 10). Mandela said that the talks between ANC and government represented 'an end to the master/servant relationship that characterised black and white relations in South Africa' (Mandela 1994: 693). However, de Klerk, a 'gradualist and careful pragmatist', was not initially prepared to give up minority rule, but tried to split the opposition by advocating group rights and federalism (Mandela 1994: 692; Sparks 1994: 12). Yet through negotiations the ANC secured their demands for an interim Constitution, a national government of unity to oversee the transition and an elected constituent assembly to draw up a new constitution. The ANC assumed power in 1996 under President Nelson Mandela and became a 'pillar of stability' in the post-apartheid period (Marais 2001: 298). A Polish-Norwegian intellectual referred to G.B. Shaw's dictum that 'revolutions never removed the burdens of tyranny but only placed them on different shoulders'; but, she added, three revolutions in modern history have proved him wrong: the women's revolution, those in Eastern Europe, and the South African (Witoszek 2005). The South African revolution and its outcome is of global significance.

The Constitution of South Africa, Act 108 of 1996, holds that 'South Africa belongs to all who live in it, united in our diversity' and resolves to 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'. It draws on international law<sup>59</sup> and advances beyond the international covenants of the 1960s by bridging the divide between 'civil-political' and 'social, economic and cultural' rights. When it was adopted, the then Vice-President Thabo Mbeki said that it 'constitutes an unequivocal statement that we refuse to accept that our Africanness shall be defined by our

race, colour, gender or historical origins' and that '[i]t recognizes that the dignity of the individual is both an objective which society must pursue, and is a goal which cannot be separated from the material well-being of that individual' (Mbeki 1996: 156-7).

Chapter 2 in the Constitution, the Bill of Rights, is called 'the cornerstone of democracy in South Africa' (7.1) and states the right of everyone to equality (Section 9),<sup>60</sup> human dignity (10), life (11) and freedom and security of the person (12). The Bill of Rights stresses the substantive content of the right to equality by specifying rights to a healthy environment (24), land (25), housing and protection against evictions (26), health care, food and water (27) and education (29). In each case the right is limited by the formulation that 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'. However, every child has the unqualified and immediate right to basic nutrition, shelter, basic health care and social services and protection from neglect and abuse (28b and c). The state must 'respect, protect, promote and fulfil' the rights in the Bill of Rights (7.2), which applies to all law and binds the legislature, the executive, the judiciary and all organs of state (8.1) and natural or juristic persons if applicable (8.2). Cultural, religious and linguistic communities may not be denied the right to practice their culture, language and religion, but these rights 'may not be exercised in a manner inconsistent with any provision of the Bill of Rights' (31). The Constitution exempts no institutional spheres from the application of the Bill of Rights. The state must protect the rights-holders, not the violators. This was not least because a Women's National Coalition launched in 1992 succeeded 'in defeating a strong drive by traditional leaders to exempt customary law from the jurisdiction of the equality clause, with potentially important implications for land reform' (Walker 2003: 123). The role of local leadership institutions was a difficult issue in the negotiation. The United Democratic Front and ANC Youth Groups had mobilised against traditional leaders as coopted by the apartheid government, but Nelson Mandela and other ANC leaders had bonds with 'traditional' leaders and needed to build support in rural areas. The 1993 Constitution recognised traditional leaders, *amakhozi*, and established Houses of Traditional Leaders at provincial level.<sup>61</sup> The Constitution (1996) recognised the 'institution, status and role' of traditional leaders but made their specific participation in governance subject to legislation (Chapter 12). 'In effect this removed the constitutional mandate and threw the question of the role of traditional leaders back into the political arena' (Klug 2000: 120).

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<sup>59</sup> Section 39 (1.b and c) provides that a court, tribunal or forum must consider international law when interpreting the bill of rights and may consider foreign law. Section 232 states that customary international law (such as the Universal Declaration of Human Rights, 1948) is national law unless inconsistent with the Constitution and national law.

<sup>60</sup> 'Equality includes the full and equal enjoyment of all rights and freedoms' and permits measures 'to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination' (9.2).

<sup>61</sup> Council of Traditional Leaders Act 31 of 1994.

### *Human rights*

Nelson Mandela acknowledged the importance of human rights in the anti-apartheid struggle both before and after he became President. South Africa adopted major international human rights instruments, for example acceding to the Convention on the Elimination of All Discrimination Against Women (CEDAW) without reservations on 15 December 1995. 'The National Plan of Action for the Protection and Promotion of Human Rights' (Government of South Africa 1998) is an official commitment to human rights by the Government of South Africa, intended to cover the period 1998–2001.<sup>62</sup> In the foreword, Mandela stresses 'as the beneficiaries of the international community's insistence that human rights are the rights of all people everywhere, the people of South Africa are proud to be participating, through this Plan, in an international effort to promote and protect human rights.' The Plan holds that the ratification of human rights instruments<sup>63</sup> will 'enjoy priority attention'. In 2003 the ANC stressed argued that human rights had guided the fight for the present political system and linked them to a national rights tradition:

The ANC's role as a champion of human rights, non-racism, gender equity and equality can be traced back to its founding conference in 1912, the adoption of the African Bill of Rights in 1923, the Africans Claims document in 1943, the Freedom Charter in 1955. All these processes became the roadmap to a new South Africa, which came to pass in 1994. (ANC 2003)

Yet, at the end of 2005 the government had yet to ratify the Covenant on Economic, Cultural and Social Rights (CESCR).<sup>64</sup> According to the UN Office of the High Commissioner for Human Rights (2004), South Africa has in the post-apartheid period submitted two reports to international treaty bodies, one under CEDAW and one under the Convention on the Rights of the Child (in 1998). By 2004 nine reports were overdue.<sup>65</sup> When the economic and human rights crisis in Zimbabwe intensified after land invasions from 2000, the South African government's 'silent diplomacy' was criticised, among others by Desmond Tutu:

Had the international community invoked the rubric of non-interference then we would have been in dire straits in our anti-apartheid struggle. We appealed for the world to intervene and interfere in South Africa's internal affairs. We could not have defeated apartheid on our own. What is sauce for the goose must be sauce for the gander too. (Sapa 2003b)

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<sup>62</sup> Adopted by government and parliament as national policy lodged with the UN as an official commitment to human rights in December 1998, the 50<sup>th</sup> anniversary of the UDHR.

<sup>63</sup> 'The international and regional human rights Conventions, Covenants and treaties strengthen the rights of everyone in the South African Constitution. They also draw on a long and informative jurisprudence in the application of rights. For these reasons, the South African Government has, within the first four years of office, approved them, and parliament is currently in the process of ratifying them. [mentions the CPR (signed 1994); ESCR (signed in 1994); CERD (signed in 1994); The Convention Against Torture (signed in 1993)]. The ratification of these instruments, documents and treaties will enjoy priority attention.' (Government of South Africa 1998)

<sup>64</sup> Interviewed in 2002, Geoff Budlender (LRC) said it was an 'embarrassment'. He had asked government officials without getting an answer; it could be oversight or reflect political reluctance.

<sup>65</sup> CAT (2), CCPR (1), CEDAW (1), CERD (3) and CRC (1). UNHCHR (2005).

*The Constitutional Court*

Civil society organisations have put pressure on the government to promote constitutional rights to health, housing and land. The Soobramoney judgement (Constitutional Court 1998) rejected a demand for health care on account of resource constraints, but offered an often quoted confirmation of the commitment to substantive equality:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security; and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring. (Constitutional Court 1998)

In the 'Grootboom case' (named after Irene Grootboom, one of the homeless applicants on whose behalf it was fought) the issue was 'whether our Constitution provides any effective remedy and relief to 390 adults and 510 children who are literally homeless; who are currently living without effective protection from the elements; who do not have anywhere they can live in security' (Geoff Budlender<sup>66</sup> on behalf of the *Amici curiae*). Budlender argued that the government saw people's right to housing as an entitlement to have their names on a waiting list for housing. This, he said, reflected 'an impoverished and mistaken understanding of the serious and considered promise made in the Constitution to the people of South Africa' (Budlender 2000). The Constitutional Court (2000) argued that socio-economic rights are justiciable under the constitution and that '[t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the rights' (para 44). The Court found that Government had not fulfilled its duties to provide relief for those in desperate need (para 66) and ruled that it must devise and implement a programme to realise the right to housing with reasonable measures to provide relief for those living in intolerable conditions and crisis situations. However, Budlender (2001: 26) noted that community members continued to live in highly unsatisfactory circumstances; but interviewed in 2002 he said one did not what had happened to Irene Grootboom who gave her name to the now famous case.

The government and civil society could use judgements such as Grootboom to guide wider social policy reform (Liebenberg 2001). The South African Human Rights Commission stressed that the judgement has implications for land reform because it 'has had the dramatic effect of showing that the courts may have to establish whether measures exist to

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<sup>66</sup> Geoff Budlender was Director-General in the Department of Land Affairs from 1996 to 2000, when he returned to the Legal Resources Centre to become the Director of the Constitutional Litigation Unit in Cape Town.



foster conditions for equitable access to land [and to] evaluate the reasonableness of measures' (SAHRC 2001: 280). Budlender detected a 'turning point in the relations between government and civil society' in the late 1990s. After protecting the democratic government in the early days of democracy, civil society actors are increasingly asserting and promoting rights through courts (Budlender 2002). However, it is still the case that a majority of cases before the Constitutional Court were brought in defence of business interests and only a few by non-governmental organisations (Seafeld 2003: 322). The first land reform case taken to the Constitutional Court (2003) confirmed the right of the Richtersveld community to restitution of land rights and compensation for a state sanctioned annexation of their land by the diamond industry in the 1920s.

### *The African Renaissance*

The meaning of the 'Constitution' and 'democracy' are renewed within broader cultural and political changes. South Africa's transition to democracy came late in Africa's decolonisation but inspired hopes of a wider African renewal or renaissance (Alagiah 2001: 261; Sparks 1994: 12). Editors of the proceedings of a conference on the African Renaissance argued that, 'mankind is now turning back to Africa for moral inspiration and renewal, for the solution of man's complex political issues, for principles of equality and nonracism, and in the construction of modern functioning democracies. Again, our continent and its people are the laboratory and model experiment of humanity in reconciling humanity ... In South Africa it is called *ubuntu* (Makgoba, Shope, and Mazwai 1999: v). The African renaissance is about the 'roots and essence of the African' that survived underneath imposed languages and institutions. Thabo Mbeki argued that Africa needs 'a second liberation' in order to realise 'an African continent in which people participate in systems of governance in which they are truly able to determine their destiny and put behind us the notions of democracy and human rights as peculiarly 'Western' concepts' (Mbeki 1999: xv, xviii). Jeremy Cronin<sup>67</sup> criticised the notions of an African renaissance for assuming an inevitable development, 'as if there is some kind of divine justice, some kind of divine eye that is seeing a queue'. He found that it encouraged a vague political discourse 'rather than something that mobilises people in relation to jobs, poverty, crime, violence against women' (Sheehan 2002). President Thabo Mbeki has also stressed that economic redistribution and the relief of poverty are essential for nation building. In his 1998 speech, *South Africa: Two Nations*, Mbeki maintained that the government has not realised the Constitutional promise of equal rights: one nation is 'white, relatively prosperous' and has access to 'a developed, economic, physical, educational, communication and other infrastructure' and therefore enjoys equal rights, except that of gender equality. However, 'the second and larger nation of South Africa is black and poor, with the worst affected being women in the rural areas, the black rural population in general

and the disabled'. This second nation lives under conditions of a grossly underdeveloped infrastructure with 'virtually no possibility to exercise what in reality amounts to a theoretical right to equal opportunity, with that right being equal within this black nation only to the extent that it is equally incapable of realisation'. Nation-building may therefore be a 'mere mirage' (Mbeki 1998: 188).

## 6.2 Wealth, inequality and human development

### 6.2.1 Legacy of deprivation

South Africa is a middle-income country in which a modern sector provides a high level of wealth, technology, research and infrastructure for a minority of the population. The history of patriarchal and racist capitalism produced extreme inequalities of incomes and capabilities. In 1970, the average per capita income of people classified as white was fifteen times higher than that of blacks. Jenkins and Thomas (2000) estimate that in 1993–1994 South Africa had the world's second highest Gini coefficient (59.3). In 1993 the proportion of individuals living in poverty ranged from 18% in the Western Cape to 48% in the Northern Cape, 50% in the Eastern Cape and 64% in the Free State. Nationally, 35% of households were 'female headed' and had a poverty rate of 60% (May et. al 2000: 34). Based on an unofficial poverty line of R352 per month in 1995, 61% of Africans, 38% of coloured and 5% of Indians and 1% of whites<sup>68</sup> were poor. Of the poor, 72% lived in rural areas, and 71% of all rural people were poor (May, Woolard, and Klasen 2000 : 30).<sup>69</sup> In rural areas people classified as white (farmers) were about 10% richer than those in urban areas; while rural people classified as black and coloured had incomes half those of urban households in the same racial group (May, Woolard et. al. 2000: 30. Quoting CSS 1995). In 1994 South Africa and Brazil were cited as particularly ineffective in turning economic capacity into human welfare: while GNP per capita was more than six times those of China and Sri Lanka, life expectancy was about eight years below (Sen 1999: 47). Inequality and other aspects of the apartheid legacy caused human development indicators to be unfavourable and racially

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<sup>67</sup> Member of Parliament for the Communist Party who until 2001 had been a member of the National Executive Committee of the tripartite government.

<sup>68</sup> These are the official racial categories, used for example in the 2001 national census. I occasionally use them when they appear relevant for reporting social inequality, which is a common justification for keeping them.

<sup>69</sup> Poverty is the inability of individuals, households or communities to command sufficient resources to satisfy a socially acceptable standard of living and often involves social exclusion and high levels of vulnerability (May 2000: 5). South Africans who are poor have said that poverty involves being alienated from the community, not getting care from others, food insecurity, crowded homes, lack of well-paid and secure jobs and fragmented family life with absent fathers and split households; it is closely linked to the experience of powerlessness (May, Woolard, and Klasen 2000: 44).

skewed.<sup>70</sup> The Human Development Index (HDI)<sup>71</sup> in 1992 ranked South Africa number 86 among the world's countries. But it differed starkly for groups classified as white (0,901: position 18), Indian (0,836: position 43), coloured (0,663: position 88) and black (0,500: position 118). HDI was on average 20% lower for women than men, mainly due to income disparities (May, Woolard, and Klasen 2000: 24-5).

### 6.2.2 Economic policy

Against the background of social and economic inequality and widespread deprivation, the first democratic government declared poverty eradication and improved material service delivery to be priority goals. The 'Reconstruction and Development Programme' – 1994 election manifesto and later official development policy (RSA 1995) – allotted the lead responsibility for development and economic growth to the state. The macro-economic policy 'Growth, Employment and Redistribution' (GEAR) from 1996 shifted the emphasis towards facilitating a competitive economy through fiscal discipline, trade liberalisation, macro-economic stability and reduced numbers of public employees (MDB 2003; Chipkin 2002: 60). After years of negotiating a political transition a closed circle of politicians, bureaucrats and World Bank advisors formulated this policy and presented it as 'non-negotiable' (Marais 2001: 162)(Torres 2004: 5). GEAR anticipated a 6% growth and 400 000 new jobs per year (ANC 1997: 18) and was officially presented as the fiscal and monetary policy needed to sustain the RDP. GEAR raised questions about the relationship between rights discourse and economic discourse in land reform and was seen as heralding a shift from the view of the urban and rural poor as rights-bearers to a view of them as entrepreneurs and architects of their own success.

South Africa has maintained a strong economic position within Africa.<sup>72</sup> The GDP grew from US\$102 billion in 1990 to US\$149 billion in 1997 but had contracted to US\$113 billion in 2001 (World Bank 2003c). It was estimated that the South African economy made up about one third of the GNP of Africa and was an important source of investments throughout the continent. South African firms increased their investments in other African countries from US\$1.2 billion in 1996 to US\$4 billion in 2001. From 1994 to 2004 trade with the rest of the continent grew by 300%, and the value of exports from R 9 to R 39 billion (The Economist 2005: 28). Economic indicators show an open economy with increasing trade, improving fiscal balance, reduction of external debt and export-led development. With strict

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<sup>70</sup> For example infant mortality in 1990 was 7.4 per 100 000 for whites, 28.6 for coloureds, 15.9 for Asians and 48.3 for black Africans. In 1993 the poorest quintile spent 59% of their income on food (R70 per capita), the richest decile 15% (R470 per capita). At the end of apartheid 25% of South African children were stunted, among the poorest quintile 36% (May, Woolard, and Klasen 2000: 38, 45, quoting PSLSD 1994).

<sup>71</sup> The HDI is a composite index of life expectancy, educational attainment and economic performance (measured as GDP per capita). It gives the country's relative position on a scale of 0 to 1.

<sup>72</sup> Per capita GNI was US\$2,520 per year, 5.6 times the average for sub-Saharan Africa (US\$450) (World Bank 2003b). By February 2004 1 Euro = R8.5 = and 1 US\$ = R 6.6.

fiscal discipline, the government has maintained the real per capita expenditure from 1995 to 2002 (2% decline).<sup>73</sup> The 2004–2005 national state budget was R363 billion (Euro 43 billion, R 6 800 or Euro 790 per capita), distributed among national departments (38%), provincial departments (57%) and local government (4%).

Despite setbacks in the fight against poverty and HIV/AIDS, the ANC remains a strong leading force in a coalition government with a unique political span.<sup>74</sup> During the first decade voter participation in national elections dropped by 20% from 19.5 to 15.6 million, but the ANC has strengthened its position by losing only 11% of the votes from 1994 to 2004.<sup>75</sup> Since 1994 the New National Party has lost almost all support and the Inkatha Freedom Party been reduced by about half in 1994, while the Democratic Party (with 12.4% in 2004) has become the largest opposition party (Independent Electoral Commission 2004 and other years).

### 6.2.3 Persistent crisis

#### *Inequality, unemployment and vulnerable capabilities*

Nevertheless, the majority of South Africans experience persistent inequality and widespread capability failures, partly related to the HIV/AIDS pandemic. Income inequality appears to have increased since the transition to democracy. From 1991 to 1996 the richest 10% of blacks increased their real income by 17% while the poorest 40% experienced a decline of 21%. The Gini-coefficient among blacks rose to 0.66, the highest among any group. (Taylor Committee 2002: 27–8). The inequality was linked to declining formal sector employment during the 1990s (Jenkins and Thomas 2000: 19). It was estimated that the economy ‘shed’ some 500 000 jobs from 1994 to 1999; 350 000 of these after the adoption of GEAR in 1996 (Bek, Binns, and Nel 2004: 25).<sup>76</sup> From 1995 to 1999 the proportion of black households where no member had a job increased from 32% to 38%, or 3.1 million households (Taylor Committee 2002: 28). In 2003 the ‘expanded’ unemployment rate was estimated at 42%. About 11.6 million (39%) of the working age population of 30 million had a job. Of these 8.3 million jobs (72%) were considered ‘formal sector’ employment and the rest ‘informal’ and domestic. For black Africans formal employment made up only about 62% of jobs. Agriculture accounted for 10% of formal and 16% of ‘informal’ employment (StatsSA 2004a:

<sup>73</sup> (UNDP 2004: 8. Table 1). Budget lines that have increased from 1995 to 2002 are general administration (+16%), law and order (+8%), social security and welfare (+8%) and health (+1%). The following have declined: defence (-19%), education (-10%) and economic services (-10%). Land reform has maintained a share of between 0.3% and 0.4% of the total budget.

<sup>74</sup> Also comprising the South African Communist Party, the Coalition of South African Trade Unions (Cosatu) and the New National Party (its leader became Minister for the Environment in the 2004 cabinet). In June 2004 the New National Party announced that it adopted the Freedom Charter and merged with the ANC (Hoeane 2004).

<sup>75</sup> The percentage of the electorate voting dropped from 87% (1994) to 64% (1999) and 58% (2004). ANC’s proportion of votes increased from 1994 (63%) 1999 (66%) and 2004 (70 %).

<sup>76</sup> Not an uncontested estimate, since ANC claims that a competitive and growing economy ‘has created 2 million net new jobs between 1996 and 2003’ (ANC 2004).

Tables B (iii), C (iv), D (v), Fig 1 & 2 (vi)). The employment pattern is a powerful indicator of the significant impact of gender and the overwhelming impact of race ('population group') on economic security. Among black Africans 42% of men and 55% of women who want to work cannot find a job (StatsSA 2004a: Table 2.5.2.2 p. 16). The UNDP reported that from 1994 to 2002 the labour force had grown annually by 2%, while the number of unemployed had grown annually by 6%; however, labour productivity grew by 2% annually, output by almost 3% and the profit rate by close to 4% (UNDP 2004: 13. Figure 8). Although the state provides welfare payments, the Taylor Committee noted that South Africa's 'social safety net' is premised on an assumption of full employment and that 60% of the poor get no social security transfers.<sup>77</sup> In 2003 it was estimated that that about 22 million South Africans (48.5%) live below a poverty line of R354 per month (about US\$1.75 per day); compared to 51.1% in 1995. The human development index declined from 0.73 in 1995 to 0.67 in 2003 (UNDP 2004: 5). Inequality, economic policy and the AIDS disaster continued to cause very high levels of human suffering and death. Powerful actors – industry, the government and the rich elite – appeared to maintain a 'structural dynamics that sunders society into pockets of privilege and vast hinterlands of deprivation' (Marais 2001: 306).

#### *HIV/AIDS*

It has been estimated that sub-Saharan Africa has 10% of the world's population and about two thirds of all people living with HIV/AIDS, that between 25 and 28 million individuals in the region are infected with HIV, and that in 2003 between 2.2 and 2.5 million died from AIDS (UNAIDS 2004c). There is not one 'African' epidemic but great variations between regions and countries (UNAIDS 2004a: Executive Summary: 6) Southern Africa is particularly severely affected. Seven countries (Botswana, Lesotho, Namibia, South Africa, Swaziland and Zimbabwe) are estimated to have adult prevalence rates above 20% (UNAIDS 2004c).

The Medical Research Council (MRC) (2001) reported 'an explosive HIV/AIDS epidemic of shattering dimensions'. It is threatening to eclipse all positive aspects of the political transition (Marais 2001: 307). The share of HIV positive pregnant women increased from less than 1 % in 1990 to 25% in 2000 (Medical Research Council 2001: 1). The prevalence of the HIV infection was estimated at 5.0 million or 11% of the total population by MRC (Dorrington et al. 2004). It was 13% for women and 10% for men; and varied strongly between racial categories: African (13%), whites (6%), coloured (6%) and Indian (2%) (Shishana and Leickness 2002: 46, 48, 51). HIV prevalence estimated to vary between 'tribal areas' (12%), 'farms' (11%), urban formal (16%) and urban informal (28%). The rate of new infections estimated to have peaked at 930 000 per year in 1998 and close to 600 000

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<sup>77</sup> Social welfare payments included old age pensions (for women over 60 and men over 65, R570/month) and grants for the disabled (R570/month), for foster care (R470), for the care of disabled children (R540) and for child support (R120/month for children under six) (2001 figures – Taylor

individuals in 2004. About 500 000 South Africans were living with full symptoms of AIDS ('WHO Stage 4') (Dorrington et al. 2004). About 19 500 (or 4%) were receiving anti-retroviral therapy (ART) in the public sector by October 2004 (ibid.). In 2004 AIDS was believed to have killed 311 000 individuals, 44% of all deaths, 42% of deaths among children under 15, and 70% of deaths in the age group 15 to 49 (Dorrington et al. 2004). Life expectancy was estimated at 51 years (49 for men and 53 for women) in 2004, 13 years shorter than a scenario without HIV/AIDS (64 years). It was estimated that a 15 year old man in 1994 had a 61% chance of reaching the age of 60; in 2004 only a 40% chance. A 15 year old woman in 1994 had a 77% chance of reaching the age of 60; in 2004 only a 48% chance (Dorrington et al. 2004). HIV/AIDS is affecting young women in particular. In 2000 women's mortality in the age range 25–29 was 3.5 times higher than in 1985 and for the age range 30–39 nearly twice that in 1985 (Medical Research Council 2001). Of one million newborn children in 2004, an estimated 37 000 (3.7%) were born with the HIV infection and 26 000 (2.6%) were infected through breast feeding (Dorrington et al. 2004: HIV and Aids indicators at mid-2004). The child (under 5) mortality rate increased from 70 per thousand in 1994 to 87 per thousand in 2004, and the infant (under 1) mortality from 51 per thousand to 56 per thousand. MRC expected that by 2015 there would be 5.7 million children who had lost one or both parents. (Bradshaw et al. 2002). Most orphans are taken care of by extended families who experience severe social and economic pressures (Brey 2004).

The struggle for the right to treatment, particularly by the Treatment Action Campaign (TAC), has become a world-famous case of civic struggle for the right to health. The TAC was established in 1998 to support the government in a court case where the pharmaceutical industry had challenged the right of the government to import generic anti-retroviral drugs. After a court case of three years the pharmaceutical industry dropped its lawsuit and in 2002 TAC Chairman Zackie Achmat told the United Nations Commission on Human Rights that '[f]or the first time, one of the most powerful multinational corporation lobbies became accountable to civil society, government and their shareholders' (Sapa-AFP 2004a). The TAC interrogated government programmes through legal action, beginning in August 2001 when it launched a court case against the government to demand Nevirapine medical treatment to reduce the incidence of mother-to-child transmission of the HIV virus during childbirth. The TAC won cases in the Pretoria High Court (2001) and the Constitutional Court (2002). During 2002 and 2003 it put increasing pressure on the government and industry to provide anti-retroviral therapy (ART) and in September 2003 the Cabinet instructed the Department of Health to develop a comprehensive treatment plan, including ART (Mbali 2005).

The South African government has regularly been criticised by major South African

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Committee 2002: 30). The value of the old age pension declined from R708 per month in 1995 to R640 in 2002 (-10%), but saw its first increase to R652 in 2003 (May and Hunter 2005: 121).

leaders, including Nelson Mandela, Desmond Tutu and the Anglican Archbishop of Cape Town, Njongonkulu Ndugane, who called the pandemic a 'world disgrace as serious as apartheid' (Sapa 2003a). The ANC government has argued that it has developed policies to fight HIV/AIDS including prevention, care and support, and research and promotion of rights (Government of South Africa 2000b). Prevention programmes have faced extremely difficult social and economic conditions that often undermine impact (Campbell 2003). The budget for the Department of Health's HIV/AIDS programme has increased from R0.35 billion in 2001/2 to R1.0 billion in 2003/3 to a projected R1.8 billion in 2004/5 and meets the 2001 Abuja commitment to allocate 15% of the government health expenditure to HIV/AIDS (UNAIDS 2004b).

The HIV/AIDS pandemic affects land and agricultural production and involves complex links between AIDS, gender, livelihoods and tenure (see HSRC and SARPN 2002; Strickland 2004). A concern is that HIV/AIDS disease and caring drains time and labour of households. Therefore land may be underutilised and land allocation an inappropriate mechanism of solidarity. It can be important that families are able to lease out land, which may require renewed forms of tenure. One may envisage that tenure and other land reform measures were combined with measures for prevention of the spread of HIV/AIDS and to strengthen the coping strategies of communities and families. The interconnections between land, health and poverty are complex and land reform would have to be part of cross-sectoral and interdisciplinary approaches. Department of Land Affairs arranged a workshop on HIV/AIDS and land reform that identified as key challenges i) a special need to protect the tenure security of women and children and prevent discrimination during inheritance; ii) rights-holders must be enabled and encouraged to lease out land when they cannot use it; and iii) micro-finance is needed to prevent exploitation by moneylenders and loss of land (HSRC and SARPN 2002: 13-15. Selected points). The DLA argued that its limited resources had made it difficult to address the HIV/AIDS pandemic which required 'drastic and innovative measures' and cooperation with NGOs, and in 2002 the Surplus People Project devoted its annual general assembly to HIV/AIDS and land reform.





## 7. TOWARDS A HUMAN RIGHTS-BASED LAND POLICY?

### 7.1 From struggle to policy making

Albie Sachs (1990) wrote that 'South African land has not always produced food, but it has always been fertile ground for producing questions' (1990a: 105) – and certainly questions about the making and unmaking of policy. The successful struggle for power by the ANC and the rest of the anti-apartheid movement created the space for a new land policy, and for seeing land in a human rights perspective. ANC leaders had weak links with the land rights tradition when a land policy development process started around 1990, but land organisations were channels for rural pressure on the government and the ANC (personal communication, Heinz Klug, December 2003).<sup>78</sup> The former government and the ANC negotiated land policy in a complex process involving land organisations, communities, the World Bank, the corporate sector and researchers.<sup>79</sup> Community pressures and threats of land invasions were a factor.<sup>80</sup> ANC activists Bongiwe Njobe and Helena Dolny took a policy initiative through a workshop in Lusaka on the 'Land Question' which took place the day after President de Klerk had announced the unbanning of the ANC and the beginning of official political negotiations (February 1990): 'We knew that we had to shift from protesting to reconstruction ... but at the same time we had very cloudy ideas about what to do' (H. Klug, personal communication, December 2003). However, many participants assumed that the Freedom Charter committed the ANC to nationalisation of land (Klug 2000: 123), a view that was soon revised. The Lusaka meeting established an ANC Land Commission to engage with land organisations, lawyers and rural communities, seeking ideas as well as 'explaining what was not possible' (Klug, disc. 2003). In consultations, rural communities sent the ANC a message that they did not demand 'nationalisation of land' but rather, as an elderly man expressed it: 'You are the new policeman. A thief has stolen our jacket. Your task is to give the jacket back to its rightful owner' (Klug, disc. 2003). The ANC Draft Bill of Rights (1990) protected personal property but singled out 'land' as a special concern. The ANC 'Land Manifesto' (1991a) advocated land restitution, redistribution and protection of diverse forms of tenure. The South African Law Commission attacked the ANC 1990 Draft Bill of Rights for advocating nationalisation of private property without adequate compensation (SALC 1991). The ANC's 1991 discussion of a wealth tax to finance land redistribution led to death threats from propertied interests (Klug 2000: 128).

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<sup>78</sup> Chair of the ANC Land Committee from 1990. At time of discussion Associate Professor of Law, University of Wisconsin.

<sup>79</sup> For example (Letsoalo 1987; Davenport 1987; Wet, McAllister, and Hart 1987; Skweyiya 1989; Van der Walt 1990; Budlender 1992; Claassens 1992; Bennett 1993; Cross 1992).

<sup>80</sup> For example, during the 1993 negotiations communities marched on Kempton Park, Johannesburg, and handed a land rights memorandum to negotiators. On another occasion 600 people from 25 communities demonstrated in Pretoria, threatening to reoccupy lands.

## 7.2 The White Paper on Land Reform (1991)

### 7.2.1 'Do justice to all citizens'

Policy change in the 1990s is symbolised by a shift from the National Party government's White Paper on Land Reform (RSA 1991) to the Mandela government's White Paper on South African Land Policy (DLA 1997, discussed in sections 7.4.3 and 0 below), from one devoid of human rights to one that refers to human rights. Alongside the transition negotiations and community pressures in the early 1990s, the National Party government abolished racially biased legislation and started a process of transferring state land to communities. President de Klerk argued that the 1991 White Paper and accompanying bills represented a 'historic turning point in the history of South Africa':

Fundamental measures accepted shortly after the establishment of the then Union of South Africa, and further developed over decades, are now being changed drastically. At the same time it is being ensured that the tried and tested juridical basis on which land rights are regulated will remain intact. ... The objective is to do justice to all the citizens of our country, also as far as rights to land are concerned, to broaden opportunities for all, while preserving lawfully acquired rights. ... It is my prayer that this monumental work will contribute towards promoting peace in South Africa and bringing progress and prosperity to all its people. (RSA 1991 Preface by F. W. de Klerk, State President)

Indeed, the view of history was a key message. The document only vaguely acknowledges that state power was involved in excluding the majority from access to land: 'The present system of land tenure is the product of the past ... historical settlement patterns, policy trends, discriminatory statutory measures and broad socio-economic and demographic processes all to some extent played a role' (RSA 1991: 1). In a remarkable understatement, the government admits that 'the existing pattern of land use in South Africa is not purely the result of natural factors and demographic processes, but has also been influenced by past policies on land tenure and land utilisation' (RSA 1991: 11).

The 1991 White Paper next argues that 'land is a basic resource common to all the people of this country', and 'because of his natural dependence on land, every person has certain basic needs with regard to land, access to it and the use of it' (RSA 1991: 1). All South Africans as 'citizens' should have access to land for residence and beneficial use and services should be available on an equitable basis (A3.2):

The Government believes that in order to address these land and land-related problems, land reform should be dealt with fundamentally and comprehensively. Land is the most precious resource for the existence and survival of man. It provides him with a living space and sustenance. Land is the base from which he operates and gains a livelihood and is, indeed, the basis on which his entire economic, social and constitutional order is founded. (RSA 1991: 1)

It states that land problems 'cannot be solved merely by the repeal of the discriminatory laws concerned and by making it lawful for everybody to own land within his means.' (RSA 1991: 1) It also articulates a view (that has been maintained in official policy to the present day) that

land reform must holistically address the needs of land users:

The right to own land must be respected, but land problems extend much further than individual claims to land tenure rights. They involve many other issues such as the economic use of land, rural and urban development, urbanisation, housing, squatting, community development, the established community life, the quality and security of the title in land, land registration systems, the advancement of agriculture and the protection of the environment. (RSA 1991: 1).

### 7.2.2 'Needs' instead of rights and 'development' instead of land reform

The alleged concern about universal 'needs' for land and holistic development efforts is interpreted in this Paper through the way they are to be institutionalised, namely via private ownership and entrepreneurship. Land should be managed through the 'wealth-creating processes of a market-oriented economy ... the private ownership of agricultural land and its use by private entrepreneurs form the basis of an established and successful agricultural industry', which would then absorb 'those who want to farm' (RSA 1991: A3.5). An attached 'Land Policy Framework' again asserts two 'points of departure' for land reform: it holds that (1) 'access to land [is] a basic human need' but then subordinates the 'need' to the institutions of (2) 'free enterprise and private ownership [as] the appropriate system to fulfil this need'. Thus the White Paper stresses 'needs' instead of rights, and 'development' instead of land reform. It considers that 'needs' for land do not give rise to rights-based claims beyond those existing legal rights in the dual land system. In a forthright manner, the authors of the White Paper reject an 'artificial redistribution of land' and argue that 'a programme for the restoration of land to individuals and communities who were forced to give up their land on account of past policies or other historical reasons would not be feasible', for it would cause conflict and disrupt the 'country's pace of development to the detriment of all' (RSA 1991: A2.11.f).

Where past colonial and apartheid policy had used the language of rights regarding citizens of European descent, the language of rights is now abandoned. Instead of individual rights, 'justice' is linked to development assistance to provide greater opportunities for all to participate in 'wealth-generating processes' (RSA 1991: A3.5). The 1991 White Paper acknowledges that 'lack of co-ordination' and development support had contributed to social and economic problems. In contrast to a view of a state-led construction of a national land system (Chapter 5), poverty and landlessness are seen as resulting from the state's lack of attention. The paper states that it was 'necessary to promote the socio-economic upliftment of rural communities and the creation of opportunities to participate in the development process in the country' (RSA 1991: D5.1-2, 22-23). A generalised development process rather than public policy should gradually merge the two systems and bring about justice in a futuristic project that creates rights. Avoiding fundamental individual rights as a starting point, policy makers may sideline questions about public duties and the time frame for creating justice.

Rights to democratic governance and equality are absent from the 1991 White Paper which overhears the criticism and demands that had been raised for example in the 1950 charters and research on gender and land rights (e.g. Walker 1982). Gender is not mentioned and the government does not commit to enforcing a ban on discrimination on non-state actors<sup>81</sup> (not to mention a positive obligation to promote equality, as human rights would require). The government rejects restitution as 'not feasible' (A2.11.f). It expresses concern about poverty and livelihoods linked to past development failures (D5.1) but does not appear to regard them as urgent. Changing (expropriating) private property rights is not considered. Instead, the Paper suggests that the 'freedom' dimension of property is fundamental (and trumps other concerns) while the entitlement dimension is incidental (and trumps no concerns).<sup>82</sup> It thus responds to political challenges by articulating a new normative rhetoric ('justice to all', 'universal needs') but does not concretise it as individual rights and public obligations. As such, transfers land to communities is seen as discretionary.

Apparently the purpose of the 1991 White Paper was not to reform the land but to communicate the view that change could happen through autonomous market processes. After 78 years, the land-based economy would have to do without public support. This policy statement is reminiscent of the deist image of the watchmaker who withdraws from the world he has made and leaves it to tick according to the mechanics installed. It resembles Fukuyama's (1991) thesis of an end to confrontation and struggle, a beginning of normal economic change. The White Paper 1991 became a 'textual baseline' for later statements of the Constitution (1996) and the Green Paper (1996) and the 1997 White Paper on South African Land Policy, in which actors developed a rights perspective. How one interprets the 1991 White Paper will depend on how one sees the strategy of providing equality in land affairs through market integration and entrepreneurship. My empirical work indicates that the 1991 White Paper pointed towards the realpolitik of the democratic government, perhaps because it was a realistic reading of power relations in the global context and in the land-based economy – power that was not relinquished.

### 7.3 Rethinking property law

#### 7.3.1 'Property law is completely out of tune with human rights'

Lawyers in the anti-apartheid struggle brought international law into the land policy processes, contributed to the South African constitutional compromise and spearheaded

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<sup>81</sup> 'The Government seeks to provide equal opportunities irrespective of race, regarding access not only to land but also access to the agricultural services structure as a whole ... subject to the uniform application of the principle of merit. ... However, the Government cannot prescribe to voluntary associations in organised agriculture, co-operatives and other institutions in the private sector in this regard' (RSA 1991: C2.6, 13).

<sup>82</sup> Though disputed then and now, a human right to property contains an entitlement dimension (*to* resources) and a freedom dimension (*from* intervention) (respectively UDHR 17.1 and 2 and Committee on Economic, Social and Cultural Rights (2002) on the right to water.

global thinking on human rights and land. Diverse social justice perspectives were discussed, including human rights and the need for agrarian reform (Skweyiya 1989) and doctrines of aboriginal title (Bennett 1993). In a key text, Albie Sachs starts from the feature of land as finite and fixed in space: it cannot be taken from none and given to all, like the right to vote, and cannot be redistributed by relocation (Sachs 1990b: 1). He describes dual land law as 'two completely different and unequal systems' and presents a vision of moving beyond land as a question of power, politics and race: 'What is clearly needed, if the issue of sovereignty is to be got out of the way and the real question of how the land should be owned and worked reached, is nationalisation of land law ... [viz.] ensuring that South Africa has a single, or national, law governing the question of land rights, so that issues are looked at no longer in terms of race, as at present, but in terms of interests and values of importance to the country as a whole' (Sachs 1990b: 5). Land law must be 'South Africanised' by paying equal attention to all citizens and drawing on different legal principles and traditions, with Roman-Dutch law as just one input. He rejects a legal positivist emphasis on existing law: 'it is ironic that those who over decades and centuries have converted land law into an instrument of pure racist domination should now be the strongest defenders of what they call a neutral property law, by which they mean a law which will defend the existing ownership patterns' (Sachs 1990b: 8). Against the arguments for shielding some sectors of society, he argues that de-racialising and nationalising land law means 'making its rules cover the whole nation and not stop at the boundaries of this or that farm, [and that it] presupposes the extension of the principles of legality or the rule of law over every square centimetre of the country' (1990a: 110). He warns against 'searching around the world for models' and emphasises that one must draw on the experiences and aspirations of land users, 'listening to them all, discovering common points of resonance, and involving all in the process of transformation. Solutions found in this way are likely to be more concrete and enduring than those thought up by think-tanks, however enlightened or progressive the experts might be' (Sachs 1990b: 9). With this qualification, human rights is the basis:

The whole question of property as a human right has been turned inside out in South Africa. The issue is presented as though the one fundamental right in relation to property is the right not to have your title deed impugned. All other aspects, your right to a home, to security, to independence, are ignored if you do not possess the title deed ... The basic fact is that in South Africa property law is completely out of tune with human rights principles. In fact, far from property law being one of the foundations of human rights, it is one of the bastions of rightlessness. In feudal society, the serfs went with the land and owed duties to the landowner, but the landowner also had certain responsibilities towards the serfs. In South Africa, the feudal-type dependence exists without any corresponding obligations. It is the worst of all worlds. ... Nowhere is the indivisibility of human rights more evident than in the South African countryside. Violation of people's property rights has been accompanied by denial of general human rights; the restoration of the one cannot succeed without the recovery of the other. (Sachs 1990b: 16, 17, 18)

Sachs argues that a constitution, which he was involved in negotiating and drafting, would 'be necessary to get beyond absolutism on the land. It will not be a case of substituting one

kind of racist absolutism with another, but of getting rid of absolutism altogether' (Sachs 1990b: 21). Human rights-based land reform was thus seen as part of the foundation of justice. 'Underneath' dominance and ownership one could recover a genuine 'land question: 'Only if we truly de-racialise the terms of ownership, occupation and use will the question really become a question of land and cease to be a question of domination and ownership' (Sachs 1990b: 3). Sachs envisages 'getting rid of the overt racism in the law and creating conditions where land is seen as land and not as power'. (Sachs 1990: 10). Thus land, the symbol of injustice, could be restored as the shared base of a nation. 'Our past weighs on us like the Drakensberg' (Sachs 1990b: 2), but human rights-based land reform could relieve the weight. However, continued democratic action would be needed:

One of the ironies of the years of apartheid and oppression is that they stimulated a rich and fundamentally democratic tradition that people matter, and can act to change their lives. It is critically important that any new system should empower people rather than disempowering them. If this does not happen, we may witness the even greater irony of a democratic government effectively destroying democratic grassroots-based politics. (1992: 297)

### 7.3.2 Property rights for whom?

In another example of critical rethinking of property law, Geoff Budlender (1992: 296) writes that land occupations are a 'South African tradition'. Communities were becoming players in new ways and some had pressurised the government to make land available through occupations. He points out that land occupations have a high cost for society, high risk for the individuals and require 'critical mass': a few individuals get bulldozed. 'From the point of the view of the landless and homeless, this model – the land occupation model – is the only functioning land claims process in South Africa today. As we look forward, we must surely want something better for our country' (Budlender 1992: 296). This would mean constitutional protection of social and economic rights, affirmative action and law-based redistribution:

Property should be a right. But most of the property rights debate centres on the right of those who hold property to retain it. What is missing is a serious discussion of the right of the property-less to what they need for a decent life – because that, too, should be understood as a property right ... Property-holders assert that they are entitled to retain what they have, and that the state is under a duty to protect that entitlement. The property-less assert that they are entitled to the basic necessities of life, and that the state is under a duty to make that entitlement effective ... This raises squarely the question of social and economic rights. (1992: 299)

Budlender pose the question of a fundamental moral entitlement to what one needs for a decent life. Nevertheless, he would rather rely on social and economic rights than a right to property. He states that existing property relations are 'the results of generations of laws and practices which would not have survived for a minute in a bill of rights society' but now beneficiaries of systematic human rights abuses seek to create and rely on a bill of rights to

protect what they have acquired (Budlender 1992: 302). He expects that a protection of property might work against the interests of the dispossessed because (1) courts tended to preserve the status quo; (2) even modest socio-economic reforms would be vulnerable to constitutional attacks based on the argument that they interfere with property rights; and (3) rules about just compensation could make redistribution too expensive – ‘the unqualified constitutional protection of existing property rights, particularly where this is coupled to a just compensation clause, will disable any attempt at substantial redistribution, and undermine the new rights created for the homeless and the landless’ (Budlender 1992: 303–4). In a cautious assessment, he also recalls the limitations of constitutional guarantees since administration of land rights was often inefficient and rural people had little access to decision-making:

We all hope and expect that the process would work differently and better under a democratic government. However, there is no structural reason to suppose that the homeless and landless will be able to make effective claims. All bureaucratic systems develop some inertia. ... Five-yearly parliamentary elections, with a strong party system, are unlikely to give the homeless and landless effective control and influence over the administrative process. By definition, the homeless and landless tend to be marginalised and have least access. (Budlender 1992: 298)

Thus, in the context of an intense political transition, experienced lawyers such as Sachs and Budlender contributed to reinterpreting land as a human rights issue, while nevertheless noting the limits of actual power and access as contrasted to formal rights.

## 7.4 Towards a new land policy

### 7.4.1 Critique and ideas for a justice-based policy

*ANC: ‘land reform means land redistribution’*

The ANC expressed its ‘outrage and deep disappointment’ with the 1991 White Paper on Land Reform for its rejection of responsibility for historical land dispossession and of restoration of land to the victims:

[T]his document is not a land reform document as it claims. Its effect is to codify the present state of dispossession under the cover of free market proposals. All this emphasises the need for speedy progress in negotiations for a constitution that will be democratic and serve the interests of all the people. Land reform means land redistribution. This document explicitly rejects land redistribution. (ANC 1991b)

The National Land Committee (coalition of land NGOs) expressed the same objections and commented on the hasty processing of the White Paper through parliament at a time when national constitutional negotiations were to take place (NLC 1991). ‘It seems to us that this is a pre-emptive move designed to entrench a system of land tenure and ownership that will serve the interests of the present government into the future, and make it much harder for a democratic state to introduce more fundamental reforms. Both the ANC and NLC rejected

President de Klerk's claim that the new policy was 'the result of extensive consultation, deliberation and negotiation'. Professor Nic Olivier<sup>83</sup> published a critique of the 1991 White Paper in which he predicted that the policy and the accompanying legislation, if adopted, would be branded by history as 'paper law' (Quoted by Carey Miller and Pope 2000: 246) – an appropriate metaphor for policy and law without measures to institutionalise rights.

The Reconstruction and Development Programme (RDP)<sup>84</sup> reflected the history of protest, the struggles over ANC land policy and the World Bank's involvement. In mid-1992 the World Bank invited the ANC Land Commission and other actors to Swaziland to discuss a land reform initiative for South Africa. Working on behalf of the World Bank, Binswanger and Deininger (1992: 2; 1993: 1466) stressed the great risk of social conflict inherent in the unequal distribution of land: 'South Africa seems to have two options: rapid and massive redistribution of land to black and coloured groups, involving substantial resettlement from the homelands onto land of the commercial sector, or decades of peasant resurrection, possibly civil war, combined with capital flight and economic decline.' Land reform was therefore believed to bring great social and economic benefits that justified international support.<sup>85</sup> Although far more critical of the existing system and in favour of a public involvement, the World Bank affiliated scholars confirmed an emphasis on market-led processes. Though sceptical, the Land Commission saw that it could use the World Bank's emphasis on land reform for economic growth to gain leverage vis-à-vis its own leaders and the National Party government (Klug 2000: 130–1). The RDP (1994) presented a land reform policy with very ambitious social goals:

Land is the most basic need for rural dwellers ... The abolition of the Land Acts cannot redress inequities in land distribution. Only a tiny minority of black people can afford land on the free market. A national land reform programme is the central and driving force of a programme of rural development. Such a programme aims to address effectively the injustices of forced removals and the historical denial of access to land. It aims to ensure security of tenure for rural dwellers. And in implementing the national land reform programme, and through the provision of support services, the democratic government will build the economy by generating large-scale employment, increasing rural incomes and eliminating overcrowding. (ANC 1994: 2.4.1-2, p. 19-20)

The RDP stated that land reform must be 'demand-driven' and have two components, 'redistribution' (providing residential and productive land to those who need it but cannot afford it) and 'restitution' (for those who lost land owing to apartheid laws) (2.4.5). Redistribution would transfer state land and expropriated farmland and be financed by

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<sup>83</sup> Olivier later chaired the national committee responsible for drafting the Transformation of Certain Rural Areas Act, 1998 (Sub-chapter 8.3).

<sup>84</sup> The ANC's election manifesto in 1994, later adopted as official development policy.



'substantial funding' by government and a land tax (2.4.8) and be coupled with rural services and infrastructure development (2.4.9). It also stated that government 'aimed' to redistribute 30% of the commercial farmland within five years and complete a land restitution process in the same period, coupled with a programme of service provision and institution building (ANC 1994: 20-22).<sup>86</sup> Thus the RDP used the same 'basic needs' approach and the broad rural development goals of the 1991 White Paper, but instead of market integration it presented state-led redistribution and restitution as the 'driving force' of rural development. It stated that land policy 'must remove all forms of discrimination in women's access to land' (2.4.4) and specifically target women.

#### 7.4.2 The Constitutional land reform mandate

Three elements in the Constitution specifically addressed the legacy of poverty and inequality: support for affirmative action, justiciable social and economic rights, and the land reform mandate. The transition negotiations disregarded the 'real wealth' such as mining wealth, financial wealth and urban real estate (Klug 2000: 138).<sup>87</sup> Negotiators paid close attention to land and changed the 'property clause' considerably from the interim Constitution (1993) to the final Constitution (1996); in the Constitutional Assembly the property clause 'once again became one of the unsolvable lightning rods' (Klug 2000: 134). The ANC, already in power, contributed to strengthening the land reform mandate, thus placing a strong obligation on government (G. Budlender, Interview October 2002).

Section 25 in the Bill of Rights, 'the property clause', is a balancing act between the protection of property against arbitrary, non-compensated dispossession and the mandate for land reform. Article 25 (1) holds that 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property' and Article 25 (2) that 'Property may be expropriated only in terms of law of general application – for a public purpose or in the public interest; and subject to compensation'. Article 25(4) provides that land reform is a public interest that may justify expropriation. The three 'legs' of the land reform programme are spelled out in article 25 (5–7):

25.5. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable

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<sup>85</sup> 'Converting commercial sector to part-time, small and medium farms is the cheapest and fastest way to generate productive employment (both farm and non-farm) on the massive scale required. If a non-disruptive process to achieve this can be found, it will also lead to better land use, higher production, and reduction of current tensions. ... Very substantial and rapid market-assisted land reform and resettlement hold the greatest, if not the only, hope for peaceful development in South Africa. The international community, therefore, has a great interest in assisting South Africa in the financing of such a program for both economic and humanitarian reasons' (1993: 2, 3).

<sup>86</sup> The 30% redistribution target was taken from a World Bank document, but the ANC removed the figures that indicated the projected cost. 'Nobody ever believed in it' (G. Budlender, Director-General, DLA 1996–2000. Interview, October 2002). The 30% for redistribution stands, but the time frame has been extended from five to twenty years (to 2014).

<sup>87</sup> Instead addressed in negotiated government-corporate sector agreements about Black Economic Empowerment (BEE), requiring (e.g.) minimum participation by black-owned companies (including a mining charter (2002), a financial sector charter (2003) and an 'Agri-BEE' for agriculture (2004).

basis.

25.6 A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

25.7 A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

Negotiators used an ‘international text’ of treaties, constitutions and case law to formulate a South African compromise that eliminated the ‘extreme’ alternatives of nationalisation or an unconditional protection of property (Klug 2000: 136). Those working for social change mainly based their argument on social and economic rights, while those who defended property interests argued on the basis of national law, not human rights – ‘that was outside their legal competence’ (H. Klug, personal communication, December 2003). Whereas the Universal Declaration of Human Rights (1948) moves from the positive right to property (17.1) to the protection against unlawful dispossession (17.2), the South African Constitution moves from the protection from unlawful dispossession (freedom right) to a positive commitment to provide redress and equitable access to land (only).<sup>88</sup> Communities and individuals are entitled to secure tenure ‘to the extent provided by an Act of Parliament’ (Article 25.6), placing the onus on legislation and implementation, although Article 25.9 reminds politicians that ‘Parliament must enact the legislation’ concerning tenure’. The full Bill of Rights – including livelihoods, equality, health and environment – is important for interpreting the land reform mandate. The property clause has remained controversial, seen as making redistribution too costly for the state (NLC 2001). An early assessment was that the further policy making would become more important than the formulation of the clause itself (Van der Walt 1997: 5). The legal tradition could also constrain the application of constitutional or international law to property issues.<sup>89</sup> The Constitutional compromise thus pointed towards more politics, policymaking and activism at the interface of law and society.

#### 7.4.3 The White Paper on South African Land Policy (1997)

In May 1995 the Department of Land Affairs<sup>90</sup> prepared a ‘Framework Document on Land

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<sup>88</sup> In the process of certifying the Constitution, the Constitutional Court considered a challenge to the property clause for (1) not stating the positive right to acquire, hold and dispose of land; (2) not adequately providing for compensation in the case of expropriation; and (3) not protecting intellectual property rights. The Court found that international conventions and foreign constitutions adopt a wide variety of formulations to protect property, or none at all, and concluded that ‘no universally recognised formulation of the right to property exists’ and that Section 25 met international standards (Van der Walt 1997: 4; Klug 2000: 135-6; Constitutional Court 1996).

<sup>89</sup> ‘[L]awyers never had the opportunity to get used to a proper constitutional system in general, and the private-law tradition is extremely strong and deeply embedded in our legal system’; ‘international law is such a specialized subject that it falls outside the field of speciality of most property lawyers, and consequently this book contains very few references to actual principles or rules of international law that affect the interpretation and application of section 25’ (Van der Walt 1997: vii, 5).

<sup>90</sup> The Ministry of Agriculture and Land Affairs consists of a Department of Agriculture and a Department of Land Affairs. Derek Hanekom was Minister from 1994 to 1999 and Thoko Didiza from 1999 to the time of writing.

Policy’ and after further consultations a ‘Draft Statement of Land Policy and Principles’. These documents were debated at the National Land Policy Conference in 1995 with more than a thousand participants, the majority from ‘disadvantaged rural communities’. A Green Paper<sup>91</sup> on Land Policy – with the title ‘Our Land’ in the eleven official languages on the cover – was distributed in February 1996 (DLA 1996). The 1997 White Paper reflects further consultations with communities and land organisations. It states that ‘past land policies were a major cause of insecurity, landlessness, homelessness and poverty’ (DLA 1997b). Its vision is to redress injustices, foster reconciliation and growth, improve household welfare and alleviate poverty (DLA 1997: v). ‘Normal’ long-term goals concerning land use planning and administration had to be set aside in favour of the urgent need for a land reform programme (DLA 1997: 7).<sup>92</sup> It observes that ‘Resentment over land dispossession runs deep in our society. It threatens to boil over, causing social and economic dislocation through the illegal occupation of land’ (DLA 1997: 11). This White Paper outlines key land reform principles with a focus on social justice, poverty and gender:

1. *Social justice*. Land is a basic human need but generations of dispossession and apartheid have caused landlessness which the government must take steps to remedy.
2. *Poverty focus*. Priority is to be given to the poor who need land to contribute to income and food security, targeting marginalised groups, including women.
3. *Needs-based programmes*. These must respond to expressed needs, not be supply driven.
4. *Government as facilitator* must give clear and widespread information about the land reform programme to ensure that the demands of the most needy are articulated.
5. *Flexibility*. Provincial and local variation requires flexible and adaptable land policies within national norms and standards.
6. *Participation, accountability and democratic decision-making* by communities and individuals is necessary and requires organisation and capacity building and sound and simple administrative processes to support land reform and the development of local government.
7. *Gender equity*. Land reform should create equal opportunities for men and women by giving priority to women applicants and other measures.
8. *Economic viability and environmental sustainability* must be ensured through local planning. (DLA 1997: Section 2.5.2: 12. Points have been shortened.)

In addition to the poverty and basic needs focus, the 1997 White Paper argues that redistributive land reform is essential to realise the market-oriented macro-economic policy, GEAR, adopted a year earlier (DLA 1997: 14): ‘We envisage a land reform which results in a rural landscape consisting of small, medium and large farms; one which promotes both

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<sup>91</sup> The legislative process in South Africa may start with the formulation of a Green Paper (an official discussion document on policy options) and subsequent White Paper (a broad statement of policy). These are the basis of Legislative Proposals that may be gazetted as Draft Bills or printed by Parliament and tabled in either the National Assembly or the National Council of Provinces as a Bill. Parliamentary committees representing different parties then consider the Bill and may invite submissions, and possibly amend the Bill. After it has been debated and approved in the National Assembly and Council of Provinces it is then signed by the State President and published in the Government Gazette as the law of the land (Government of South Africa 2000a).

equity and efficiency through a combined agrarian and industrial strategy in which land reform is a spark to the engine of growth' (DLA 1997: 7–8). The Paper lists 'vital economic benefits to society generated by land reform' (2.5.3: 13–14), including improved household food security and thereby physical and mental development of children; labour-intensive agriculture; reduced unemployment (estimated at between 40% and 58% in rural areas); entrepreneurship and increased access to credit. However, while deeds registration, land survey and land reform are defined as national government responsibility, responsibility for infrastructure development and agricultural services is placed with provincial and local government (DLA 1997: 16).

The 1997 White Paper repeatedly refers to 'human rights', but makes only one specific reference to international law, CEDAW (DLA 1997: 18). It is anchored in the constitutional definition of equality as 'the full and equal enjoyment of all rights and freedoms' (DLA 1997: 15–17) but does not generally address the obstacles to realisation, including resistance, lack of resources and government capacity. One exception is the focus on gender and land. Section 3.1.6 holds that 'discriminatory customary and social practices' and lack of access to and rights to land are key factors in women's poverty: 'Power relations that impede women's attainment of productive and fulfilling lives operate from the domestic to the highest public level'.

Leadership is often dominated by men who assert that they have their own traditions and culture, and do not require the interfering advice of government officials on how to handle gender relations. Section 9 of the Constitution confers the right to equality before the law and the right to equal protection and benefit of the law. It states further that equality includes *the full and equal enjoyment of all rights and freedoms*. In relation to land matters, like many other matters, this requires positive action by government. Specific strategies and procedures must be devised to ensure that women are enabled to participate fully in planning and implementation of land reform projects. These have yet to be adequately formulated. Unless this is done, existing gender inequities in the allocation of land rights could be exacerbated by the programme. (DLA 1997: 17. Emphasis in original)

It argues that gender-neutral land reform had negatively affected gender equality elsewhere and that the 'issues must be addressed in the context of national and international developments' (DLA 1997: 17). So, unlike the 1991 White Paper, it declares that the government is ready to challenge power relations and practices. Thus the Constitution replaces markets as the major mechanism of integration and no institution can be shielded from constitutional rights and obligations.

#### 7.4.4 National human rights institutions and land policy

'The National Plan of Action' addresses land issues,<sup>93</sup> mentioning 'our international

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<sup>92</sup> Paradoxically the White Paper on Land Reform (1991) rejected land reform while the White Paper on Land Policy (1997) says that a normal 'land policy' is impossible so long as a thorough land reform has not been carried out.

<sup>93</sup> Adopted as national policy and official commitment to human rights in December 1998. I have only seen references to the land section of the Action Plan in the Human Rights Commission's reports.

obligations' with reference to UDHR 17 and the African Charter (Government of South Africa 1998: 115). The Plan of Action focuses on new land legislation, and the need to speed up redistribution and provide access to credit. It pays attention to tenure security, stressing the need for improved information, legal assistance and resources to arbitrate disputes.

The Constitution requires the Human Rights Commission (SAHRC) to monitor, in annual reports, the fulfilment of rights to shelter, food, health care, social security and the environment.<sup>94</sup> By 2004 the SAHRC (1999; 2000; 2001; 2003a; 2004) had submitted five reports, primarily based on protocols sent to ministries and departments, but also involving research institutions and other organisations. The SAHRC is empowered to summon public institutions that do not meet reporting deadlines, and has done so. Although 'land' is not mentioned in monitoring obligation, it is a major issue in all the reports, primarily with reference to the land reform clause (Section 25 of the Bill of Rights). The first report (covering the period 1997–1998)<sup>95</sup> notes that the Department of Land Affairs had reported on historical injustices 'but did not adhere to the protocols in describing the human rights implications of its work' (SAHRC 1999: 70). It requests more information on how the DLA had implemented and planned to implement its programmes, requests better monitoring, time frames and information about beneficiaries, and notes that none of the provincial departments had responded to the request for information. Specifically it requests better information about subsidy schemes for women farmers and other vulnerable groups, and requests that programmes incorporate people with disabilities (SAHRC 1999: 71, 72, 77). The main focus of these first reports was to extend the rights of access to more people, drawing on the obligation to foster conditions of equitable access to land (Bill of Rights 25.5). Some of the reports return to an individual right of access, similar to the positive entitlement in UDHR 17(1).<sup>96</sup> The second report notes many legislative initiatives but comments that the 'progressive realisation of the right of access to land was not adequately dealt with' and that it did not demonstrate 'how the legislative measures have advanced the land reform process' (SAHRC 2000: 200).

The third report covering 1999–2000) discusses the protection of existing rights to property balanced against 'what is often referred to as the social function of property, such as issues of fairness, equity and justice in access to land' (SAHRC 2001: 278-9). It refers to the

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<sup>94</sup> Constitution Act 108, 1996. Section 184(3). Reports available at SAHRC Website: <http://www.sahrc.org.za/publications.htm> [January 2005]. Reporting has received financial support from various donors, including the European Union and Scandinavian governments.

<sup>95</sup> Chairperson Barney Pitso Rabe opened the first report lamenting that 'politics had intervened' and led to the disintegrated approach of the two international human rights covenants from 1966. He quoted the 1993 Vienna Declaration as pointing towards 'an integrated, holistic approach to fundamental rights ... viewed as equally enforceable', as now confirmed in the Constitution (SAHRC 1999: i).

<sup>96</sup> The second report (2000, covering the period 1998–1999) constructed an attractive individual right to land by interpreting the property clause (25.5): 'Everyone has the right of access to land. The state must respect, protect, promote and fulfil this right and should take reasonable legislative and other measures, within its available resources to achieve its progressive realisation' (SAHRC 2000: 192. Section 25(5) is given as the source).

Declaration of Social Progress and Development (United Nations 1969) and argues that this document 'calls for land ownership that ensures equal rights to property for all' (a generous interpretation of the relevant clause, which, like the Constitution, stays at the societal level). It further mentions CEDAW (Article 14.2.h) and the ILO Convention 169 in order to find general support for the social function of property. It finds that the redistribution programme was unacceptable slow and calls for immediate measures to strengthen tenure reform, which 'once again fell short of addressing core issues' (SAHRC 2001: 286).<sup>97</sup> An outcome of an earlier workshop with departments in March 2000, this third report emphasises the situation, special measures and impact on vulnerable groups. The SAHRC finds the DLA reporting inadequate:

What is missing from the report [by the DLA to the SAHRC] is a demonstration of special considerations given to the groups mentioned above [landless men and women, farm workers, and people on state-held land]. While the Department views its measures as broadly giving considerations to these groups, it did not show sensibility to the more specialised needs of these groups. For instance, concern has been raised about the position of persons with disabilities in the context of land reform. The Department could have reported on its understanding of the needs of each group, and the way its measures addressed these needs. (SAHRC 2001: 287)

Thus, at the time when I initiated my study, a significant national review of land reform in a human rights perspective had been institutionalised and included dialogue between the Commission and public offices. The reporting on social, economic and environmental rights is mandatory, relatively transparent and frequent. The reports engage critically with land reform policy but show the difficulty of defining the human rights requirements. They use the Constitutional obligations with regard to land, and sometimes refer to international documents, but seldom apply specific articles. Though demanding information on women as land reform beneficiaries, the reports do not engage the charged issues of gender discrimination and local governance. Perhaps the authors were mindful of the sensitive politics around 'traditional leadership' or perhaps a severing of cultural and political rights from economic and social rights played a role, which would not be consistent with the interdependence of rights that Pityana pointed to in the first report (fn. 95).

#### 7.4.5 Overview of the land reform programme

##### *The land reform programme: Three 'legs'*

Based on the mandate in the Constitution, land reform in South Africa comprises three

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<sup>97</sup> It notes the 'process of drafting regulations ... intended to empower the Minister of Land Affairs to approve urgent applications for the transfer of land to communities occupying communal land in the former homeland and SADT areas' (regulations based on the Land Disposal Act 48 of 1961 and the Upgrading of Land Tenure Rights Act 112 of 1991). It regards the measures as 'reasonable' and as paying attention to vulnerable groups but notes that they 'have not yet addressed some of the fundamental problems impeding the land reform programme. The biggest challenge remains that of effective implementation of land legislation, especially in the areas of tenure reform' (SAHRC 2001: 282-3).

programmes, *redistribution*, *restitution* and *tenure reform*, and includes a range of legislation, activities and achievements (see Table 3).

*Land redistribution* shall address racial and gender imbalances in access to land. South Africa covers an area of about 1.22 million square kilometres, or 122 million hectares of land (Kepe and Cousins 2002, refer Table 3). At the time of study it was estimated that individuals classified as white held about 50 000 privately owned farms, 70% of the total area, while groups and individuals classified as black primarily held land rights in former homelands but also various rights in privately owned farm land (as workers, tenants and sharecroppers, and less often owners). The skewed land distribution worsened during the 20<sup>th</sup> century owing to forced removals and state-facilitated reduction in the population on commercial farms, which were given preference for paid employment in towns and cities, and population growth in former 'homelands'.

Table 3: Land distribution in South Africa at the time of study (2002)

	Percent of total area	Area (hectares)	Households/farms	Hectares per farm/household
Privately owned agricultural land	70%	86.2 million ha	50 000 farms	About 1 724ha per farm
State-held land in former 'homelands'	14%	17.1 million ha	About 2.4 million households	About 7.1ha per household
State-held land in Act 9 Rural Areas	1.4%	1.7 million ha	About 10 000 households	About 170ha per household
Land reform projects	0.9%	1.1 million ha	99 000 house hold beneficiaries	About 11ha per household

Source: (Kepe and Cousins 2002). Act 9 Areas and two right columns added by author. Owing to great variations in land productivity the figures are not directly comparable (for example most of the Act 9 Rural Areas are in arid or semi-arid areas with low productivity).

The RDP stated that the government aimed to redistribute 30% of the commercial farmland to people and communities who were disadvantaged under apartheid within five years, and that this should be coupled with a programme of service provision and institutional development, financed by 'substantial funding' by government and a land tax (ANC 1994: 20-22). Marcus (1996) found that about 68% of black rural households desired land for farming, about half requesting one hectare or less (quoted in May 2000: 241).

The media and the DLA regularly report on successful land reform measures, such as restitution of land and forming of joint ventures. From 1994 to 2004, 'the Decade of Freedom', about 3% of commercial farmland was redistributed (Hall and Lahiff 2004). A great majority of farm owners are still believed to be white, though the figure is not known (Walker 2004). The government has pursued the goal through adapting existing legislative frameworks (particularly from the transition period in the early 1990s) and by developing

grant mechanisms.<sup>98</sup> The more recent 'Land Redistribution for Agricultural Development' (LRAD) programme includes 'food-safety-net projects', equity schemes and support for agriculture in communal areas, which revives the notion of the 'emergent black farmer', stressing the capacity to farm commercially rather than a right to redress or livelihood. A newspaper expressed concern about a policy change that it saw as favouring emerging commercial farmers over vulnerable rural and urban groups (Mail & Guardian 2001). The LRAD programme has caused a shift towards supporting fewer relatively more well-off farmers (Hall, Jacobs, and Lahiff 2003: 9). Lack of a coherent legal framework and policy has been seen as a reason for below-target redistribution of commercial farmland (Lahiff and Rugege 2002). From 2001 the government extended the deadline for redistribution of 30% of farm land to 2014 (Didiza 2001c). By 2004 approximately 3% of commercial farmland has been redistributed. Researchers estimate that to meet the 2014 deadline the government would have to annually transfer 2.1 million hectares, equivalent to the total transfers during the eight years preceding 2003 (Hall and Lahiff 2004). Since 2001 the 'Landless People's Movement' has increased pressure on the government to redistribute land and in 2004 it advocated a boycott of the national elections (Sapa 2004).

Cherryl Walker (2004) has pointed out a limitation of a land redistribution approach to poverty alleviation. First, she notes that resettling 50 000 to 60 000 on all the commercial farms in the country would help less than 10% of landless households in the 'former homelands', estimated at around 700 000 households (Walker 2004, quoting Aliber and Mokoena 2003). The focus on an area-based goal, to the neglect of institutional development and human capabilities, can also be misleading.<sup>99</sup> In Namaqualand an extensive programme of land redistribution has been carried out whereby private farms have been purchased by government and transferred to municipalities to the benefit of formerly disadvantaged communities (as described in Part III). Some farmers in Namaqualand said in 2001 that land redistribution was 'the best thing the new government did'. On the other hand, the son of a Transvaal farm owner told me that when a farmer hears the words 'land reform' he shouts, 'Wife, hurry up, bring my gun!' (Dialogue page 104). He rejected any 'justice' perspective on land ownership and pointed at the power relations between the government and farm owners: 'You have got to give farmers what they want, then you [the government, the public]

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<sup>98</sup> Until 2000 the government offered a 'Settlement/Land Acquisition Grant' (SLAG) of up to R17 000 per household. In order to be eligible for this grant, applicants had to be poor and to have an income below a certain level. In 2001 the government introduced the 'Land Redistribution for Agricultural Development' (LRAD) programme, which gave the National Department for Agriculture and its provincial offices increased responsibility for land redistribution (Turner 2002: 6). The LRAD offers grants of between R20 000 and R100 000 to beneficiaries able to contribute a minimum of R5 000 in cash or labour. The grant increases on a sliding scale according to how much the beneficiary is able to contribute, but the proportion of grant is higher for beneficiaries who make only a small contribution (Ministry of Agriculture and Land Affairs 2001).

<sup>99</sup> The government could meet this goal by buying all the (semi-arid) farmland in the Northern Cape (about 30 million hectares), affecting only 10% of current farm owners and a fraction of total land value (Walker 2004).



can get what you want.'

*Land restitution*<sup>100</sup> involves returning land or granting other compensation to persons or communities who were dispossessed of property after 1913 as a result of racially discriminatory laws or practices. Restitution is based on the mandate in the interim and final Constitution and the Restitution of Land Rights Act 22 of 1994, which established a Land Claims Commission and a Land Claims Court. About 69 000 claims had been submitted by 1999 (80% from urban areas), and by March 2003 about 36 500 had been settled at a total cost of R1.63 billion. Settlements included both land (512 000 hectares at a cost of R430 million) and cash settlements at a standard offer of R40 000 per property (R 1.2 billion) (DLA 2003b). Rural claims often involve multiple, overlapping claims and by August 2002 only about 5% of them had been settled (Kepe and Cousins 2002). In February 2002 President Mbeki announced that the government would complete the land restitution process within three years (Mbeki 2002), now extended to 2007. Despite increased budgets, the resources still do not appear to match the political guarantees.<sup>101</sup> Minister Thoko Didiza reported in July 2005 that 62 000 of 87 000 claims had been settled (Sapa 2005). In 2005 rural people suggested a reopening of the restitution process (Groenewald 2005). Of an estimated 3.5 million individuals forcibly removed from their land during the relevant time period, only about 80 000 have applied for restitution. Residents in the Eastern Cape who were dispossessed under the 'betterment schemes' of the 1960s say that they had been discouraged from applying by the Land Claims Commission set up to assist them. The Minister of Agriculture and Land Affairs was reported as saying that 'the state will not allow for any new claims as it would be a very expensive affair and lead to economic instability' (Sapa 2005).

*Land tenure reform* aims to increase the security of tenure, 'the conditions under which land is held and used, the rights and obligation of the holder' (Bruce 1998). In South African two major land tenure issues are debated: (1) the insecure tenure of farm workers and tenants and (2) the insecure tenure of communities and individuals who live on various state-claimed lands, held under 'communal tenure' (addressed in this thesis, see Chapter 8). Regarding (1), the democratic government produced legislation to protect labour tenants and farm workers (Extension of Security of Tenure Act, 1996 and Land reform (Labour tenants) Act 3 of 1996). It has not worked. Schadeberg (2005) estimates that 2.9 million live as

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<sup>100</sup> The view of restitution as getting back 'the stolen jacket' (7.1) appears consonant with a legal definition of restitution: 'The return of property to the owner or person entitled to possession. If one person has unjustifiably received either property or money from another, he has an obligation to restore it to the rightful owner in order that he should not be unjustly enriched or retain an unjustified advantage' (Oxford Dictionary of Law – OUP 2003).

<sup>101</sup> The national budget for land reform has been between 0.3% and 0.5% of the total national budget and has seen a slow but steady increase to R1.6 billion in the 2003/4 budget (Hall and Lahiff 2004). The budget reflects an increasing emphasis on restitution (R839 million or 65% of transfers, subsidies and current payments) as compared to tenure reform and redistribution (R465 million or 35%). The projected 2005/6 budget for restitution is R1.2 billion but the Commission on the Restitution of Land Rights has estimated the sum needed to meet outstanding claims to be R13.5 billion (Hall and Lahiff 2004).

workers or tenants on privately owned farms, and that massive evictions from farms have marked the past decade. Based on a prevalence survey involving 7 700 households in 75 communities, he estimated the number of evictions between 1994 and 2004 at 943 000 compared to 737 000 in the period 1984 to 1993. Only 1% of the evictions involved a legal process; they were particularly frequent in years where legislation was introduced to improve tenure security or work conditions (Schadeberg 2005).

The Interim Protection of Informal Land Rights Act, Act 31 of 1996 was introduced to protect groups with insecure rights against encroachment (and renewed annually pending new tenure legislation).

The Communal Property Associations Act 28 of 1996 provided a new legal framework for group ownership and democratic governance. The CPA Act was the first law to regard communities as juristic persons and requires that members adopt a constitution that ensures constitutional rights of individual members, such as to non-discrimination, democratic decision-making, and secure tenure. About 500 CPAs have been established around South Africa, primarily in connection with restitution or redistribution of land. With reference to five CPA case studies, Pienaar (2000a) argues that the CPA organisations were overloaded with development expectations and tasks and had little capacity to deal with conflicts. The CPA Act guarantees support to organisations but in most cases this has not been provided (personal communication, SPP and LRC staff).

### *General land reform experience*

Many observers have documented the slow pace and uneven socio-economic impact of land reform (Lahiff 2001; Hall, Jacobs, and Lahiff 2003). 'The major problem has been the slow pace of implementation of all three programmes of land reform', the Human Rights Commission wrote (SAHRC 2001: 280). Another observer remarked that laws and policy frameworks are not matched by capacity within the Department of Land Affairs and and coordination between government departments: 'The plethora of small pieces of legislation has the potential to lead to, or have [sic] actually led to, administrative confusion' (Gutto 2001a: 8). The Human Rights Commission wrote that 'the land reform process is still slow. Poor implementation, corruption and lack of capacity continue to affect the land reform process' (SAHRC 2003a).

Struggles for gender equality have been central in land research and in policy, at least at high level (Walker 2003) but may also illustrate increasing tensions between the government and civil society during the period of my study. The 'Promoting Women's Access to Land Programme' was a joint effort of the Department of Land Affairs, the National Land Committee and other NGOs, supported by the Foundation for Human Rights in South Africa. In 2002 the editors of a joint report wrote about 'deteriorating relations between the government and certain progressive quarters of civil society' (Editor's note. Cross and

Hornby 2002: 4).<sup>102</sup>

The government has allocated between 0.3% and 0.4% of public spending to land reform (Mingo 2002). Expenditure on land reform in the first decade after 1994 does not appear to indicate that access to property and a livelihood are regarded with the urgency that human rights create.<sup>103</sup> 'Land won't belong to all by 2005', a perceptive journalist wrote after interviewing PLAAS researchers (Mail & Guardian 2004). However, the government recently announced further increases in the land reform budget, from R 2.0 billion in 2004/5 to R 3.8 billion in 2005/6. The national budget projects an increase to R 4.8 billion in 2006/7 and R 5.6 billion in 2007/8 (PLAAS 2005: 2). The government has maintained that state-led land reform will provide social justice and economic growth. The then Director-General of the Department of Land Affairs presented the 'South African Experience' of land reform thus:

From the South African experience, land reform can be defined as the systematic transformation of patterns of land ownership and tenure systems, through inter-linked and co-ordinated interventions led by the state, in order to redistribute land and rights in land, as well as economic benefits, to disadvantaged sections of the society. In other words land reform is essentially a political process aimed at achieving economic and social goals, and in South Africa its key objectives include reversing the negative historical legacy of colonial and apartheid inspired dispossession, as well as opening up opportunities for economic development. (Mayende 2001: 2)

While describing the 'systematic transformation' as the 'South African *experience*' is unusual, ambitious policy goals have been articulated from the 1991 White Paper 1991, the RDP 1994, the 1997 White Paper and recent tenure reform policy (DLA 2004). Law formulation has been comprehensive (as witness the long list of Acts from the transition period and democratic era, Table 5, p. 103) and draws on the competence of experienced lawyers. Recent South African land law gets attention from other African countries.<sup>104</sup>

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<sup>102</sup> The DLA has placed the document on its website as a 'Land Reform Gender Policy Framework'. Other policy links given here are to the RDP, to CEDAW and to the 'Tanzania Gender Networking Programme' ([http://land.pwv.gov.za/legislation\\_policies/policies.htm](http://land.pwv.gov.za/legislation_policies/policies.htm) [Dec 2005]).

<sup>103</sup> In 2003–4 income tax cuts amounted to R15 billion (May 2004: 12. The presented conference paper was used), approaching the amount spent on land reform up to that date. In 2005 the Minister of Social Affairs, Zola Skweyiya, estimated the annual loss due to official's misappropriation of welfare payments (by creating fictitious receivers) at R1.5 billion per year (Mail & Guardian 2005), also more than the annual allocation for land reform up to the date of my field research.

<sup>104</sup> For me this was symbolic: At an academic land conference at Victoria Falls, Zimbabwe, in 2002, a young (black) lawyer from Harare commented to his older (white) colleague from the LRC, Cape Town, that 'South Africa has such good land laws', referring among other things to the Communal Property Associations Act 1996. The South African lawyer who had been involved in preparing the Act was quick to point out weaknesses of design and implementation.

Table 4: Key features of South Africa's post-apartheid land reform programme

	<b>Redistribution</b>	<b>Tenure reform</b>	<b>Restitution</b>
Bill of Rights, 25:5-7	<i>The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.</i>	<i>A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.</i>	<i>A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.</i>
Issues	Commercial farmland (70%) almost exclusively owned by about 50 000 white farmers. Rural and urban landlessness.	Rural people with insecure tenure on privately owned farms and in former 'homelands' (estimated 13–15 million).	History of racially motivated dispossession, including an estimated 3.5 million forced removals during the apartheid era.
Legislation and policy	<ul style="list-style-type: none"> <li>- Policy goal in RDP, 1994: Redistribute 30% in 5 years</li> <li>- Distribution and Transfer of Certain State Lands Act 119, 1993</li> <li>- Provision of Land and Assistance Act, 1993</li> <li>- SLAG: Settlement/Land Acquisition Grant</li> <li>- From 2000: Land Redistribution for Agricultural Development Programme (LRAD): grants for commercial black farmers with resources and skills</li> <li>- Municipal Commonage Programme</li> </ul>	<ul style="list-style-type: none"> <li>- Land Reform (Labour Tenants) Act 3, 1996</li> <li>- Extension of Security of Tenure Act 62, 1997</li> <li>- The Interim Protection of Informal Land Rights Act 31, 1996</li> <li>- Communal Property Associations Act, 28 1996</li> <li>- Transformation of Certain Rural Areas Act, 94, 1998</li> <li>- Land Rights Bill, 1999 (shelved)</li> <li>- Communal Land Rights Bill, 2002, new version 2003 (enacted 2004)</li> </ul>	<ul style="list-style-type: none"> <li>- Restitution of Land Rights Act 22 of 1994, amended 96, 97, 99 and 2003</li> <li>- Establish Chief Commissioner on the Restitution of Land Rights, with five Regional Commissioners and a Land Claims Court</li> <li>- Change from court process to administrative process in 1999</li> <li>- Restitution of Land Rights Amendment Act 2003</li> </ul>
Progress	<ul style="list-style-type: none"> <li>- 1994–2004: 3% of commercial farm land</li> <li>- Concerns about sustainability: economic, social, environmental</li> <li>- Landless People's Movement: increasing pressure from 2001</li> <li>- Beneficiaries remain poor. Women gain less land, and engage less in agriculture (DLA 2000)</li> </ul>	<ul style="list-style-type: none"> <li>- Communal tenure reform contested and delayed before and after policy shift in 1999</li> <li>- CPA first legal option for owning land in common. Poor results in practice</li> <li>- Farm dwellers still face poor work conditions, massive evictions, and cases of abuse</li> </ul>	<ul style="list-style-type: none"> <li>- Registration of claims till 1999 (69 000)</li> <li>- 31 March 2003: 36 500 settled</li> <li>- Rural: Only 5% of rural claims settled. 512 000ha restored (cost R0.431 billion)*</li> <li>- Urban: Mainly cash settlement (R40 000 each) (Cost R1.2 billion).</li> <li>- Problems with sustainability and land development. No comprehensive evaluation of impact, but case studies (DLA 2002)</li> </ul>
Challenges/Road ahead	<ul style="list-style-type: none"> <li>- New government target: 30% of commercial farm land before 2015</li> <li>- Implement plan to redistribute 669 000ha of state land</li> <li>- Taxation (under implementation)</li> <li>- Increase incentive packages</li> <li>- Training, natural resource development and marketing</li> <li>- Incorporate impact of HIV/AIDS</li> </ul>	<ul style="list-style-type: none"> <li>- Enact and implement tenure reform in former 'homelands'</li> <li>- Trancraa experience: tenure reform requires increased funding and DLA and NGO capacity</li> <li>- Economic and legal support for farm worker rights</li> <li>- Impact of HIV/AIDS including children's tenure rights</li> </ul>	<ul style="list-style-type: none"> <li>- Presidential Directive: Finalise restitution process by end 2005, extended to 2007</li> </ul>

Sources: Turner 2002, Kepe and Cousins 2002, Lahiff 2001, Mingo 2002, Lahiff and Rugege 2002, Hall, Jacobs and Lahiff 2003.

Table 5: Some land acts and land-related acts 1988–2004

## Transition (1988–1993)

1988	The Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988
1989	Development Trust and Land Amendment Act 31 1989
1990	Rural Amendment Act 121 1990
1991	The Abolition of Certain Racially Based Land Measures Act 108 1991
1991	Upgrading of Land Tenure Rights Act 112 1991
1991	Less Formal Township Establishment Act 113 1991
1993	General Law Amendment Act 108 1993
1993	Land Titles Adjustment Act 111 of 1993
1993	Distribution and Transfer of Certain State Lands Act 119 1993
1993	Provision of Land and Assistance Act 126 of 1993
1993	Republic of South Africa Constitution Act 200 1993

## After introduction of democracy (1994–2003)

1994	Restitution of Land Rights Act 22 of 1994
1994	Council of Traditional Leaders Act 31 of 1994
1994	Human Rights Commission Act 54 1994
1995	Land Administration Act 2 1995
1995	Development Facilitation Act 67 1995
1995	Our Land – Green Paper on Land Policy 1995
1996	Constitution of the Republic of South Africa Act 108 1996
1996	Interim Protection of Informal Land Rights Act 31, 1996
1996	Land Reform (Labour Tenants) Act 3 of 1996
1996	Local Government Transitions Act 1996
1996	Communal Property Associations Act 28 of 1996*
1997	Our land – White Paper on Land Policy 1997*
1997	Land Survey Act 8 of 1997
1997	The Extension of Security of Tenure Act 62 1997
1998	Transformation of Certain Rural Areas Act 94 of 1998*
1998	Water Act 1998
1998	Provision of Land for Settlement Amendment Act 26 of 1998
1998	Local Government Municipal Demarcation Act 27 1998*
1998	Sub-division of Agricultural Land Act Repeal Act 64 of 1998
1998	Deeds Registry Amendment Act 93 of 1998
1998	Local Government Municipal Structures Act 117 1998
1999	Draft Land Rights Bill 1999*
1999	Land Restitution and Reform Laws Amendment Act 18 of 1999
2000	Promotion of Access to Information Act 2 2000
2000	Promotion of Equality and Prevention of Unfair Discrimination Act 4 2000
2000	Communal Land Administration Draft Bill 2000
2000	Municipal Systems Act 32 of 2000
2001	Draft (3 <sup>rd</sup> ) Communal Land Rights Bill, November#
2002	Mineral and Petroleum Resources Development Act 28 of 2002
2002	Communal Land Rights Bill published#
2003	Traditional Leadership and Governance Framework Act 41 of 2003#
2003	Restitution of Land Rights Amendment Act 2003
2003	Communal Land Rights Bill (revised version)#
2004	Communal Land Rights Act 11 of 2004#

The list is not complete. 'Bills' are only noted regarding communal tenure reform.

\* Trancraa and policy initiatives closely linked to it. # The Communal Land Rights Bills and Act.

Many land acts were available online: [http://land.pwv.gov.za/legislation\\_policies/acts.htm](http://land.pwv.gov.za/legislation_policies/acts.htm) [January 2004], now listed there [December 2005]. Texts may be obtained from [ResourceCentre@dla.gov.za](mailto:ResourceCentre@dla.gov.za).

## Dialogue with son of Transvaal farmer working in Springbok, February 2002

- E: What is it you do?
- PW: I do research on land reform...
- E: So you are one of these guys that farmers want to shoot!
- PW: Well, I come from abroad to study it. I cannot claim that I have contributed to land reform. Why do farmers want to shoot people who do that, anyway?
- E: Because government wants to take their farm away, and they don't want to lose it. Like our farm [a cattle farm in Transvaal], we have been three generations on the farm, it's ours!
- PW: Well, they cannot 'take it', can they? It is supposed to be 'willing buyer, willing seller' at market prices?
- E: Well, they wanted to buy the farm and the guy they sent to assess it said it was worth 2.5 million. And at that time we already had an offer of 7.5 million! If they offer eight or eight and a half, we would be talking. But then we would sell all the cattle, all the machinery, water pumps, furniture etc. With all these things, the price would be thirteen to fourteen million.
- PW: Does that mean the price is emotional or hiked-up? Would it be financially viable to buy at that price?
- E: When my dad sells cattle worth 7 to 8 million per year, I should say it's viable. It's a 19 000 hectare farm.
- PW: Anyway, if you don't want to sell, you don't have to sell?
- E: The government applies all kinds of pressures. It is the government, they can do all kinds of things, and they do it so many places.
- PW: Why is the land distribution then going so slowly?
- E: Money, they haven't got the money. Anyway, what good would it do? You know, there are 103 workers on the farm. They are not going to be employed there if it gets bought up. You know, we drive them to town every second Friday or Saturday.
- PW: Why do 'you' drive them to town?
- E: Well, not me, my daddy or someone else.
- PW: I mean, why don't they go by themselves?
- E: It's far, it's more than eighty kilometres and public transport is expensive.
- PW: They ought to go by their own cars.
- E: Ha! There's no way a farm worker who makes five hundred a month – ehh ... five hundred a week – can ever afford a car!
- PW: So pay them more.
- E: No, it would not work. Remember, when you employ someone, you employ the family, the wife, mother, everyone. They get all their food, they eat meat everyday, beef, even game. If they want game, they get game.
- PW: That's petty things. Give them money, today money is power.
- E: Many of us work for petty things, I work for petty things.
- PW: I don't see why an enterprise that makes seven to eight million a year cannot pay its workers better?
- E: That is why, when some guy like you come to the farm, and I ask 'what are you doing', and you say 'land reform', I say, 'Please wait', and shout to my wife, 'Hurry up, bring a gun!' You know, we were three generations on this farm, and have put so much work here, we don't want to just see that wasted. The first Boers put down a lot of effort, they were ready to give up their lives for the farms.
- PW: And ready to kill, too?
- E: It is not a just world, you know!
- PW: But some people think it should be a just world.
- E: But ... it just isn't, it doesn't work that way.
- PW: The government has said that land and natural resources should be distributed equitably among the inhabitants. In 1994 it said that 30% of the land should be redistributed in five years.
- E: Ha, ha, that's just not gonna happen!
- PW: No, that's clear, but why not?
- E: Well, one thing you got to remember is that farmers own most of South Africa, and farmers are ready to fight for their farms. It is not going to be very pleasant when all farmers suddenly say they are not going to sell any products in this country. Another thing is good lawyers. When the government puts on a guy of 25 and the farmer has a 45-year-old lawyer who has studied all the relevant laws, came out top of his class and is making a hell of a lot of money, don't think the government has got a chance! The lawyers ask them to extend, and then extend a bit more, until the government has got all this backlog of cases. That's why they have this backlog of 7 ½ years. In the meantime you have sold the farm, and they're in trouble, ha, ha! You've got to give the farmers what they want, then you can get what you want.

## 8. TENURE REFORM IN STATE-CLAIMED LANDS

This chapter elaborates the issue of tenure reform in 'communal' or state-claimed land. I first revisit what I have seen as major expressions of policy change in the 1990s, the white papers by respectively the De Klerk National Party government in 1991 (see subchapter 7.2) and the Mandela ANC government 1997 (see subchapter 7.4.3). Following that I present the Transformation of Certain Rural Areas Act, Act 94 of 1998 (Trancraa), the focus of the study, and then and the process towards a Communal Land Rights Act, Act 11 of 2004 which is an important to interpret the wider significance of Trancraa, particularly with regard to land tenure as a human rights issue.

### 8.1 The White Paper on Land Reform 1991

#### 8.1.1 'Ethnic and tribal communities are realities that have evolved naturally'

The White Paper on Land Reform (RSA 1991) holds that only private property can sustain productive land uses and recommends that 'communal' land tenure should be phased out, although not by government decree. Within the strategy of integration in the commercial sector, it aims to 'promote the quality and security of the title in land on an equitable basis for all people', giving it a 'firm foundation of legal certainty'. This Paper takes two major approaches to tenure reform: an assisted process of privatisation and a 'hands-off' approach to some 'traditional' or 'tribal' areas. It recommends that 'lower-order rights' be upgraded, that 'the capacity to acquire property be conferred upon tribes and tribal communities subject to the ordinary laws of the land, that the continuation of the traditional tribal system of land tenure be recognised alongside individual land tenure and that tribes and tribal communities that so choose be enabled to convert their system of tribal or communal tenure to individual tenure' (RSA 1991: B1b, 7).<sup>105</sup> The right to 'choose' to change tenure system is placed with a 'tribe' or 'tribal community'. However, in some areas 'the tribal land system' is seen as rooted in tradition and natural differences, so that tenure cannot be protected under statutory law (B3.1).

In the traditional areas, ethnic and tribal communities are realities that have evolved naturally in Black community life. A tribe's identification with its land and the communal tenure are essential for the continued existence of tribal community life. These realities cannot be ignored when determining a general land policy. After due consideration the Government has decided not to interfere with this traditional land tenure system. The traditional system of land tenure underpins a delicately balanced subsistence economy system which, if replaced injudiciously, could lead to the collapse of the communities to which it affords a livelihood. The Government is, however, not in favour of the expansion of this system. (RSA 1991: B3.2, p. 8)

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<sup>105</sup> An Act from 1991 defined 'tribe' as 'a community living like a tribe'. In the Upgrading of Land Tenure Rights Act from 1991, 'tribe' was defined as '(a) any community living and existing like a "tribe"; or (b) any part of a tribe living and existing as a separate entity'. Claassens (2000: 257) writes that there is no definition. I avoid the term 'traditional', using it only in the official South African sense of institutions and leaders recognised as 'traditional'.

Tenure policy is linked to constructions of history and community. The 1991 White Paper reifies the bounded 'tribal' community. In the (not clearly defined) areas with a 'traditional system' agency is attributed to 'tribes' and their leaders. This implies that the government has less responsibility for 'internal' institutions (such as women's land rights and political rights). It is a parallel to how the government shielded the commercial farm sector against human rights requirements, arguing that 'the Government cannot prescribe to voluntary associations in organised agriculture, co-operatives and other institutions in the private sector in this regard' (RSA 1991: C2.6, 13).

In certain other 'rural and urban Black areas' (B2.1) the Paper considers that land rights were constructed by the government: 'inferior' leaseholds, 'quitrent' and 'deeds of grants' etc. Here poor registration practices, 'lack of interest on the part of those concerned', and 'strong natural resistance' to tenure reform had caused problems. The government announces that it is prepared to take greater 'responsibility' for land tenure by facilitating a process of 'convert[ing] lower order land tenure rights into full ownership as soon as is practically and legally possible and to integrate them with normal deeds registry practices' (RSA 1991: B2.6), argues that it 'will create a new property market with a substantial growth potential' (B.2.9), and envisages converting 300 000 leaseholds and one million residential plots to full ownership, well in line with old and more recent 'formalisation' programmes. The government let markets provide the mechanism and let chiefs do the decision-making.

#### 8.1.2 ANC: Land reform must overcome dualism

Both the ANC and NLC (1991) welcomed a programme to strengthen 'communal' land tenure, but criticised it for being isolated from a comprehensive reform of the land system. The ANC (1991b) argues that the 1991 White Paper 'perpetuates racist perceptions and practices and so maintains the situation where there is one set of standards and practices for whites and one for blacks'. It holds that (i) the tenure reform proposals would extend bureaucratic control and thus inequality before the law – 'The approach to communal tenure also worries us deeply. The government maintains it will allow the system to continue to exist, but has also constrained it by a high level of administrative intervention which will make it very difficult for communities to maintain this system'; (ii) the proposals would create undue pressure toward privatisation – 'The pressures in the white paper to force black communities to choose individual over communal tenure reminds us of the disastrous experience of the betterment policy which destroyed the remaining base of black agriculture in the 1940s and 1950s'; and that (iii) the white paper did not deal with restructuring commercial agriculture – 'Surely a land reform for a new South Africa must overcome the dualism inherent in our present reality and address the challenges of one agricultural system in one country' (ANC 1991b: 2). The Reconstruction and Development Programme aimed to 'ensure security of tenure for all South Africans regardless of their system of land holding' (2.4.4), and recognise



diverse forms of tenure and support new forms of group land holdings (2.4.10). The emphasis on individualisation in the 1991 White Paper was thus played down while women's land rights received attention: 'Institutions, practices and laws that discriminate against women's access to land must be reviewed and brought in line with national policy. In particular, tenure and matrimonial laws must be revised appropriately' (ANC 1994: 2.4.11).

## 8.2 The White Paper on South African Land Policy 1997

The 1997 White Paper (DLA 1997b) describes the main problems (viii); principles (xii), land tenure issues and interim measures and proposals for a land tenure reform programme. It states that tenure reform is 'a particularly complex process ... [that] has to be developed with extreme care' because of the difficulties created by the past and because new systems of land rights would have far-reaching implications (xi–xii). Two years were therefore set aside for consultation, test cases and drafting of legislation (1997–1998), including a promised Green Paper on Land Tenure Policy by the end of 1997 (later abandoned). It followed the Constitution<sup>106</sup> with a two-pronged emphasis on historical and de facto land rights and human rights:

While the Department of Land Affairs is committed to the recognition and protection of pre-existing land rights which were undermined by colonialism and apartheid, it is equally committed to protecting and upholding the basic human rights of all South Africans. In particular the rights of members of group based land holding systems must be protected, especially in the process of exclusive decision-making in all matters pertaining to the management of the jointly held land asset. (DLA 1997: 4.19, 67)

The key principles formulated are: (1) tenure reform must move towards rights and away from permits; (2) tenure reform must build a unitary non-racial system of land rights for all South Africans; (3) tenure reform must allow people to choose the tenure system appropriate to their circumstances; (4) 'All tenure systems must be consistent with the Constitution's commitment to basic human rights and equality'; (5) a 'rights based approach and adjudicatory principles have to be adopted which recognise and accommodate de facto vested rights'; and (6) 'new tenure systems and laws should be brought into line with the situation as it exists on the ground and in practice' (DLA 1997: xii).

The White Paper's more rights-informed reading includes awareness of human problems of insecure tenure, far beyond negative economic and environmental effects (though they too are noted). The problems recognised are:

1. *The 'second class status of black land rights'* (3.18). This makes people and communities vulnerable to confiscation of their land by the state or others, and makes it difficult for them to obtain housing subsidies and development finance.
2. *Overcrowding and forced overlapping of land rights* (3.19). This was caused by dispossession and forced movements of groups: 'No tenure system can function

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<sup>106</sup> The Constitution of 1996 Section 25 (6) holds that: 'A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.' The clause does not make gender discrimination a ground for making claims.

- effectively under the population density which has become the norm in certain areas’.
3. *Traditional and communal tenure* (3.20). Transformation of traditional tenure by state programmes often involved confiscation of rights. Members of communities experience variable protection of their constitutional rights. There has been a breakdown of group rules, and legislation to protect and facilitate group ownership is lacking.
  4. *Violence* (3.21). ‘Because many people are desperate and have no other viable way of obtaining access to land they may resort to invading land. There are warlords who take advantage of this desperation and lead invasions. Thus it is that land has come increasingly to be transacted by violence almost on the model of frontier wars.’
  5. *Informal settlements in urban areas* (3.22). Here, de facto land rights are not legally recognised and people are therefore vulnerable to encroachment or exploitation.
  6. *The provision of services and development* (3.23). This is hampered where land rights are unclear.
  7. *Discrimination against women* (3.24). Women are discriminated against under tribal, statutory and private law and their participation in decision-making is restricted.
  8. *Lack of protection against evictions* (3.25). Occupants of privately owned land, including farm dwellers, have little protection against evictions, which lead to landlessness and destitution.  
(DLA 1997: 3.18–3.25: 30–34)

The 1997 White Paper confronts tensions around ‘traditional leadership’. Land workshops had revealed ‘widely different opinions on the future involvement of tribal authorities and chiefs in land administration’. Some had argued that ownership by ‘subjects’ would lead to separation from ‘tribes’, and that ‘chiefs’ should get the title to land for subsequent redistribution in accordance with customary practice. Others had advocated community titles and were concerned about the corruption, lack of security and development constraints inherent in administration by chiefs (DLA 1997: 2–3). Like the 1991 Paper, the 1997 policy document distinguishes between ‘traditional’ tenure and ‘communal’ tenure, where the latter had been transformed by chiefs, ex-homeland officials and politicians (DLA 1997: 31–32). However, due to the human right perspective of the White Paper the government may have a responsibility towards both. The document recognises that it may not be necessary to interfere with systems that function democratically and protect members’ rights (DLA 1997: 4.19, 66). However, there are other systems which do not:

There are also tribal authorities which do not function democratically and which operate in ways which undermine the constitutionally entrenched basic human rights of members. The government is under an obligation to ensure that group-based land holding systems do not conflict with the basic human rights of members of such systems, nor of other residents living in communal areas. The challenge is to find a way in which the procedures governing the exercise of group-based rights ensure that all rights holders are able to participate effectively in decisions regarding their joint land asset, and that the rules of such systems are consistent with the principle of equality. (DLA 1997: 3.20.2, p. 32)

The Paper recommends that all land redistributed, restored or awarded should be registered under some form of ownership (DLA 1997: 64–5). It recommends that ‘tribally and communally-occupied land, held in trust by the state, is transferred to the ownership of the members of those communities and tribes in a manner compatible with the Constitution’ (DLA 1997: 10) and stipulates that ‘the ownership of the land will vest not in chiefs, tribal

authorities, trustees or committees but in members of the groups as co-owners of the property' (DLA 1997: 4.19, 60). Tenure reform could deliver security in different ways, for example by awarding independent land rights and secure lease agreements, protection against evictions, and confirming membership in groups or private ownership. 'Communal' tenure reform should develop mechanisms for upgrading de facto vested interests in land to legally enforceable rights, but the 'rights of affected landholders will be formalised only in response to requests. A programme of forced titling will not be undertaken'. The Department of Land Affairs recognises that it has limited capacity and that in large areas tenure reform will not take place for many years (DLA 1997: xii). It does not discuss whether this is consistent with Constitutional rights, including to tenure security.

The DLA argues that apartheid land tenure reform and confiscation of lands 'did not acknowledge that communal systems are based on pre-existing joint rights to land. Once the rights underlying the systems are recognised and the principle of freedom of choice is upheld, it follows that changes to communal systems can take place only on the basis of agreement by members' (DLA 1997: 3.20.1: 32). Where rights vest in groups, they may only be individualised through democratic decision-making. Protecting de facto<sup>107</sup> rights was seen as particularly important for women (DLA 1997: 30, 32, 67). In cases of family tenure, formalisation must award rights to all holders of de facto rights within the household. In particular, 'Permissions to Occupy' should not be automatically upgraded to the person in whose name it was registered, for past permits were invariably granted in the name of men who, in some cases, had left to work elsewhere and could have incentives to sell land despite the interests of the rest of the family. 'It is for reasons such as this that the far reaching protection for women will be built into the new forms of ownership and the procedures for upgrading rights' (DLA 1997: 4.19: 68).

Thus, in my reading, the 1997 White Paper envisages tenure reform as a transition from a system characterised by (i) formal state ownership, (ii) permits granted under statutory law and coopted institutions and (iii) de facto tenure rights based on occupation and use to another tenure system where rights and practice reflect the Constitution and human rights (see Table 6). The task of tenure reform (law and practice) is to facilitate the transition, consistency between levels of government and legitimacy of property rights.

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<sup>107</sup> *De facto* vested rights were explained as (i) established occupation, (ii) long-term historical ownership of land not recognised by law, and (iii) 'underlying ownership' by communities and individuals whose land was confiscated by chiefs or the government (DLA 1997: 61).

Table 6: Tenure reform: Transition towards security and legitimacy

Past	Transition	Future
<i>Insecurity and illegitimacy</i> [Human rights not relevant] State trustee ownership Parliamentary sovereignty Permit-based statutory law Customary law (coopted) Practice violates rights	⇒ Mediated by the Constitution and land tenure policy	<i>Security and legitimacy</i> Human rights promoted Diverse ownership patterns Constitution Rights-based statutory law Customary law (reformed) Practice fulfils individual rights

The 1997 White Paper focuses on individual men and women as the bearers of human rights and decision-makers. It gives principled guidance for law drafting and is informed by the Constitution and international human rights concerning gender. Yet as Tranraa and the Communal Land Rights Act processes would illustrate, a policy document is only a step towards changed practice.

In a perceptive comment on land reform, Jonathan Shapiro (1994) portrays South Africa as a patient who has undergone surgery to remove the 1913 Land Act. 'Doctor' Hanekom, Minister for Agriculture and Land Affairs 1994–1999, had envisaged that the operation would produce an instant cure. The signboard on the bed has: 'PATIENT: SA. PROCEDURE: 1: Remove Land Act. 2: Insert Land Rights Bill. 3: Suture.' The last two steps have indeed required patience.



Figure 1: Land tenure reform as surgery: remove, insert, suture.

Zapiro 1994. The restoration of land rights. *Mail & Guardian*, 10 November 1994.

### 8.3 Transformation of Certain Rural Areas Act 94 of 1998 (Trancraa)

#### 8.3.1 Certain Rural Areas

The 20<sup>th</sup> century South African government strategy of constructing South Africa as divided not only between black and white but between various fragmented groups is the historical basis for having two different approaches to tenure reform in state-claimed land. The Transformation of Certain Rural Areas Act, Act 94 of 1998 (Trancraa), for the former 'coloured reserves' is an early and different approach seen in relation to the Communal Land Rights Bill, subsequently Act 11 of 2004 (RSA 2004) for former 'homeland/Bantustan' areas. Trancraa provides for protecting user rights and transferring land ownership to residents or accountable local institutions in 23 'rural areas' most of which were at the time held in trustee ownership by the state.<sup>108</sup> These 23 areas cover about 18 000 km<sup>2</sup> and have about 70 000 inhabitants in four provinces<sup>109</sup> (Catling 1996). The largest are in the arid and semi-arid north west (see Figure 2). Of the 23 areas, 18 originated as mission stations and five as other forms of group held land. In 1994 state trusteeship for 16 of the areas was placed with the Minister of Agriculture. For seven of the Act 9 Areas trust obligations were transferred to local councils (Catling 1996: 23).

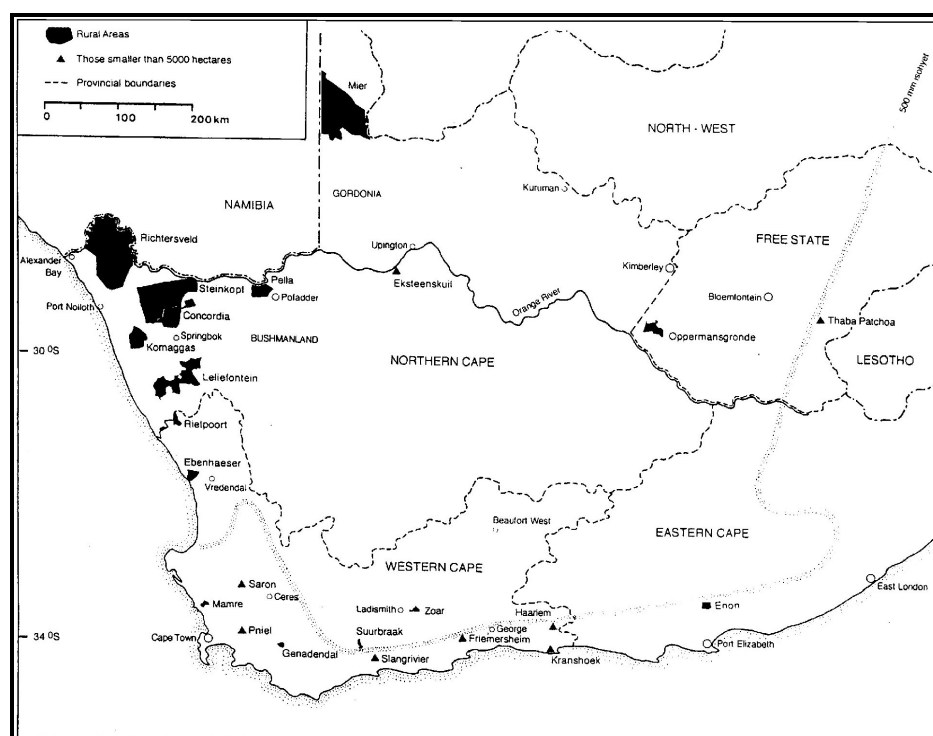


Figure 2: Act 9 Rural Areas in South Africa

Source: (Catling 1996) 'Act 9' refers to Rural Areas Act 9 of 1987

<sup>108</sup> Under the Rural Areas Act 9 (House of Representatives) of 1987 (hence 'Act 9 Areas'), which had replaced the Coloured Rural Areas Act, 1963. 'Certain Rural Areas', the phrase established by Trancraa, refers to the specific areas without using a racial terms (abandoned in 1987).

<sup>109</sup> In the Western, Northern and Eastern Cape and the Free State. The total area covered is about 1.5% of the land area of South Africa. For comparison, they make up about 10% of the area in former homelands and only 0.5% of the population. The average population density is 4 per km<sup>2</sup> in the predominantly arid areas, compared to 76 per km<sup>2</sup> in the former homelands (national: 36 per km<sup>2</sup>).

### 8.3.2 Making and presenting an act

Trancraa is the first democratic era ‘tenure reform’<sup>110</sup> for state-held lands and was an outcome of popular pressure and civil society advocacy during and after the struggle against apartheid. During meetings with leaders from the Namaqualand ‘rural areas’ (in the meaning created by law) and land organisations in Steinkopf in 1994, the Minister for Agriculture and Land Affairs, Derek Hanekom, had promised that he would consider a revision of the Rural Areas Act 9 of 1987. In 1995, he wrote to residents about further studies and consultations towards this end (Hanekom 1995: Point 1.1.4) and he noted that ‘Development brings change. The new political and constitutional dispensation require that I consider the future of the Rural Areas Act in the light of new challenges’ (1995: Point 1.3). He noted that the Constitution guarantees basic human rights and stipulates the division of powers between different levels of government. Furthermore, new legislation about local government<sup>111</sup> had replaced the election procedures in Act 9, while local government was still required to rule in accordance with Act 9. He believed that the Rural Areas Act 9 could hamper development which should be strengthened by allocating title to residential plots in towns, granting permits for mineral exploitation and allowing investments in the Rural Areas. He said (1995: pt. 1.3) that ‘[he had] decided that these and other questions shall be addressed not in a piecemeal (‘stuksgewys’) manner, but that the Rural Areas Act should be examined in its totality’. In November 1995 the ‘Rural Areas Committee’<sup>112</sup> was established to prepare an information and discussion document on the revision of Act 9, presented in June 1996 (Landelike Gebiede Komitee 1996b). The national committee was supported by provincial committees. From July to October 1996, communities were consulted about the change in the law. In the Northern Cape Province, the Surplus People Project (SPP)<sup>113</sup> was hired to lead the consultation (SPP 1996a).<sup>114</sup> Lawyer Henk Smith, LRC, stressed that Trancraa had been thoroughly consulted: ‘What is so remarkable about the Act is that [while] it only affects very few people, the consultation process prior to the drafting of the Act was incredibly comprehensive, because they held workshops and conferences in each and every village,

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<sup>110</sup> Trancraa is generally seen as a part of the tenure reform programme. However, a legal scholar placed it under the heading of ‘redistribution’ because it relies on existing tenure forms (Carey Miller and Pope 2000: 449). Trancraa is national legislation, therefore I have placed the general information here. However, much of the process and contents will make more sense in the context of Namaqualand history and land use addressed in Chapter 9.

<sup>111</sup> Transitional Local Government Act, 1993.

<sup>112</sup> ‘Landelike Gebiede Komitee’. The Committee was headed by Professor Nic Olivier and involved the Provincial Department of Local Government and Housing, the Northern Cape Office of the Department of Land Affairs, the Legal Resources Centre (LRC) and the Surplus People Project (SPP). The LRC and SPP have a history of working with land research and advocacy in Namaqualand.

<sup>113</sup> The Surplus People Project ([www.spp.org.za](http://www.spp.org.za)) is a civil society organisation assisting rural communities in the Northern and Western Cape. It has worked with research, advocacy and land reform in Namaqualand since 1987.

<sup>114</sup> The consultation was carried out with representatives of the provincial Department of Land Affairs and Housing and Local Government and involved meetings with eight Northern Cape communities governed under Rural Areas Act 9.

that were tape recorded' (Henk Smith, LRC, Workshop, PLAAS, University of the Western Cape, April 2002).

A pamphlet used to inform communities in 1996 focused on conflicts between the Rural Areas Act 9 and the Constitution, particularly new rights of freedom of movement, administrative justice and democratic local government (SPP 1996c). It indicated that whereas most residents felt positively about title to residential plots, opinions were divided over the commonage.<sup>115</sup> The 1996 community consultations sent a message that the state trusteeship should be ended and that land ownership should be transferred to local government ('plaaslike owerheid') (SPP 1996a). A resident in the Eksteenskuil area wrote: 'We would hereby like to make clear to you that all of us who attended the gathering at Currieskamp on 28 September felt that the Act 9 from 1987 must be scrapped. The Act disadvantages those of us who have property and those who still need it will also be disadvantaged by the Act ... We appeal to the national authorities to scrap the Act, we do not want to hear any more of it.'<sup>116</sup> However, on more specific issues (residential plots, grazing areas and cultivated land) views differed. A discussion document by ANC at Steinkopf (1996) articulated the demand for the return of landownership to the local level. There were organised but not necessarily unanimous claims that 'It is our land'.

In formulating *Tranraa* the main policy documents were the Constitution (1996), the ongoing formulation of the 1997 White Paper on South African Land Policy and the draft Land Rights Bill (1996–1999) (H. Smith, LRC, personal communication, 2002). I see the process not as 'vertical' and sequential translation but as consultative and driven by pressures from individuals and groups demanding legal security and a 'return' of the land, with an important impetus coming from SPP, LRC and researchers who had been active in Namaqualand; the boundaries between state and civil society were permeable.<sup>117</sup> A former land affairs official involved in formulating the Act said that it was made 'at a time when there was still a good relationship between government and civil society' (interview, 2002). Passing the Bill through Cabinet, Minister Buthelezi reportedly asked about the role of 'traditional leaders', unmentioned by the Act, but was assured that the issue posed neither a problem nor represented an oversight (personal communication, land researcher). In Parliament, approval was facilitated by the support of the ANC representative for Namaqualand, and a former SPP staff member. Parliament approved the Bill on 20 October 1998<sup>118</sup> and it was

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<sup>115</sup> The pamphlet had illustrations of three different tenure options: (1) 'communal tenure', in which a man, a youth and a woman, are holding the land with traditional style houses, between themselves; (2) 'trust land', in which two officials with uniforms and an unhappy looking local man are holding the land; and (3) 'freehold', in which one farmer is holding a piece of land with one farm and a windmill.

<sup>116</sup> Resident in Currieskamp. Letter to SPP, 30 September 1996 (reproduced in SPP 1996a).

<sup>117</sup> For example, an SPP researcher went on to join the Department of Land Affairs, heading the Sub-Directorate for Redistribution under which *Tranraa* was placed until passed into law in 1998, when responsibility was transferred to the Directorate for Tenure Reform (interview, October 2002).

<sup>118</sup> *Tranraa* was passed as one of ten acts or amendments to acts on that day and as one of 137 acts passed in 1998 (of which 102 in the second session of parliament, August to December 1998).

signed into law by President Nelson Mandela. A newspaper article proclaimed: 'Hanekom to let go of "coloured reserve land"' (Mail & Guardian 1998). The first stage of implementation awaited the completion of municipal reforms, and took place in 2001 and 2002. Trancraa was thus ahead of the Communal Land Rights Bill regarding tenure reform in former 'homelands'. Henk Smith, LRC, called it, with an ironic echo of Zimbabwe, a *fast-track approach*.

The SPP, LRC and DLA used an information pamphlet to inform residents and other stakeholders about the legislation, drawing attention to management issues such as family-held cultivated lands and the challenge of financing future management. Throughout the process, the pamphlet was available in the SPP's office in Springbok and was distributed in various information sessions, generally in Afrikaans. Some residents later remembered points made in it, for example about minerals.

#### Text Box 1: Information pamphlet on Trancraa

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*'What does this Act allow us to do:*

- Transfer the Act 9 land from the Minister to the people or representative structures
- Remove many of the old restrictions on the land
- Give the community opportunities to benefit from the exploitation of minerals on their land
- Bring the old Act 9 areas in line with the rest of South Africa and repeal Act 9 of 1987 after a transition period of 18 months
- Protect the existing rights of residents by ensuring that all formal and informal rights are recognised in the tenure plan for the commonage.'

*'What principles must be adhered to by the land holding entity in dealing with land which is transferred to them through this process?*

If the commonage is not transferred to a private individual(s), the entity holding such land must adhere to the following principles:

- Give all residents (people who ordinarily lived in the Act 9 area at the commencement of the Act or who are liable for rates and taxes in the area) a fair chance to participate in the decision making process regarding the administration and allocation of the land
- Not discriminate against any resident
- Give residents a fair opportunity to participate in decision making regarding access to land
- Not sell any land without the consent of the majority of residents.'

*'Some questions for you to think about before the Transitional Period starts*

- What do you want the Transformation Act to do for you?
- How do you think the land should be held to give you the best protection of your right and also ensure productive and responsible use of the land?
- If you believe the commonage should be transferred to the local authority, what arrangements should be made to protect your rights should the local authority be amalgamated with another local authority?
- If you feel the Commonage should be transferred to a Communal Property Association how will you finance the administration? Will someone be employed?
- Should the 'saailande'<sup>119</sup> be cut out of the commonage and transferred to individuals?
- Is it possible to manage communal land – Should we go back to the Economic Units?<sup>120</sup>
- Should residents be able to trade rights?'

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Source: SPP/LRC/DLA 1999 (Selected sections quoted) (SPP/LRC/DLA 1999 Selected sections quoted)

<sup>119</sup> Dry land plots to which certain families have 'traditional' rights, but which are currently leased to them by local authorities and used mainly for cultivation of dryland crops (SPP, 1999: Report on the 'Saailand' Pilot Study in the Rural Areas of Namaqualand). Trancraa (3.8.16) provides for allocating resources to survey, record and resolve conflicts related to family and individual use rights.

<sup>120</sup> Plots of grazing land created under forced subdivision of common land in the 1970s and 1980s.



### 8.3.3 The Act

#### *The purpose: transfer of land*

Trancraa is a remarkably short document of about five pages; it was made public in the bilingual Government Gazette. (Appendix 1) (RSA 1998). It sets out a framework to be followed during a 'transitional period' of 18 (extendable to 24) months. During this period the relevant municipalities must examine it and report to the Minister of Agriculture and Land Affairs. The Act thus spells out various conditions for a decision about the transfer of land that rests with the Minister.

The government intended that Trancraa should 'bring an end to administrative uncertainty, as the governance of these areas will be done solely in terms of local government legislation' (Cabinet Memorandum 1998). The main stated purpose was 'to provide for the transfer of certain land to municipalities and certain other legal entities'. Land could be transferred to (1) a municipality; (2) a communal property association (CPA, Act No. 28 of 1996); or (3) another body or person approved by the Minister. The transfer of land applies to the Act 9 Area held in trust by the State (*buitemeent*, or remainder), but not to town areas (*dorps*) where most residents live. These would continue to vest in government, except residential plots to which residents could register private title.

In 1998 the Chief Director of the sub-directorate responsible for the Act stated her understanding that trust land in the remainder 'shall be transferred to an entity by the time the transitional period is over (the clause should not read that it can only be transferred at the expiry date but up until the expiry date)' (DLA 1998b). It was thus expected at high policy level that land should be transferred within the 'transitional period' of 18 or 24 months. In the final stage of drafting, Trancraa had been affected by views of members of the Land Rights Bill drafting team (regarding 'former homeland' areas) that a rapid transfer could cause conflict or lead to alienation and harm vulnerable right holders.

Just to complicate matters I would like to raise a policy issue which has not been raised by the comments but which concerns me. I understand there has been a policy shift in the work being done by the tenure rights Bill team, where the focus is no longer on transferring of state land in the short term. I think that this Bill does not contradict the TRBill but that it may be wise to include an "out" clause, where if by the end of the transition period, the residents are not ready to take the decision about transfer, the land can continue under the Minister's trusteeship. As it presently stands, if no decision has been taken by the end of the transition period, the Minister must decide to whom the land is transferred. (DLA 1998b)

A Section 3.13 was included stating that if land had not been transferred during the transitional period the Minister could do so at a later stage in accordance with the Act.

#### *The protection of rights*

Further key points stressed by the DLA Chief Director (1998) were that the existing rights and interests of the residents should be protected during the transition period and the principle of community choice: 'The residents, through an open process must decide to

whom (CPA, other body, municipality or individual) the land should be transferred, and must show the Minister that the existing rights and interests have been taken into account in making this decision.'

The complex Section 3 was often quoted during the process, particularly sections 3.2 about the balance of rights and 3.3 about the Minister's power to determine rules (see Appendix 1). Key points were that a transfer could only take place if the Minister was satisfied that the rules applicable, whether to a municipality, CPA or other body, made 'suitable provision for a balance of security of tenure rights and protection of rights of use of (i) the residents mutually; (ii) individual members of such a communal property association or other body; (iii) present and future users or occupiers of land, and the public interest of access to land on the remainder and the continued existence or termination of any existing right or interest of a person in such land' (3.2). If the Minister found that the legislation or rules did not achieve such a balance of rights he or she could determine additional terms and conditions for the transfer of land (3.3). The Minister thus had a central role in approving and determining rules.

#### *The accountable municipality*

Furthermore, Section 4 of the Act defines the accountability of a municipality to the rights-holders, were it to become the owner of land. Such a municipality should, among other things, (a) 'afford residents a fair opportunity to participate in the decision-making processes regarding the administration of the land'; (b) not discriminate against any resident; (c) give residents reasonable preference in decisions about access to the land; (d) not sell land without the consent of a majority of residents; (e) be accountable to the residents; (f) manage and record effectively all financial transactions regarding the land; and (g) have 'fiduciary responsibilities in relation to residents'.<sup>121</sup> The section was reportedly included in the face of some political pressure from the ANC (Nic Olivier, Chair of Drafting Committee, personal communication, Oslo, June 2003), and in order to stress democratic principles that still had a weak footing in the country. The section may point towards a municipality as future landowner.

#### *Minerals*

Minerals are an important asset that Trancraa addresses in a constrained manner. Under the Rural Areas Act 9 of 1987 minerals were not included in resident land rights.<sup>122</sup> Henk Smith said of the 1996 Act 9 consultations that:

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<sup>121</sup> From Latin: *fiducia*, trust. 'Fiduciary' means 'In a position or relationship of trust, such as those between a trustee and their beneficiaries, or solicitors and clients' (Oxford Dictionary of Law). The term may point to a continued 'trusteeship' at the local level.

<sup>122</sup> With regard to 'mining of metals, precious stones, natural oil or any other minerals, any area or portion of an area to which the provisions of this Act apply ... shall be deemed to be un-alienated state land' (Rural Areas Act, S. 51.1). Prospecting required the consent of the Minister (51.3) and illegal mining was punishable by fines or imprisonment (51.4).

Half of those conferences dealt with something not addressed properly in Trancraa – actually addressed in Trancraa, but an issue that is going to be ignored in the broader tenure process – namely mining rights and preferential access to mining development in these reserves. And that remains a *very, very* important issue not properly addressed in our envisaged tenure reform. (Henk Smith, LRC, Workshop, PLAAS, University of the Western Cape, April 2002)

The LRC had fought for a stronger protection of community interests. Referring to policy directives in the RDP and in order to ‘to improve the communities’ position’ the LRC suggested in a letter to the DLA that a clause be inserted as sub-section 6(4) that the Minister of Minerals and Energy could dispose of mineral rights.<sup>123</sup> Pienaar explained that ‘it makes practical, administrative and efficient management sense to entitle the entity that owns the land rights to grant leases to small miners’ and noted that:

it is not just the perception that mineral rights belong to the communities, but in practice, decisions are made and negotiations conducted as if it is the case. In Komaggas for example, we helped in the negotiation of a diamond mining lease. De Beers for all practical purposes treated the Komaggas community as if they were the owners of the mineral rights. (K. Pienaar, LRC, letter to DLA 10 September 1998)

The LRC explored a political channel<sup>124</sup> but the initiative did not succeed, although potentially important clauses about consultation, preferential access to prospecting, employment and benefit sharing were included (Trancraa Section 6).

#### 8.3.4 Aborted amendments

The LRC and SPP (1999) prepared a proposal to amend Trancraa which was consulted in the ‘network’ that I see as central in the Namaqualand land reform: the LRC wrote to the DLA that ‘the proposal has been made subsequent to issues raised by *the informal Act 9 transformation steering group* which consists of DLA, LRC and SPP staffers. I have discussed the proposal with most of the team members and they are happy with the proposal’ (my emphasis).<sup>125</sup> I found both the example above (minerals) and this political line to the Ministry interesting. The amendments, Pienaar wrote, ‘do not change the substance of the Act but merely gives greater clarity, invokes some safeguards and fixes the odd glitch’. However, they suggested that the goal of the reform (Section 3.2) should be expanded to include ‘the sustainable use and management of such land’. (The justification for the amendment was that 3.2 would then ‘clearly state the objects for land reform’, but only the phrase about sustainability was actually proposed.) The Minister should not merely be concerned that the rules were in place but that the objectives could be achieved, and should have the powers to ensure this. The amendment distinguished between ‘rules’ and

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<sup>123</sup> K. Pienaar, LRC, letter to DLA 10 September 1998.

<sup>124</sup> ‘Henk [LRC] will continue discussions with Boeboe [van Wyk, Namaqualand ANC member of Parliament] to see whether he might be prepared to persuade Minister Hanekom to approach Minister Maduna to give his consent that the clause be proposed at the portfolio committee’.

'institutions':

We know now that the crafting of rules on its own can do nothing in itself – no matter how sufficient – it needs to be ensured that both procedures and institutions are in place ... The biggest flaw of the Act currently is that no provision is made for what happens after the transfer occurred – this should be addressed as part of the terms and conditions that need to be met – currently the emphasis is merely on rules and not on institutions. (LRC and SPP 1999: 5)

The amendments were not followed up. Also rejected was an expanded section 3.3 which suggested that the Minister may designate a land rights officer to investigate, determine and terminate rights or interests in land and proposed that any person aggrieved by a decision by the land rights officer should be able to appeal decisions to a magistrate's or Land Claims Court. Asked about this, Pienaar (personal communication, 2005) recalled that the LRC had engaged with DLA officials who 'decided that to ask for an amendment will not be feasible – it will cause major delay and we had to work with what we had'. Which is what they did.

### 8.3.5 Stronger rights?

Table 7 gives an overview of how Trancraa addresses residents' rights and interests.

Table 7: Does Trancraa strengthen the rights and interests of residents?

<i>Right or interest</i>	<i>Strengths</i>	<i>Weaknesses</i>
<i>Transfer of land Access to land</i>	The purpose is to transfer ownership and management rights to institutions accountable to residents.	The Act is confined to the legally defined area (Act 9). No allocation of land. Possible weakening of residents' right to exclude others.
<i>Process and decision-making Rights of use</i>	Facilitates consultation  States the obligation to record and protect existing rights of residents and provides resources for this purpose	Many aspects of consultation unspecified Redress for losers (in the process) is not dealt with by the Act. Ultimate decision-making power rests with the Minister
<i>Institutional development</i>	Emphasises the accountability of municipalities	Provides no guidelines or resources for other institutional arrangements
<i>Equality</i>	Repeals past discrimination on the basis of ethnic group and states non-discrimination as a general principle, and seeks to strengthen tenure security.	Includes few measures to counteract effects of past discrimination. Does not address gender.
<i>Livelihoods</i>	Indirectly through tenure security	Not directly addressed by the Act
<i>Minerals</i>	The Act requires consultation and preferential access to employment.	Mineral rights not transferred; de facto entitlements put at risk.

<sup>125</sup> Letter from K. Pienaar, LRC to Director-General, Department of Land Affairs (G. Budlender), 8 September 1999.

Trancraa challenges some aspects of the past authoritarian state control and permit-based land use. It requires consultation with land users but does not authorise residents to decide about future land ownership and governance. A DLA official explained that some people had 'raised questions' as to whether 'we [were] continuing kind of placing different focuses on different areas ... Some people have felt very uncomfortable with this. ... They say that we are perpetuating this kind of segregationist approach of the past'. However, he stated that 'there *are* problems that are peculiar to these areas that *have* to be addressed in a certain way. And, well, at appearance it might seem as if one is coming up with a dispensation for so-called "coloured" people, but personally I am convinced that that has never been the intention'. He expected that the process would 'merely sort out tenure issues and make various tenure mechanisms available to the people in the rest of this country, so that in future ... this legislation will no longer be used' (DLA official responsible for Trancraa, interview October 2002). Thus, acknowledging a debate about the ethno-politics of Trancraa he emphasised the scenario of a common institutional future.

Trancraa makes no references to land policy, social goals, the Constitution or international law. A preamble that did so had been discussed at the time but was dropped (DLA Chief Director responsible for drafting, interview, October 2002). 'Rights', are only used about the historical and existing operational land rights. Trancraa bans discrimination against residents (4.b) but does not mention the right to gender equality or special needs or interests of either gender. It is puzzling that gender is not addressed, given that women in Namaqualand had organised in 1993 to protest against tenure legislation that they saw as a threat (Archer and Meer 1997: 84, 92). The Act defines a process but does not explain what the Constitutional right to secure tenure (Bill of Rights, 25.6) means. However, Trancraa was presented as possibly a new social contract:

And now in Trancraa of 98 there is a slow and uneven movement away from a permit-based system to a system where there can be agreements to a broader kind of social contract with the rest of the community, where there is an attempt to define individual users, user groups and a broader community, the boundaries of the broader community. There is an agreement where these various interest groups can come together at a once-off moment, at the referendum, to approve a social contract. (Henk Smith, Legal Resources Centre, presentation, Workshop at PLAAS, University of the Western Cape, 22 April 2002)

'A new social contract' – established through the Trancraa process – is an ambitious statement of what Trancraa may be about, placing it in the tradition of political constitutionalism. One may ask if it is a new social contract between residents, the state and the wider society or an internal 'community' agreement? Trancraa followed Sachs's (1990) and Smith's (1993) emphasis on consultation with land users, avoiding top-down and detailed regulations characteristic of earlier acts governing state-claimed lands in Namaqualand and elsewhere. Partly therefore it was an open question how Trancraa would affect tenure practice and human rights when introduced in Namaqualand from 2001.

## 8.4 Land tenure reform for the 'former homelands/Bantustans'

### 8.4.1 Background and contested views

The major 'communal tenure' issue and policy process in South Africa concerns the 'former homeland/Bantustan' areas and was part of Trancraa's policy context. Although it increasingly came to represent a different policy approach one must be aware of it to understand the space for human rights action, the different pressures on the state in the two cases, and for drawing lessons from Trancraa. Here I pay special attention to a single event, the National Land Tenure Conference in 2001, which brought out changing views on land tenure reform, and return to further debate in 2003 and 2004 in Part IV.

The former 'homeland/Bantustan' areas cover about 14% of the total area and an estimated 12 to 15 million out of South Africa's population of 45 million live here (Kepe and Cousins 2002; DLA 2004b). So-called 'communal' lands include various categories of state-claimed land.<sup>126</sup> These were and are used according to a mix of statutory and customary law and practices.<sup>127</sup> The interpretation of 'communal' tenure is contested and closely linked to different interpretations of history. One major viewpoint emphasises insecurity of rights combined with lack of legitimacy for rural institutions as transformed by colonial and apartheid policies (Budlender and Latsky 1991). Colonial and apartheid governments transformed local authorities into appointed agents of the state (Ntsebeza 1999: 108-9). Under the state trusteeship, land tenure by 'chiefs' merged 'ownership' and 'governance' in feudal unity (Ntsebeza 2001: 4). Land allocations to sections of African groups were actively used by previous governments to divide groups and control resistance (Claassens 2001: x). In a pessimistic assessment, Cross (1997: 72) writes that 'while there is probably no substitute for communal tenure, these systems are becoming less workable as they edge towards collapse' and believes that the homelands risk 'being written off as basket cases'. It is still commonly argued that insecure tenure makes men, and women in particular, vulnerable in development processes (Ntsebeza 1999; Kepe 2001; Lahiff 2001).

However, voices have been critical of tenure reform. Letsoalo (1987) criticised the limited 'tenure reforms' of the late apartheid government and argued that '[n]othing can be more detrimental for the majority of the Blacks than privatisation of rural land. There is nothing inherently unprogressive in the indigenous land tenure system of the Blacks. The

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<sup>126</sup> The draft 1999 Land Rights Bill addressed land at any time held by South African Development Trust (Act No. 18 of 1936), former self-governing territories (Act No. 21 of 1971), former proclaimed republics, land listed in the 1913 Land Act and land transferred to communities between January 1990 and May 1996.

<sup>127</sup> Based on surveys in 1997, it was estimated that about 64% of 2.4 million households had 'permission to occupy' residential land, 27% lacked it and 10% were uncertain. About 56% of households had access to grazing, almost all (97%) on 'communal' land. About 70%, or 1.7 million households, had access to land for cultivation. Of those 70% had obtained land through a 'Local/Tribal Authority', about 8% through inheritance from a family member, 4% had private land and a few had obtained it through leases (1%), allocation by the state (2%), employers (0.4%) or informally (1%) (NLC 2000).

problem in South Africa is the unequal distribution of land between the races' (Letsoalo 1987: Preface). Andile Mngxitama of the then National Land Committee expressed a similar view in 2002, seeing tenure reform as based on a 'Eurocentric view that the traditional system is repressive' and de-linked from the major problem of land scarcity.<sup>128</sup> A young law lecturer at the University of the Western Cape argued in favour of autonomous indigenous governance systems, referring to ILO Convention 169.<sup>129</sup> She was sceptical of current (2002) land tenure reforms, primarily because of the lack of consultation, an overriding emphasis on individualising tenure, and constraints imposed on local institutions. Asked about gender discrimination and lack of democratic decision-making, she replied that they were problems to be solved through local action: 'You've got to squeeze the chief'.

#### 8.4.2 The draft Land Rights Bill (1997–1999)

The draft Land Rights Bill (DLA 1999b) provided for the protection of rights to occupy or use land; for the registration of protected rights; for the transfer of state land, and for future land rights management. The bill applied to various state held land (see footnote 126) but not land addressed by *Tranraa* (1998) nor land transferred to groups under the Communal Property Associations Act, 1996. The 1999 bill represented a compromise between the goal of offering legally secure rights to land users and the 'risks' of a 'transfer of title paradigm', since pilot trials had revealed disputes over boundaries, overlapping claims, group membership and power (Claassens 2001: ix). The bill provided that while rights would be transferable, the title would initially remain with the state. Any transfer of the title was made subject to the approval by the majority of residents and the Minister (Chapter 4). Persons could hold land jointly through a CPA or other legal entities or in 'commonhold title', according to which residents could authorise persons to represent them in land matters (Sections 37, 45, 8.f). 'General principles' were that women must not be discriminated against with regard to rights determination, participation in decision-making and membership in 'any structure involved in the management of protected rights' (Section 8.a). Decisions regarding rights must enjoy majority support, be based on consultation, democratic participation, free expression of views and, where appropriate, determination of views by secret ballot. Persons holding a 'protected right' would be entitled to protection against deprivation, to transact in respect of the right, to receive benefits arising from it and to enforce it against others (Section 12).

The draft Land Rights Bill was deemed by the ANC to be too controversial to be debated during the run-up to the 1999 national elections (Claassens 2001: 4). After Thoko Didiza replaced Derek Hanekom as Minister of Agriculture and Land Affairs in June 1999, the bill was shelved. Civil society organisations responded with hesitation to new policy

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<sup>128</sup> He mentioned the example of his access to land that his father left in 1962, seeing this as demonstrating that current tenure was secure and land registration 'overrated and inflexible' (Interview, November 2002).

statements in 2000 and were concerned that a ‘major shift in policy was taking place’ while rural sector organisations were unorganised and unable to make a coordinated response (SPP 2000). Ntsebeza interpreted the policy change as part of a ‘conservative’, more accommodating stance towards chiefs (Ntsebeza 2001: 6). In retrospect, Didiza (2001b) stated that the Land Rights Bill contained ‘certain weaknesses’ and that therefore ‘non-governmental organisations and traditional authorities met with DLA officials to seek amicable solutions’. The Director of Land Tenure Reform Implementation Systems (DLA) wrote that the 1999 Bill proposed a ‘huge bureaucracy’ and that the criticism from ‘well-intended white liberal academics and activists’ had questioned the legitimacy of traditional leadership institutions (Sibanda 2001: 11).

#### 8.4.3 The 2001 National Land Tenure Conference

##### *The rightful owners and their traditional institutions*

A new draft bill (RSA 2001)<sup>130</sup> was discussed at the November 2001 National Land Tenure Conference in Durban<sup>131</sup> which addressed tenure security on farms and state-claimed land. The invitation stated that tenure reform was a major challenge ‘where the government still has to begin to deliver to the estimated 2.4 million people [households] living in the communal areas under conditions of insecure tenure’. The DLA envisaged that new legislation, implementation strategies and institutional capacity building would be completed by March 2004 (DLA 2001b). Minister Thoko Didiza expressed concern that the land tenure reform programme had been ‘very, very weak’, but stated that policy was now being developed to show that ‘we will retain where possible, a dual tenure system, acknowledging that we still have a freehold land tenure system in the country as well as the customary land tenure, particularly those in communal areas’ (Didiza 2001b: 8). Consultations with NGOs and traditional leaders since 1999 had, she said, removed uncertainties and loopholes in the 1999 Land Rights Bill, while important principles remained the same:

Through the principles and the bill that will be presented to you, we’re saying as Government, we recognize the underlying rights of individuals and groups to produce off the land which is nominally owned by the state. We say rights rest in the people who occupy, use or have access to the land, not in institutions. In some cases the underlying rights belong to groups and in other cases to individual families ... We are also saying where the right to be confirmed exist on a group basis, the co-owners must have a choice about the structures which manage their land rights. (Didiza 2001b: 8)

The (informally) circulated bill emphasised the role of ‘traditional African communities’, and

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<sup>129</sup> Vulani Joy Baloyi, Lecturer, Faculty of Law, University of the Western Cape (Interview 30 August 2002). Her MA thesis addresses indigenous people and land rights in South Africa (Baloyi 2000).

<sup>130</sup> A ‘third draft’ of the Communal Land Rights Bill had circulated unofficially among some research institutions and NGOs.



voices of 'traditional leaders' had a prominent place at the conference. In his address at the Gala Dinner hosted by the DLA, 'His Majesty Uzwelithini Khabebuzulu, King of Kwazulu', said that 'kings and traditional leaders fought and died for the land of their people' and land should be restored to 'its rightful owners through their traditional institutions'.

..every household has a head and the head is responsible for the upkeep and the protection of that particular household. Similarly, every nation has a leader, and in this regard, traditional leaders, by virtue of their birthrights are the heads of the households in their areas of jurisdiction. ... I am delighted to see that Amakhosi namaKhosazana are part of this conference and am very confident that their presence will be felt, in a positive way, throughout the conference. It has always been the desire of the Amakhosi to have a platform of this nature so as to be part of the broader change processes in our country, and in particular, to correct some of the misconceptions about the institutions of traditional leadership. (Kabhebusulu 2001)

At the conference, Patekile Holomisa<sup>132</sup> regretted that not all the 'reigning kings of the country, custodians of land bestowed upon them by the ancestors', were at the conference, because this meant that resolutions would have to be taken to them for approval (Holomisa, oral presentation). He noted how government departments were increasingly working with traditional leaders to ensure implementation of their programmes and that 'as people who are notorious for working with governments of the day, we shall continue to lend a helping hand where the interests of the country and the lives of our people stand to improve' (Holomisa 2001: 1). He noted 'with some amusement' that the demand for changes in land tenure came more from people living outside than within the areas concerned. Referring to President Mbeki's 'championing of African renewal and the African Century', Holomisa warned against undermining the continent's cultures, customs and traditions, and stressed that the 'former Bantustans' are only small remnants of the areas once controlled by traditional leaders. Nevertheless, they are the only natural resources 'over which Africans can claim effective ownership'. He explained the land management through headmen (*inkosana*) and sub-headmen in his own 'traditional area'. Land belongs to a family in perpetuity, cannot be alienated and is only allocated to married men or unmarried women with dependents: 'Discrimination is thus applied against those who are not in position to use the land for the benefit of the vulnerable members of the community' (2001: 5). Holomisa dismissed the argument that colonial and apartheid abuse of traditional leadership institutions has rendered them inherently illegitimate. He referred to other 'parliaments' that also reflected colonial

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<sup>131</sup> 'Finding solutions, securing rights', National Land Tenure Conference, International Conference Centre, Durban, South Africa, 26–30 November 2001. The conference was funded by the United States Agency for Development Aid (USAID). I attended the Conference three months into my stay in South Africa.

<sup>132</sup> P. Holomisa's diverse 'portfolio' included 'Nkosi' ('Traditional leader') of the Hegebe; participant in the Transkei delegation to the Convention for a Democratic South Africa (CODESA); President of the Congress of Traditional Leaders of South Africa (Contralesa), BA Arts and LLB Law; member of parliament for ANC; Chairperson of the parliamentary portfolio Committee on Agriculture and Land Affairs; member of the house of Traditional Leaders, Eastern Cape; and founder member of the National Association of Democratic Lawyers.

influence but had been transformed to suit current needs. He recommended a land governing authority composed of both traditional and democratically elected leaders and with women's representation. However, to turn 'traditional leaders' into 'ordinary community members on matters of ancestral lands' would 'cause chaos'. The Minister should transfer land 'to the people and institutions from whom her predecessors-in-title took them'. He stressed that traditional leadership institutions are a unique link between the past and the present, between spirituality and everyday use of the land, but acknowledged that these institutions should be 'suitably transformed and democratised'. However, the government's claim to ownership was a relic of the colonial past:

We are aware that in terms of inherited apartheid law the state, through the Minister of Agriculture and Land Affairs, is the legal owner of our lands. This in reality, and with due respect, is a fiction because amaHegebe know themselves to be the owners of the land they occupy and no one could possibly do anything on it without their consent ... Our advice to government is that legal title to communal land be in the name of the relevant traditional authority. [Failing] to do so would not only amount to the further erosion of the role of traditional leaders in the life of our people, but would serve to cut the ties that there are between the land, the people and their ancestors who bequeathed the land to us. Land is not only a resource for our physical livelihood, it is part of our spirituality. The rituals we perform as we practice our religion are tied to the land. The animals, the birds, the rivers, the forests, the hills, the caves, the valleys are in one way or another inextricably connected with us as we pursue our spiritual fulfilment. We are told that as traditional leaders we are the collective link with the ancestors. (Holomisa. 2001: 3, 7)

He recommended that the government should transfer communal land to 'traditional authorities suitably transformed and democratised'. Once transferred, 'people themselves' should decide how to deal with the land: 'For far too long governments have assumed the right to decide for our people. That time is now past, government has no right or duty to prescribe how people should deal with their property' (Holomisa 2001: 11).

*Criticism: lack of accountability*

Following Holomisa's presentation, Lungisile Ntsebeza<sup>133</sup> remarked that he would now violate the rule that 'a subject should not speak after a chief'. He argued that the immediate need is tenure legislation that meets constitutional requirements, that lands are state-owned today and that people have no security and are excluded from decision-making. To rely on 'traditional leaders' would be incompatible with a democracy: Why should people be 'subjects' in rural areas, when they can be 'citizens' in the city? (Ntsebeza 2001 and notes from presentation).

The press covered the Land Tenure Conference. Ben Cousins (2001) asked if the Communal Rights Bill represented 'a return to the apartheid era' and argued that 'the poorly drafted document, if it became law, would greatly strengthen the powers of unelected 'traditional leaders' at the expense of ordinary rural dwellers' and that transfer of land led to a

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<sup>133</sup> Then Senior Researcher, Programme for Land and Agrarian Reform, University of the Western Cape.

feudal fiefdom, a 'rule of fear' rather than rule of law.<sup>134</sup>

A number of civil society organisations were active at the conference, and made inputs to the plenary session and (in particular) the many side workshops. They circulated a 'discussion document' that criticised the system of traditional leadership as incompatible with the constitutional freedoms and advocated the right of all rural resident to choose their own leaders (Land organisations and research institutions 2001). The organisations claimed that the Bill permitted transfers to 'communities' with unaccountable leaders and listed as major problems that the bill defined rights-holders in terms of community membership and shared rules, which a leader could use to exclude individuals; gave no clear procedures for selecting accountable governance structures (automatically included institutions of traditional leadership); did not protect existing land uses from being harmed by a transfer of title (and subsequent transactions); gave unclear provisions for registering land rights; and contained inadequate guarantees of public support for protecting rights. The organisations stressed the basic principles of the 1997 White Paper on South African Land Policy and demanded that tenure reform should (1) give people rights not permits; (2) create a unitary, non-racial system of land rights; (3) enable individuals to choose tenure system; (4) fulfil constitutional rights, including to gender equality; (5) protect de facto rights; (6) provide additional land to compensate for overlapping and contested rights caused by forced removals.

*Tenure reform and 'the traditional African community'*

DLA officials tried to show that individual interests and the institution non-elected leaders could be united within 'traditional African communities'. A thorough paper on 'The principles underpinning the Communal Land Rights Bill, 2001' explained the problems of insecure tenure caused by the inconsistent nominal state ownership and the 'underlying land tenure rights' of 'traditional African communities (Sibanda 2001). Lack of clear land rights caused 'fierce struggles between local government and traditional leaders', inhibited investments and disrupted government programmes (Sibanda 2001: 4-5). Sibanda (2001: 6) justified tenure reform within an economic development discourse ('incentives', 'entrepreneurs', 'investment'). The Land Rights Bill should 'provide an enabling environment for adjusting the relative powers and responsibilities among the State, African traditional communities, other communities, groups and individuals.' (Sibanda 2001: 7).

Tenure security is achieved when the people in the former homeland and ex-SADT areas have as their first prize, the ownership of the land that is currently registered in the name of the State. They will similarly have security of tenure as their second prize if they have rights to occupy a homestead, to use the land for crops, to make permanent improvements on the land, to bury the dead, to graze livestock, to have access for gathering fruits, grass and minerals and other things. Whether they have the ownership in a strict legal sense or they have various rights as indicated above, tenure security is achieved when these people have

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<sup>134</sup> Referring to Claassens (2001), which documented how land transfers by the National Party Government in 1994 had enabled a leader to impose rents on tenants and delay development programmes (Forrest 2001).

rights to alienate, have rights to transact and rights to exclude others from the above listed rights at every level of social and political organisation and rights to enforcement of the legal and administrative provisions in order to protect their rights. (Sibanda 2001: 3, fn. 2)

A certain ambiguity arises because 'people' is used both about the first prize (collective ownership) and second prize (individual use rights). The view appears to be that although state trustee ownership had been patronising and inhibiting, a community ownership controlled by 'traditional leaders' would not necessarily be. After all, in many areas 'people do enjoy day to day de facto tenure security and do not express great anxiety about their long-term future on the land' (Sibanda 2001: 5). Sibanda rejected the term 'tribe' as imprecise and pejorative (Sibanda 2001: 7, fn. 5) and advocated a replacement: '[T]he term "African traditional community" will be used in all policy documents and legislation to refer to a community or group of persons or part of a group of persons whose land tenure system is underpinned by customary/indigenous law and provides for communal ownership and use of land and in which land is held in common by members of a community in perpetuity' (Sibanda 2001: 7). The first principle of the Bill is thus that it 'recognizes African traditional communities as juristic personae for all purposes' (Sibanda 2001: 8).

A juristic person is a legal fiction. This refers to a fictional person created in law. It is a collective for a group of natural persons who create a 'juristic' person to do business on their behalf. They have an existence apart from its individual members. They acquire assets and incur debts in their own name. The members of the entity do not [sic] an automatic right to the assets of the entity and are not personally responsible for the debts of the entity. The entity, unless otherwise stated has perpetual succession. A change in membership does not affect the existence of the entity. (Sibanda 2001: 9)

The individual land user and community come into being through rules. Because recognition of customary law is a condition of membership, under this definition of 'African traditional community', individuals and groups could be excluded from access to the benefits under the law ('other communities', that is those that are not 'African traditional', are also defined as groups whose rights to land are regulated by shared rules). Sibanda noted that leadership based on ascribed rules was against the Constitution, but also that the institution was recognised by the Constitution and many communities. The challenge, he argued, was to devise 'systems and procedures that will help over time to transform the institution of traditional leadership in line with the requirements of the Constitution'. The role of the government, NGOS and the 'white liberal academics and activists' should be to educate people to facilitate such change: 'Change is a function of time. It is not going to come about through moral exhortation or legislative fiat but it will certainly come when the people who bear the brunt of the system decide that it is time for the institution to go' (Sibanda 2001: 19). Alongside the proposed state backing for 'traditional African communities', the argument placed a major responsibility for changing institutions on individuals and civil society.

The Land Tenure Conference linked the government and other stakeholders in a difficult law drafting process and involved a large number of participants and criticism and

debate in the national media. It indicated that the government was moving away from a confrontational approach towards undemocratic local institutions in the 1997 White Paper and 1999 draft Land Rights Bill, which many land organisations and some researchers found provocative. The government engaged in further consultation and consensus building. Shortly after the conference Thoko Didiza addressed the House of Traditional leaders, stressing the government's dependency on broad civil society cooperation and making the link to Presidents Mbeki's call for an African Renaissance:

During the National Land Tenure Conference ... the Department of Land Affairs asked the traditional leadership for their perspective on how best to secure rights on communal land. The call to traditional leaders on how to secure communal rights comes at an opportune time; when our President is calling for and championing the African Renewal cause. African Renewal alone, ladies and gentlemen, cannot reach its pivotal realisation without us going back to our natural leaders, our traditional leaders, who have been the custodians of the rich African land. ... Government is committed to expropriate land to communities who will then elect representatives who will form themselves into an executive committee ... including the traditional authorities ... Ours is a clear position: for land reform to succeed Government needs civil society, Government needs the legislature, Government also needs Amakhosi to all work together. (Didiza 2001a)

During the 1990s land was caucused, legislated, talked and written about. Pressure by communities and land NGOs sought to create a link between a history of protests against dispossession and marginalisation and democratic national policy-making. The 1991 White Paper on Land Reform sought to create an impression of 'historical' changes around a continued liberalisation of the agricultural economy. A major change in perspective, partly informed by human rights, was reflected in the 1997 White Paper on South African Land Policy, which linked the constitutional land reform mandate with a description of tenure insecurity, poverty and political marginalisation. Land tenure is about shared institutions, including property rights, that the state guarantees across the divides of a pluralist society. Tenure reform involves negotiation of the minimum requirements regarding security, equality and democratic governance, the right to an institutional order that safeguards human rights (UDHR 28): That could be one way to understand that 'tenure reform is the mother of South Africa's land reform programs' (Sibanda 2001: 53). Also, DLA officials continued to articulate an ambitious understanding of tenure reform as integral to rural transformation. Sibanda defined 'tenure reform' as 'planned change in the terms and conditions on which land is held, used and transacted', and involves changes in rules, organisations, the distribution of land, *and* rights in land so as 'to put right defective tenure systems' (Sibanda 2001: 3, fn. 2). The Director-General of the DLA, Gillingwe Mayende, held that:

Tenure reform will indeed have a positive impact on the socio-economic development of these areas if it is accompanied by institutional and extension and support. Tenure reform is therefore a necessary but not on its own a sufficient condition for socio-economic development. It must thus be accompanied by access to inputs, credit, extension, services, assistance with transport, provision of access to markets and government complementary actions to stimulate the rural economy. Only then can the full benefits of tenure reform be realised in terms of increased production of goods and services, growth and investment.

Tenure reform must thus not only be seen as a set of measures aimed at combating rural poverty, it must also be seen as forming a firm basis for rural development and economic prosperity for individual households and communities. (Mayende 2001: 4. Also Sibanda 2001: 3, fn 2)

At the time of the Land Tenure Conference, when these words were published, residents and facilitators were far into the process of implementing Trancraa in Namaqualand. During 2002 CLRB debates and policy caused some uncertainty among Trancraa facilitators and residents in Namaqualand as to whether the Communal Land Rights Act might offer a better deal.

**PART III. CASE**

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## 9. NAMAQUALAND

Part III documents tenure reform in the Pella community in the northeast part of Namaqualand and resistance to the reform in Komaggas in the west, set against the background of what was once the land of the Namaqua: 'Namaqua-land'. Chapter 9 addresses land and history in Namaqualand. Chapters 10 to 15 are about Pella and the implementation of Trancraa there in 2001–2002. Chapter 16 deals with Trancraa experiences in Komaggas where owing to resistance the tenure reform was not implemented during this period.

### 9.1 Location, geography and economy

Namaqualand is located in the northwest corner of South Africa. It is bordered by the Atlantic Ocean in the west and Namibia and the Gariep (Orange River) in the north – In the east, the boundary runs through the plains of Bushmanland. The southern border is debated. From Cape Town the drive north to Namaqualand is 500 to 600 kilometres along the N7. The drive traverses a landscape shaped by colonial history, from the productive, accessible lands around the point of colonial entry in the south where land has been monopolised by the settler minority to the arid, less accessible lands towards the north where others have secured a part. The first 150 kilometres runs through the rich wheat and dairy country of the Boland. Crossing Pikenierskloof Pass you enter Citrusdal, with orchards and farm worker towns and on the right the magnificent, sometimes snow clad peaks of the Cederberg. The Clanwilliam Dam irrigates land as far north as Klawer, where one leaves behind the green wine orchards. Van Rhynsdorp claims to be the entry to Namaqualand, but what brings you there is the drive across the vast *Knersvlakte* – the 'plains of the gnashing of teeth', reportedly named after the sound of the *trekboer* ox-wagon wheels on the quartz-pebbled surface of what was once the Orange River delta. You enter an area where place names remember the Nama language, as in the towns of Garies, Komaggas and Nababeep.

Namaqualand has a diverse geography, and there is a significant contrast between Komaggas and Pella. In the northwest is the mountain desert of the Richtersveld. Along the Atlantic Coast is the arid Sandveld, a 20 to 40 kilometre wide belt of slightly undulating sandy plains. Komaggas is located just on the border of the Sandveld and the mountain Boveld further inland. Towards the east are the plains of Boesmanland (Bushmanland), in which Pella lies, a desert shrub land that receives patchy and unpredictable summer rainfall of 100–200mm. The annual rainfall varies from 50mm in the northwest to 400mm in the Kamiesberg where the predictable winter rainfall is supplemented by coastal fog and with temperatures moderated by the Atlantic Sea (Cowling, Esler, and Rundel 1999). Vegetation types include the Succulent Karoo which is characterised by a high diversity of plant life – a total of about 3 000 species among which about ten percent of all known succulent species (Cowling, Esler, and Rundel 1999: 7). The arid and semi-arid climate explains the large

areas required for stock farming. Namaqualand has many attractions, but best known are the magnificent flowering annuals, particularly in old cultivated fields and grazing land, which attract large numbers of visitors in a busy tourist season during spring, sometime between August and October.

#### *Administrative boundaries and the Act 9 Rural Areas*

During most of the 20<sup>th</sup> century Namaqualand was a Magisterial District in the Western Cape Province but post-apartheid demarcation of provincial boundaries made it part of the Northern Cape Province.<sup>135</sup> In 2001 the former Namaqualand Magisterial District was amalgamated with Hantam Karoo to form the Namakwa District Municipality (an 'A-municipality' headquartered in Springbok).<sup>136</sup> After the demarcation and reorganisation of municipalities in Namaqualand<sup>137</sup> from 2001, the old Namaqualand became equivalent to the new 'B-municipalities' of Kamiesberg, Nama-Khoi, Richtersveld and Khâi-Ma, with an area of about 45 000km<sup>2</sup> and 77 000 inhabitants (NDMT 2000), plus a District Management Area governed directly by the Namakwa District Municipality. When I refer to 'Namaqualand' I mean this area, which covers about 48 000km<sup>2</sup>.

Namaqualand comprises white-owned farmland (52% of the area); Act 9 Rural Areas, mining land owned by the state or private companies, including the company-owned mining towns of O'Kiep, Nababeep, Carolousberg (till 2001), Kleinzee and Aggeneys; conservation areas and towns, with Springbok as the district capital. Table 8 gives an overview of land.

Table 8: Categories of land in Namaqualand

Land use/owner	Area (ha)	Share (%)
State land (mainly farmland)	383 000	8%
Mining	390 000	8%
Conservation	230 000	5%
Private farm	2 501 000	52%
Total state and private	3 504 000	73%
Act 9 areas – 'old'	1 042 000	22%
Redistributed land – 'new'	277 000	5%
Act 9 area residents	1 319 000	27%
Total	4 823 000	100%

Source: Department of Agriculture, Springbok, 2001. Figures rounded to nearest 1000. Land redistribution is addressed in Section 9.3.3.

Six of South Africa's 23 Act 9 Rural Areas are in Namaqualand: Richtersveld, Steinkopf, Concordia, Komaggas, Pella and Leliefontein (see Table 9). The population of the six Act 9

<sup>135</sup> The Northern Cape Province covers about 362 000km<sup>2</sup> or 30% of South Africa. The population is about 820 000, 2% of the total population of 45 million.

<sup>136</sup> The Namakwa District Municipality covers an area of about 101 000 km<sup>2</sup> (8% of South Africa) and has a population of about 110 000 (0.3% of the total population). The low population density of about 1 per km<sup>2</sup> reflects the arid, mountainous environment. The expansion to include this vast area under one administration has created pressure on government offices such as the health authorities (NDMT 2000: 4) and the Department of Agriculture (Interview, DoA, Springbok, 2002).

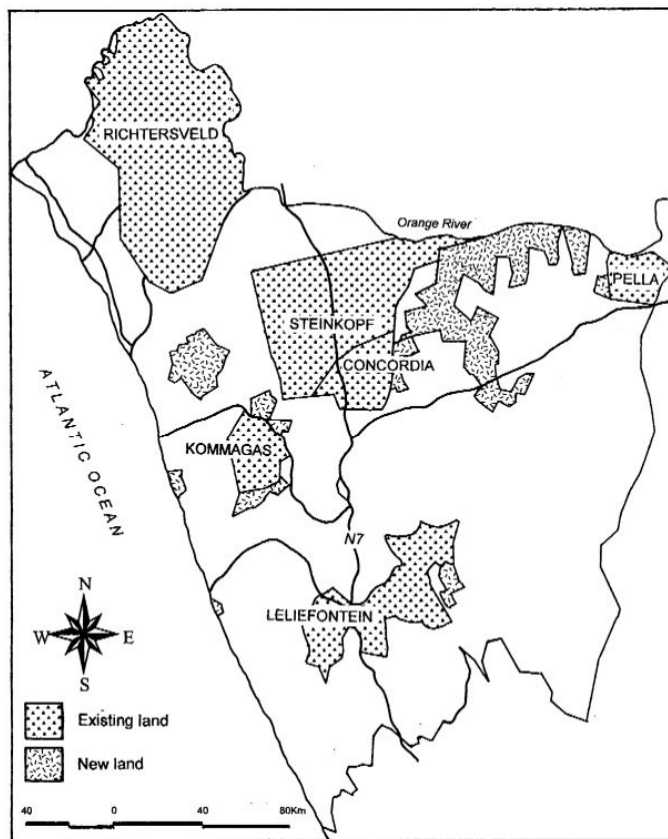
<sup>137</sup> Provided for in Local Government: Municipal Demarcation Act 27 of 1998.

areas was estimated at about 30 000, equivalent to 38% of the population of the four municipalities. Most residents live in small rural towns and a few scattered hamlets; some live at a stock post (*veepos*), a modest dwelling with a *kraal* (livestock pen) used as the base for livestock keeping. From 2001 the Act 9 areas were administratively integrated with the new municipal structure making Act 9 Area became a ward (*wyk*) in the respective municipality. Figure 3 highlights the Act 9 areas, whereas new administrative maps display Act 9 Areas like other towns within the four new municipalities (e.g. Chief Directorate: Surveys and Mapping: Northern Cape, 2<sup>nd</sup> edition 2001).

Table 9: Act 9 Areas Namaqualand: Population and area

	Population	Area (Ha)	Share of the Namaqualand Rural Areas
Leliefontein	4 800	159 200	13%
Concordia	4 600	75 700	6%
Pella	4 100	48 300	4%
Komaggas	4 900	62 600	5%
Steinkopf	7 800	329 000	28%
Richtersveld	3 600	513 900	43%
Total	29 800	1 188 700	100%

Source: (SPP 2003: 4). Area before land redistribution during 1996 to 2001. Figures rounded to nearest 100. The total area here includes about 162 500ha leased to the Richtersveld National Park.



Source: Surplus People Project, Annual Report 1999

'Existing land' is the Act 9 Areas, former mission station lands.

'New land' is redistributed farms. Formerly private land purchased by government and allocated to municipalities for the benefit of communities in Act 9 Areas, as well as state farms accessed by residents.

The map carries no legal power.

Figure 3: Namaqualand: Act 9 areas and redistributed land

### *Economy and land use*

Namaqualand's economy is based on mining, agriculture, tourism, fisheries and trade and services. Valuable resources are labour, minerals, wool, and tourist attractions, especially flowers and scenery. The Nama have mined and used copper for centuries and colonialists developed a large-scale industry from the 1850s. In the 1920s prospectors discovered diamonds along the coast and the government sold off land to diamond companies. Diamond and copper mining have been central to the economy in the 20<sup>th</sup> century. Mining accounted for about 70% of employment and wages in 1998, while other sources of wage income were trade (12%), government employment (8%), transport (4%), finance (2%) and agriculture (2%) (National Botanic Institute 1998). Linked to the concentrated land ownership and the external or elite control of the mining economy, average incomes have been low.<sup>138</sup> The province has experienced a long-term economic crisis related to downscaling in mining.<sup>139</sup> Government and private organisations have been pursuing various alternative development strategies to mining, including tourism, mariculture, fishing and irrigation development (Wilson 1999). A provincial strategy document suggested that support to emerging and small-scale farmers was a key development strategy (Northern Cape Province 1997). However, the budget for agricultural services was only R58 million for an area the size of Japan or Germany. While nationwide ten percent of the employed worked in agriculture, in the Northern Cape it was 55 000 or 26%, three times the number working in mining (15 000 or 7%) (StatsSA 2003b: 62, 63).

In Namaqualand, apart from high value irrigable lands along the Gariiep, the climate and water availability mainly permit extensive livestock rearing, based on groundwater from natural springs or wells or boreholes (Catling 1996). *Boerdery* (farming) normally implies livestock keeping, mainly with small stock (sheep and goats), though it may be specified as *veeboerdery* to distinguish it from crop cultivation on dryland plots (*saailande*) or irrigated land (*bespruuingsgrond*). Approximately 670 farms owned by people of mainly European descent and classified as white covered 25 000 km<sup>2</sup> or 52% of Namaqualand, averaging 3 700ha each. Because of multiple farm ownership the number of farm owners is lower than the number of properties. A commercial farmer's rule of thumb holds that a 'viable' farm must be 5 000ha, and more in the arid Bushmanland (Interview, Agricultural Union, 2002). About

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<sup>138</sup> The Human Development Index (HDI) was 0.428 for Namaqualand, comparable to that of Lesotho and far below the national average of 0.677, while the HDI for the 'coloured population' was estimated at 0.340, ranking it amongst the least developed countries of the world (Rohde, Hoffman, and Allsopp 2003: 23, quoting DBSA 1998; DBSA 1998).

<sup>139</sup> Employment in mining declined by over 4% per year from 1980 to 1990 and 3% per year from 1990 to 1995 (Northern Cape Province 1997). Unemployment in the Northern Cape Province was around 33% at the time of study (StatsSA 2003a). The copper industry has always fluctuated in response to world market prices and is being phased out due to exhaustion. The O'Kiep Copper Company used to employ 6 000 to 7 000 workers but in 2001 employment was down to 600 (OCC Manager, Interview, November 2001). Diamond mining peaked in the 1970s and downscaling has affected other sectors negatively.

2 000 households in the 'communal areas' (one third) were estimated to be engaged in farming (DoA 2001).<sup>140</sup> Despite redistribution from 1996 (Section 9.3.3), privately held farms were on average six times the size of the average land endowment of a livestock owning family in one of the Act 9 areas, estimated at about 650 hectares per farming household. In the higher rainfall areas of central Namaqualand (Leliefontein, Komaggas, Steinkopf and Concordia) some families cultivated cereals (mainly winter wheat and oats) on about 1 500 dryland farm plots (SPP 1999). Incomes from farming generally supplemented wage incomes and state pensions, but for some households farming was the main income source (Household interviews in Pella and Komaggas, 2001 and 2002). Women did not participate equally with men in politics (Carstens 1966). Men's greater access to paid jobs, particularly in mining, reduced women's status (Archer and Meer 1997). Women were in a minority as herd and plot owners, but active in a number of emerging land uses, particularly tourism (Interview, tourism officer, Steinkopf and personal observation, Pella, 2001–2).

The number of livestock kept by farmers in the Rural Areas is uncertain and contested. Table 10 estimates the change in livestock numbers over time and suggests that the amount of land available per small stock unit (SSU) has almost doubled from 1978 (4.4ha per SSU) to 2002 (8.6ha per SSU), partly because of redistribution and partly because of a decline in the number of stock units.

Table 10: Livestock in the Namaqualand Rural Areas, 1890, 1978 and 2002

	1890			1978			2002		
	Number	SSU	Percentage	Number	SSU	Percentage	Number	SSU	Percentage
Small stock	64 000	64 000	52%	229 000	229 000	85%	155 000	155 000	74%
Large stock	10 000	60 000	48%	7 000	42 000	15%	9 000	54 000	26%
Total small stock units		124 000	100%		271 000	100%		209 000	100%
		Hectares			Hectares			Hectares	
Hectares of land (total)		1 200 000			1 200 000			1 800 000	
Hectares per SSU		9,6			4,4			8,6	

Sources: Mellvill (1890), based on interviews with missionaries. Klinghardt (1982: Table 1.1: Namaqualand rural coloured areas in 1978, based on Report of Administration of Coloured Affairs, 1978). G. J. Fredericks, Chief Animal Health Inspector, Dept. Of Agriculture, Steinkopf, July 2002 (animal dip figures April 2002). In the past, livestock figures were monitored through annual counts. In the early 1990s the practice was discontinued and only resumed in 2002 (G. J. Fredericks, interview July, 2002). Figures rounded to nearest 1000. It is difficult to compare the implication of changing figures across time because of changes in herding practices and access to land.

The livestock count in April 2002 (Table 10) indicated that Namaqualand Rural Area farmers

<sup>140</sup> Before 1994 the Department of Agriculture (DoA) channelled its resources to farmers with private ownership, while the responsibility for the Act 9 rural areas was placed with other departments. After 1994 the DoA concentrates its resources on the Act 9 rural areas (DoA Springbok, Interviews 2001 and 2002).

owned a little more than 200 000 small stock units (SSU).<sup>141</sup> The stock density varied between the large and generally more arid areas of Richtersveld (14ha per SSU) and Steinkopf (10ha per SSU) and the smaller areas of Leliefontein, Komaggas, Concordia and Pella (4 to 6 hectares per SSU). The April 2002 count gave the total number of stock owners in the Namaqualand Rural Areas as between 1 200 and 1 300 (but the Department of Agriculture (2001) estimated that 2 000 households owned livestock).<sup>142</sup> For different areas the average herd size varied between 100 and 300SSU (about 180SSU overall, but lower when taking the higher number of owners into account).

Downscaling in mining is often assumed to lead to increase in livestock keeping. Residents in Pella and Komaggas confirmed this connection for recent years. A political leader in Concordia said that land was important for *oorlewing* (survival) but under 'the previous government the Act 9 residents did not have the opportunity to say I own land' (*om te kan sê ek het grond*). He said that in farming 'everybody is out to get the piece he can get for himself ... the rich see an opportunity to enrich themselves further and the poor see an opportunity to get out of poverty' (ANC Councillor, Concordia, interview February 2002).

## 9.2 History

### 9.2.1 From ownership to dispossession

...He walks in pain, but he walks on slowly, he walks softly on:  
And as he goes, he talks, and talking, he sings as he walks,  
for although he has been cut, he still talks as he goes along.<sup>143</sup>

Ancestors of the San probably appeared in Namaqualand about 40 000 years ago, living as hunters and gatherers moving between the coastal region, central mountains and interior plains. Pastoralists probably entered the areas about 2000 years ago (Davenport and Saunders 2000).<sup>144</sup> The Nama on both sides of the Gariep 'could scarcely be said to form two separate societies. It is therefore an established fact that the autochthonous Nama occupied a vast territory before the Dutch arrived' (Sharp 1995: 2). People in Namaqualand had exchange relations with other African groups, for example to obtain cattle and metals

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<sup>141</sup> Goats and sheep were about 74% of SSU, cattle 16% and equines, mainly donkeys, 10%, but the proportions varied between the areas. For example cattle were 35% in Pella, and donkeys and horses almost 25% in Komaggas (G. J. Fredericks, Chief Animal Health Inspector, Department of Agriculture, Steinkopf, July 2002. Animal dip figures April 2002).

<sup>142</sup> A relative or friend may take herds owned by different individuals for dipping and registration (Interviews, Pella, 2001–2).

<sup>143</sup> Lucy Lloyd and Wilhelm Bleek recorded the language and stories of /Xam from an area southwest of present-day Pella. Their stories and poems have been reinterpreted and presented by Alan James. One song represents conflict, suffering and healing by an image of the waxing and waning of the moon, caused by the sun cutting away at the its flesh, leaving it hollow, limping and wounded until it is again able to grow, also representing Busman hunters on their way home at night after a long hunt (James 2001: 35).

<sup>144</sup> Historically 'Greater Namaqualand' was used to refer to Nama areas in present-day Namibia, while 'Little Namaqualand' was used to refer to present-day Namaqualand south of the Gariep.

(Boonzaier et al. 1996). Land use was based on clan divisions and resource rights, particularly to water, held by families and clusters of families. Herding practices included seasonal migrations between the coastal belt, the central mountain region and the plains (Carstens 1966).

Namaqualand was among the first areas to be explored by colonists, who for example sent six expeditions from the Cape station there between 1660 and 1664, motivated by reports of mineral resources and myths of a land of plenty under King Monomotapa (Steenkamp 1975: 32-37). Although the Nama had used copper for centuries and some of them brought samples to Cape Town in the 1660s, exploitation was not deemed viable before the mid-19<sup>th</sup> century because of the difficulty of access and transport. Until then European exploitation focused on the resources of game,<sup>145</sup> grazing and livestock trade with the Namaqua, who possessed large herds of well-fed stock. *Trekboers* and others penetrated Namaqualand from the 1730s and gradually undermined Namaqua society through dispossession, economic exploitation and diseases (Boonzaier et al. 1996). Many San and Nama were killed or forced across the Gariep; colonial authorities rejected responsibility for this in areas claimed to be outside their control (Marais 1939: 27-29). From 1751 to 1770 twenty loan farms were approved in Namaqualand by the Dutch East India Company (Sharp 1995: 3). A traveller to Namaqualand reported that of 19 'loan farms'; five were managed by couples of European descent and 14 by couples consisting of Nama wives and European husbands – during the 18th century individuals of 'mixed descent' were able to obtain loan farms (Rohde, Hoffman, and Allsopp 2003 referring to Penn 1995). The British traveller Barrow criticised the government and 'encroaching [Dutch] peasantry' for stealing land and livestock and causing the pauperisation of the Namaqua (Barrow 1801: 358, 388, quoted by Rohde et. al. 2003). Barrow saw the Dutch trekboers as primitive, as witnessed by the lack of fences, and used this 'moral geography' to justify British colonialism (Comaroff and Comaroff 1991: 95).

J. M. Coetzee's novella 'The narrative of Jacobus Coetzee' tells the story of a Boer explorer and soldier whose journey through Little and Greater Namaqualand in 1760 develops into a mission of revenge against its inhabitants. In Coetzee's account, an academic commentator justifies dispossession and exploitation with a myth of change from 'herder' to 'citizen':

The tribes of the interior sold their herds and flocks for trash. This is the truth. It was a necessary loss of innocence. The herder who, waking from drunken stupor to the wailing of hungry children, beheld his pastures forever vacant, had learned the lesson of the Fall: One cannot live forever in Eden. The Company's men were only playing the role of angel with the flaming sword in this drama of God's creation. The herder had evolved one sad step

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<sup>145</sup> Namaqualand was richly endowed with game. The Olifants River was named after early explorers observed a herd of several hundred elephants there. The /Xam celebrated both the lioness's power and the diversity of wildlife: 'she eats all things': steenbok, gemsbok, jackal, ratel, caracal, korhaan, porcupine, duiker, vulture, quagga, aardwolf, wild cat, spotted cat, great bustard, kori bustard, fox, lynx, ostrich, anteater, klipspringer (James 2001: 60. Narrator Kabbo; transl. Lloyd).

further toward citizenship of the world. We may take comfort in this thought. (Coetzee 1974: 110)

Justifying the loss of land and human deprivation by an account of an ideal 'citizenship of the world' is not, in my view, a comforting thought and Coetzee's exposure a timely warning against discourses of progress that overlook the material dimensions of human well-being.

### 9.2.2 Mission stations

In 1798 the British colonial government fixed the border at Kousie (Buffels Rivier), which included the Leliefontein and Komaggas areas in the colony. In 1847, after the discovery of major mineral deposits, the border was moved to the Gariep. Government officials often argued that the area was not 'owned' or used by the inhabitants and left it to them or their supporters to forward claims for land (Klinghardt 1982: 33; SPP 1995: 4). Missionaries played a key role in extending British colonial interests and Keegan (1996) argues that the missionary project of 'humanitarian imperialism' combined protection, paternalistic transformation and integration. He held that missionaries worked for the 'complete transformation of indigenous peoples into productive and legally equal members of colonial society as a long-term goal of imperial intervention' but saw 'territorial segregation', a kind of early, protective apartheid, as essential to prevent the subjugation of indigenous people as 'rightless and exploited bondsmen on the terms of rapacious colonists.' It was this double concern that required that land should come under imperial control at the same time that indigenous institutions were 'undermined and transformed by the agents of civilisation – missionaries, traders and administrators' (Keegan 1996: 7).

The London Missionary Society was active in Komaggas from 1810 and in Pella from 1812 and the Wesleyan Mission Society in Leliefontein from 1816 (Marais 1939: 75). From the mid 19<sup>th</sup> and into the early 20<sup>th</sup> century missionaries received 'Certificates' or 'Tickets of Occupation' from the colonial government to protect residents' rights to live, keep stock and so on within defined areas. The Ticket of Occupation for Komaggas from 1843 was the earliest for Namaqualand (Textbox 1). Mission stations became places of refuge for women and men who were trying to protect themselves against further dispossession and displacement by settlers and the state. The government stated that it would not tolerate farmers encroaching on mission station lands (Mellvill 1890: 4) but in practice often left it to the residents and the missionaries to secure their rights. Klinghardt (1982: 33), referring to Sharp (1977), argues that without the missionaries 'settlers would have been able to secure the rights to the land and bring about the complete subjection of the local population'.



## Text box 2: The Ticket of Occupation for Komaggas

'By his Excellency Major-General Sir George Thomas Napier KCB, Governor and Commander in Chief, &c.

This is to certify that the land comprised within the annexed diagram framed by the sworn land-surveyor M. J. M. Wentzel and represented to contain an extent, more or less, of 69 173 morgen<sup>1</sup> situated in the division of Clanwilliam, Field Cornetcy of Little Namaqualand, and known by the name "Kamaggas", shall not be alienated, but be held for the families of Aborigines and Bastards who were in occupation thereof on the 1st day of January of the present year 1843, or of others, of the same description, who having resided thereon before the date, left it, and be inclined to return thereto, or may be admitted as residents upon showing that they are entitled to such admission, and should any discussion arise regarding the admission as residents, of any party claiming such, the question shall be submitted to the Civil Commissioner of Clan William for investigation into the justice of the claim, which he is hereby empowered to decide. Also that the missionaries belonging to the Rhenish Society in charge of the mission station established on this land, are permitted to occupy the ground on which the mission buildings stand, and to cultivate such an extent as they may need for horticultural purposes.

Any trespassing on this land of cattle not belonging to the occupiers shall be dealt with in like manner as trespass on other private property.

Given under my hand and seal at Cape Town, Cape of Good Hope, this Ninth day of November in the Year of our Lord One Thousand Eight Hundred and Forty-Three.

Signed: Geo. Napier, Gov. by his Excellency's command  
Signed: W. Fred. Herzog, Assist. Surveyor General

Copied from Sharp 1977: 53. (Governor 1843). 1: About 59 000 hectares.

### *Decentralised governance*

Missionaries practised an authoritarian and decentralised system of governance by councils (*rade*, plural of *raad*),<sup>146</sup> in some cases using written constitutions drawn up by local councils and sometimes recognised in law (Marais 1939: 77). The *raad* acted as court of law and could use sanctions such as loss of grazing and sowing rights and eviction. It consisted of nominated or elected *burgers*, acknowledged community members with residence, grazing and cultivation rights (apparently always men). *Bywoners* were co-residents, normally in a inferior position or on probation for acceptance as *burgers*, while *vreemdelinge* (strangers) could be teachers, traders and so on (Sharp 1977; Boonzaier et al. 1996: 129-130).

Land access was linked to a civic rights tradition which, although it was male-centred and did not include all residents, afforded a measure of protection. The *burger* status became increasingly important as the allocation of private farms to settlers increased the pressure on land during the 19<sup>th</sup> century. Employment in mining was uncertain, so mission stations remained places of relatively secure residence, social networks, insurance and survival. Policy-makers often assumed that land rights were granted by the state but many residents understood them differently, for example seeing the Ticket of Occupation in Komaggas as a confirmation of a deeper right to land based on occupation and relations with

the original Namaqua owners of land (Sharp 1977). Except in Pella, the beneficiaries of mission stations were defined as groups other than whites, but to some extent different racial groups interacted and mixed, as they did in the larger system of transhumant pastoralism.<sup>147</sup>

### *Subdivision or protection*

The mission station lands have been upheld and reconstructed through legal reform, changing administrative practices and economic pressures. Various actors have demanded that the areas should be protected others that they should be subdivided. In the 19<sup>th</sup> century, observers often claimed that 'communal tenure' and 'poor work ethic' rather than lack of land were the causes of poverty. In 1851 a group of farmers of European descent in the Komaggas area protested against the large size of the mission stations and warned against plans to protect further pastures (*trek-veld*) for the residents. The letter writing farmers, 'Memorialists', argue that 'the majority of the inhabitants of the stations, not being aborigines of the soil, and having only recently localised themselves under the auspices of the Missionaries, at the same, cannot even substantiate a claim to the ground they now occupy, and certainly cannot lay claim to a grant of extension of territory.' This is in contrast to the writers: 'Your Memorialists, or their fathers, have resided in this district for forty years and claim at least an equal right to the Government Grounds, with those who have localised themselves here, posterior to that date' (Van Zyl and others 1851). They hold that the areas are very large compared to the number of residents and that 'and consequently no reasonable plea for extension of ground can be maintained'. The writers also took the opportunity to comment more generally on the residents, buttressing their protests against the creation and expansion of the mission lands with negative comments on the work ethic and form of tenure of residents: 'The inhabitants of the Missionary Stations are, taken as a body, poor and discontented. Their poverty may be in part ascribed to their natural indolence, and in part to the ruinous effects of holding their ground by "joint occupancy" They are puzzled by the residents' 'aversions' and 'illfeeling' towards colonialists and issue an interesting warning against racial separation, related to their own interest in land and labour: 'Your Memorialists are of opinion that the isolating of the coloured tends to widen the chasm between the races, and severed they are and will remain as long as the present system is pursued.' The farmers 'earnestly pray that Your Excellency will not grant the exclusive rights of the Trekveld unto the said stations. (Van Zyl and others 1851)

In his report on 'the lands in Namaqualand set apart for the occupation of natives and others', government Land Surveyor Mellvill advocates 'Individual Tenure' to break up the

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<sup>146</sup> The Dutch term *kaptein* (leader or *amakhosi*), *raad* (council) and *corporale* (sub-chiefs or advisors or *indunas*) had been used to describe Namaqua political organisation but mission stations should not be seen as extensions of indigenous institutions (Boonzaier et al. 1996: 127).

areas, expose them to economic competition and ultimately transform or eliminate what he sees as lack of thrift among indigenous groups (Mellvill 1890). Melvill does not recognise indigenous land rights, but acknowledges rights of documented use and the Tickets of Occupation. His report recognises that it would be a 'breach of trust' to diminish the areas protected by Tickets of Occupation at the time – Komaggas, Leliefontein and Pella – and supports granting the same protection to Steinkopf and Richtersveld, though not the size of area demanded (Mellvill 1890: 4. Paras 11, 12).

Mellvill argues that the influence of the missionaries had effected a certain level of civilisation, but that lack of private individual ownership caused 'stagnation' or 'retrogression': 'The system now prevailing is of the communal kind. Although each inhabitant may have his plot of garden ground or sowing land, it is not his own, he uses it only on sufferance' (5, Para 16). Taking a Social Darwinist perspective, he sees the areas as affording an unsound protection against competition with individuals from other groups:

The communistic kind of life prevailing at the institutions tends to increase and intensify the indolent and improvident habits inherent in the race. People too lazy to work for wages or to cultivate their ground, can always make sure of getting enough to eat, by sponging on their more industrious neighbours, or by begging food from the missionaries. (4, Para 14)

Melvill advocates that tenure to residential plots, gardens and cultivated areas should be individualised, while grazing lands should be divided into fewer collectively held sections (8: Para 44, in the case of Steinkopf). Rights to undivided grazing land should be linked to ownership to private plots (5. para 21). He recommends that government carry the costs of surveys, as had been done in other mission stations (5: Para 20). Title should be issued to 'each adult inhabitant'<sup>148</sup> found to hold rightful claims to residential and agricultural land; titles should be transferable to both insiders and outsiders. This would unleash development:

With Individual Tenure established many of the idle, improvident and non-progressive sort will soon have to part with their holdings, and quit the Institutions, making room for better men from elsewhere, probably of better blood, European as well as Native. This introduction of new blood, together with the action of the law of 'the survival of the fittest', will, it is hoped, result in the development, in time, of communities composed of men of a higher type, possessing more industry, energy and enterprise, and thus better fitted to contend with the difficulties and drawbacks to progress natural to the country. (6: Para 24)

He repeats that the 'leading feature' of the proposals is the 'breaking up of the existing Hottentot nationality of the communities at the different institutions by means of a system of land tenure that will allow of the introduction among them of men of other and superior nationalities, European as well as native' (17, Para 106). Tenure reform, then, is about the

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<sup>147</sup> Carstens stresses the widespread and lasting cultural sharing between groups, partly because *trekboers* depended on indigenous knowledge, livestock, labour and techniques of survival. For example, around 1940, 20% of white residents in Namaqualand lived in Nama-huts or mat houses (1966: 16, 232).

disciplining of individual character for economic productivity and progress. Although he believes in the perfectibility of man through tenure reform, he does not recommend it for people in Richtersveld.<sup>149</sup>

Mellvill's negative attitude to migrating pastoralists includes *trekboers* of European descent, whom he sees as also in need of guidance, tenure reform and civilising influences. While presenting the residents at mission stations as honest, he reports that *trekboers* were exploiting a system of auctioning land by illicit, coordinated bidding and subsequently using much larger areas than they had been granted: 'Time has arrived for putting an end to this very unsatisfactory system of leasing the valuable grazing lands of Bushmanland, and I would strongly urge the necessity of their being surveyed at an early date, and cut up into lots for sale' (20: Para 127). He believes that the *trekboers* too need the incentive of ownership, for example to make them willing to invest in wells (20: 132). He notes that they benefited from the mission station at Pella:

The existence of this institution under its present management cannot but exert a beneficial influence on the neighbouring *trekboers*, and others, not the least of which is the opportunity afforded them at Pella of coming into contact with civilizing influences, and of having their children educated. I am, therefore, not in favour of disturbing the existing occupation, though I believe the time will come when a change to a better more of tenure, perhaps Individual Tenure, will become necessary. (17: 101)

Thus he saw the civilizing effect as outweighing the benefits of individualising tenure. At the end of the report Mellvill supports the request for a special area with a church and school for white *trekboers* in Bushmanland. 'I am of opinion that a reserve of this kind should be made, as the nomadic white residents in the country are sadly in want of some civilizing influence such as that afforded by a village, with its churches and schools, places of business, etc.' He envisages that privatisation of land must be accompanied by special supportive measures for whites. Thus, in the case of settlers of European descent, the economist vision yields to a welfarist concern that justifies public investments and points towards ending the integration of different groups which was at that time characteristic of Pella.

Against the subdivision of the mission lands, Tindall (1890), who was a missionary at Leliefontein from about 1875 to 1881, argues that it would be a serious blow to the inhabitants to lose even a few of the favourable farmlands. Dividing the common land into sections would also be impractical because all the farmers depended on both summer and winter veld and each individual had residential, grazing and farming plots in different parts of

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<sup>148</sup> He does not mention women's interests in land but criticises the missionaries for not providing training in useful income generating skills for women: 'good needlework' and 'the duties of house servants' (6. para 29).

<sup>149</sup> 'I am disposed to think that the time has not yet arrived for forcing Individual Tenure on them' (10: Para 60). Land along the Orange River claimed by Richtersvelders 'should not be left in the hands of natives, who are utterly incapable of developing the great natural resources it possesses in the way of rich arable land on the banks of the river, together with an unfailing supply of water for irrigation' (Mellvill 1890: 11, para 61).

the area. He criticises the Social Darwinist perspective on trade in land rights, for residents had already been able to trade land rights internally, 'which does not appear to me to have worked well as it has enabled the wealthier men to take advantage of the distress of the poorer in times of drought and scarcity. The result in all cases has not proved a fortunate illustration of the law of the survival of the fittest' (Tindall 1890: 28. Para 3). Furthermore, outsiders who managed to secure control of land would not be likely to be willing to accept 'such control and regulations as are suited to a native community'. Tindall also believes that 'for weal or woe' individualisation of tenure would undermine the missionary institution.

In his 1896 *Report on the Namaqualand Missions and Reserves*, which was a preparation for the preparing for future legislation Magistrate Scully argues that the interests of mines and private farm owners were best served by a communal system providing for the survival of labour during off seasons and recessions (Sharp 1984: 7); a reason why Mellvill's forced individualisation did not win the day. The colonial government feared that subdivision the reserves could cause unrest in areas where its control was still weak (Sharp 1984: 6, 8; Boonzaier et al. 1996: 137). Thus more than a century ago 'tenure' was central in debates about economic development and human well-being and power.

### 9.2.3 A history of legal reform

From the beginning of the 20<sup>th</sup> century the government more actively sought to control and transform the Namaqualand Rural Areas, in parallel with its increased control over other areas through the Black Land Act of 1913 and subsequent legislation. Table 11 (p. 144) shows some of the extraordinary legislative interest in the Rural Areas. An overview by K. Pienaar (2000b) lists twenty acts and amendments 1909–2000 that address land tenure in Namaqualand. Action and policy were not always law-based, but together with the missionary practice of ruling through regulations and the practices of *burger* citizenship it contributed to a lasting concern about law and legal rights. Reverend Grove in Komaggas said that residents are 'legally minded' not because they have experienced justice but 'because they have been robbed so often' (Interview, October 2001).

Table 11: Namaqualand Rural Areas: Milestones (mainly legal)

1700s	Beginning of immigration of trekboers
1795–1803	First British rule. 1798: Border of Cape Colony established at Kousie (Buffels River)
1803-6	Dutch rule
1806	British rule
1843	'Ticket of Occupation', Komaggas
1847	Border of Cape Colony moved to the Gariep (Orange River), making present-day Steinkopf, Concordia, Richtersveld and Pella areas part of the Cape Colony
1852	First major copper mine opened in the Springbok area
1854	'Ticket of Occupation', Leliefontein
1874	'Ticket of Occupation', Pella mission station
1881	'Ticket of Occupation', Pella land
1890	S. Mellvill, Second Assistant Surveyor General: Report on land tenure in Namaqualand
1903	Steinkopf rules of self-governance adopted by 186 <i>burgers</i>
1909	Mission Stations and Communal Reserves Act 29 of 1909 passed as Proclamation 53 in 1912 (put areas under national administrative control; applied to all areas except Pella, till repealed in 1963)
1919	Commonages Act 17 of 1919 (to provide for commonages in the Cape Province)
1929	Cape Mission Stations and Communal Reserves Act 12 of 1929 (to amend Act 29 of 1909)
1930	Coloured Persons Settlement Areas (Cape) Act 3 of 1930 ('to provide for the settlement of coloured persons in the Province of the Cape of Good Hope')
1940	Land Settlement Act (provided for grazing licences to white farmers, later converted to ownership)
1946	Coloured Settlement Act 7 of 1946 (to provide for 'coloured persons settlement areas')
1949	Coloured Mission Stations and Communal Reserves Act 12 of 1949 (to amend and make the 1909 Act apply throughout the Union)
1950	Group Areas Act
1955	Coloured Mission Stations and Communal Reserves Act 35 of 1955 (amendments)
1959	Coloured Mission Stations and Communal Reserves Act 32 of 1959 (amendments)
1961	Coloured Persons Communal Reserves Act 3 of 1961 ('To apply Mission Stations Act to Coloured Persons Settlement Areas. Repealed (Cape) Act 3 of 1930)
1961	Preservation of Coloured Areas Act 31 of 1961 (to provide for the 'preservation of certain traditional Coloured areas', apply Act 29 of 1909 to them and 'transfer land in those areas to the Minister of the Interior in trust for the Coloured persons')
1963	Rural Coloured Areas Act 24 of 1963 'relating to the control, improvement and development of Rural Coloured areas, the disposal of land in such areas'. Repealed Act 29 of 1909.
1965	Regulations 1965. Zonation for land use planning. 'Economic Units'
1972	Namaland Consolidation and Administration Act 79 of 1972 (to provide for a reservation 'for the sole use and occupation of the Nama' in South-West Africa – not implemented)
1973	Coloured Farmers Assistance Law 1 of 1973 ('To provide for assistance to Coloured persons carrying on or undertaking to carry on farming operations'. Amended 1983)
1979	Rural Coloured Areas Law 1 of 1979. (Economic units can be leased out or sold)
1983	Rural Coloured Areas Amendment Act 46 of 1983 (to provide for the granting of farms to certain persons; and for the establishment of separate boards of management)
1987	Rural Areas Act 9 of 1987 (House of Representatives) ('To provide for the control, improvement and development of Rural Areas and settlements, the disposal of land in such areas and incidental matters'. Provided for the privatisation of land, after consultation with residents)
1990	Rural Areas Amendment Act 121 of 1990 (extended powers of the Minister)
1991	Abolition of Racially Based Land Measures Act 108 of 1991
1991	Upgrading of Land Rights Act 112 of 1991
1991	Rural Development Bill (withdrawn)
1993	General Law Amendment Act 108 (amends the Upgrading of Land Rights Act 112 of 1991. A new chapter 2A proposed to upgrade use rights of 'registered occupiers' to full ownership. Amended the Abolition of Racially Based Land Measures Act 108 of 1991 so the state president may repeal the Rural Areas Act 9 of 1987 of his own accord)
1993	Rural Areas Amendment Act 112 of 1993 (provides that the Minister may transfer land held in trust to the relevant Management Board, which in turn could dispose of it)
1996	Northern Cape community consultations about the revision of Rural Areas Act 9, 1987
1998	Transformation of Certain Rural Areas Act 94, 1998 (Tranraa)
2001-2	Implementation of the 18 (extended to 24) month 'transition phase' of Tranraa

Sources (main): Henk Smith, LRC, presentations to rural communities, Concordia and Steinkopf, February 2002: 'Selected legal changes affecting the Namaqualand Rural Areas'. (Archer and Meer 1997; Sharp 1994; Pienaar 2000b; Smith 1993)

*The Mission Stations and Communal Reserves Act 29 of 1909*

The Mission Stations and Communal Reserves Act 29 of 1909 (promulgated as Proclamation 53 in 1912) stated as its aim that it would 'provide for the better management and control of certain mission stations and certain lands reserved for the occupation of certain tribes or communities, and for the granting of titles to the inhabitants of such stations and reserves'. This Act distinguished between 'mission stations' and 'communal reserves' and defined the latter as 'any Crown land in the division of Namaqualand reserved or set apart otherwise than by formal grant for the occupation of native or other communities'. The Act provided for individualising tenure in mission stations (Section 8) after consultation and subject to the approval by the majority of rights-holders. This provision did not apply to the 'communal reserves' in Namaqualand, where the protection against individualisation was made somewhat stronger. However, the Act did allow a subdivision of land into 'wards' (22.1a); subdividing and allotting sections of the 'outer commonage' to rights-holders and selling the remaining portions (24.2). Section 26 allowed individualisation of tenure if requested by the Board of Management, supported by a majority of residents and approved by parliament.

The 1909 Mission Stations and Communal Reserves Act contributed to constructing the Namaqualand reserves as places residents with limited political rights and certain functions in the economy. Through this Act the state claimed the rights to all mineral resources and introduced a head tax to induce residents to seek employment. The Act moved authority from missionaries and local councils to the Department of Native Affairs acting through a district magistrate in Springbok and directing a local 'Board of Management' (of six elected members and three appointed by the Governor). It introduced a system of Registered Occupiers, to replace the *burgers* of the mission era, a shift from a form of local citizenship to a place on bureaucratic list.<sup>150</sup> Registered Occupiers would still hold rights to land and to elect representatives for the Board of Management. Many residents contested the 1909 Act, seeing it as a means of reducing community autonomy. The Steinkopf *burgers* passed resolutions against the system of appointed superintendents rather than elected council chairmen (Carstens 1966: 33). A magistrate said he had to send out police patrols to control disturbances and 'to strike at the root of the evil, namely unauthorised public meetings and the unlawful assumption of authority by the will of the people' (Quoted by Hendricks 1995). Striking down political freedoms associated with land was important for the government. In Leliefontein and Komaggas locally elected councils were working in open

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<sup>150</sup> After the law had been passed, residents continued to use the terms *burgers*, *bywoners* and *vreemdelinge*, but not in official minutes (Sharp 1977: 101). In the Trancraa the sense of an old rights-bearing status remained relevant. K. Pienaar (LRC) wrote in draft minutes from a Trancraa workshop (UWC, April 2002): 'I do not get the reassertion of burger rights and how one may make sense of it – are burgers not an elite of persons who were allocated with land rights – men who became registered occupiers and who may vote?'

defiance of the new Boards of Management.<sup>151</sup> Sharp (1984: 8) argues that workers resisted the Act because they depended on an unreliable labour market, often had to be away and were keen to insist on their land rights.

In Pella, the Roman Catholic Church successfully resisted the application of the 1909 legislation. The absence of known mineral deposits probably played a role but government officials also appreciated missionary efforts in this particularly remote area a week's travel from Springbok (e.g. Melvill, 1890: para 100, 101 and Marais 1937: 84). Magistrate Scully praised the autocratic rule of the Bishop there: 'like an Arab chief he ruled his clan' (quoted in Klinghardt 1982: 81–83), and found church rule effective in achieving government aims, such as sending able-bodied men to work in the mines. Some groups that had been marginalised under missionary governance tried to use national legislation. Some Pella residents asked for the 1909 Act to be applied so as to reduce the power of the church, but without success (Klinghardt 1982). Nama leaders in Steinkopf successfully lobbied for their own stronger participation in local governance against members of the elite of mixed descent (Carstens 1966).

For about fifty years the authorities did not pursue the possibility of individualising land tenure that was provided for in the 1909 Mission Stations Act. Sharp (1984: 8-9) argues that one reason was economic crisis. The closing of two copper mine companies in 1919 and 1931 and global recession in the 1930s caused widespread unemployment and poverty, making land rights of vital importance. In the 1930s the administrative responsibility for the Rural Areas shifted to the Department of Social Welfare,<sup>152</sup> but the government addressed economic crisis mainly as it affected 'poor whites', who were given preferential treatment in land development and exclusive access to jobs in the state mining company in Alexander Bay from the 1920s. Sharp (1984: 9-11) suggests that in the context of drought and poor markets for agricultural production many of the bigger communal farmers lost herds and so pushed less for exclusive land rights or sought employment elsewhere, making space for other residents to reengage in farming, and demonstrating the flexibility of the communal system in a volatile economy and environment.

As in South Africa in general, features of the apartheid landscape of Namaqualand had been constructed well before the advent of 'grand apartheid' in 1948. Nevertheless, in the 1940s racial segregation became increasingly important and the government redefined

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<sup>151</sup> The magistrate wrote about Komaggas that 'Public notices issued by the board of management are destroyed and disregarded, public works are interfered with and the "Raad" meets openly and issues its instructions which are observed by the majority of the community regardless of their legality'. Magistrate D.C. Giddy to Secretary for Native Affairs, December 1913 (Document 1/SBK 5/6/1, quoted in Hendricks, 1995).



the meaning of 'coloured' as a residual group.<sup>153</sup> In 1949 the 1909 Act was renamed 'Coloured Mission Stations and Reserves Act' and administrative responsibility transferred to a new 'Department of Coloured Affairs'. The Act was made applicable throughout the Union to provide for racial segregation in rural areas as the Group Areas Act of 1950 did for towns and cities. A 'Coloured Person' was defined as 'any person who is not a white person, a native, or Turk or a member of a race or tribe whose national or ethnical home is Asia, and shall include a member of the race or class commonly called Cape Malays or of the race or class commonly called Griquas'.<sup>154</sup> Elders in Pella put 1954 as the year in which Pella people were made 'coloured' (*Mense van Pella word "kleurlinge" gemaak*. Group discussion, November 2001). These conceptual changes were subsequently used to eliminate some residents classified as white or native from the Pella area, shaping the understanding of self and others to this day.

#### *The Rural Coloured Areas Act 24 of 1963 – and 'Economic Units'*

The Rural Coloured Areas Act 24 of 1963 repealed the 1909 Mission Stations Act (with amendments) and provided for town planning and modern rangeland development in the 'communal' areas. Now the government construed 'coloured' as a *volk-in-wording*, a 'people in the making'. One must probably hear an essentialist 'unfolding' of an inner potential rather than a purely constructionist approach to race. One interpretation is that the government was looking for opportunities to coopt a rural elite and was therefore willing to grant rights to property and entrepreneurship to a section of the community, rights that would be reminiscent of those of whites but safely contained within the coloured areas (Sharp 1984). Section 8 of the Act held that land vests in 'the Minister in trust for the community' and could be divided, allotted and disposed of by the Minister. Section 21 provided for dividing the land into residential area, town commonage, agricultural area and 'outer commonage' (*buitemeent*). The Minister could transfer commonage to the Board of Management (Section 49). A new highly prescriptive approach to development and environmental protection is reflected in for example Section 28, which in 41 paragraphs prescribes how a Board of Management may regulate (with the approval of the Minister) human conduct, land use, livestock, dwellings, businesses and so on.

Residents resisted the application of the 1963 Rural Coloured Areas Act with subsequent amendments. In Komaggas, residents ousted board members who sympathised

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<sup>152</sup> Among different offices responsible for the Namaqualand rural areas have been 'Department of Native Affairs' (1912–1930s), 'Department of Social Welfare' (1930s–1950), 'Department of Coloured Affairs' (1950–end 1970s), 'Coloured Persons' Representative Council', and the Ministry of Agriculture and Land Affairs (1994–?).

<sup>153</sup> 'Coloured person' means any person other than a European, an Asiatic as defined by section eleven of the Asiatics (Land and Trading) Amendment Act (Transvaal), 1919 (Act No. 37 of 1919), or a Black as defined by section 35 of the Black Administration Act, 1927 (Act No. 38 of 1927)' (The Coloured Persons Settlement Act No. 7 of 1946, Section 1).

<sup>154</sup> Act No. 12 of 1949 (S. 1) amending the Mission Stations and Communal Reserves Act of 1909.

with the town and farming development plans and elected new members, whom the authorities subsequently banished from politics. In 1975, a hundred women blockaded the office of a superintendent and ensured that bulldozers used to implement town planning were sent away (Sharp 1977: 271). In Pella in 1976, a newly established 'Advice Board'<sup>155</sup> opposed the development plans proposed under the Act, particularly livestock regulations and subdivision of the grazing land (Based on Klinghardt 1982: 193-224).

Regulations under and later amendments to the Rural Coloured Areas Act (in 1979 and 1983) further provided for the implementation of 'economic units', a programme to subdivide commons and lease sections to individual 'bona fide farmers', a term that was not clearly defined but in practice came to mean those who had the resources to afford the 'economic units' (Sharp 1984: 4). This undermined the remnants of the institution of citizenship with accompanying rights to land and increased the risk of impoverishment for non bona fide farmers. Major conflicts arose over the 'economic units' programme and after years of conflict it was abandoned in Komaggas and in Northern Richtersveld (where people refused collectively to apply for 'economic units'). It was implemented in modified form in Steinkopf (1980),<sup>156</sup> in southern Richtersveld (1982), Leliefontein (1984), and Concordia and Pella. Rules stipulated that applicants had to be 'bona fide farmers', own 200 head of stock or assets to the value of R3 000. Units were hired out for R250 per year on five year leases (Kröhne and Steyn 1991: 25-30). The system attempted to create or consolidate contrasts between land-rich and land-poor within the Rural Areas.<sup>157</sup> Largely disregarding existing land rights or residents' fundamental rights, it was motivated by a forward-looking construction of an entrepreneurial class.

The Economic Units programme was abandoned after a court ruling in 1988 in favour of the Leliefontein community; the judgement was based on a 'technical requirement' of the Act<sup>158</sup> but many residents interpreted it as supporting people's rights to farm 'communally' and to be protected against forced privatisation (Kröhne and Steyn 1991: 6).

### *Rural Areas Act, Act 9 of 1987*

This Act gave the areas the name that was widely used during the tenure reform in 2001: Act

<sup>155</sup> Act 24 of 1963 provided for levels an Advisory Board (with less power) or a Management Board.

<sup>156</sup> In Steinkopf 26 economic units between 6 000ha and 9 000ha in size were demarcated and leased to individual farmers. To respond to criticism, 30 units of variable size were leased as jointly occupied farms to others (Sharp 1984: 21).

<sup>157</sup> In Leliefontein, which had about 280 stock farmers, 30 units covering 99 000 hectares were leased to 74 farmers (about 1 300 ha each), and 17 jointly operated farms were leased to the remaining 203 farmers, giving them about 280 hectares each – thus finally realising the proposal Tindall had protested against in 1890 (Section 9.2.1).

<sup>158</sup> The relevant Act (Rural Coloured Areas Law 1 of 1979: Section 41) stipulated that *akkerboupersele uitgemmeet moet word* ('agricultural plots shall be demarcated'). A Steinkopf farmer, Paul Cloete van Skuitberg, read *akkerboom* (oak tree) for *akker-bou* and exclaimed: 'But we don't have oak trees!' This put lawyers on the track: they argued that the Act was not applicable because it presupposed a type of resource (agricultural plots) that was not present in all the areas (Personal communication, Henk Smith, December 2002).

9 Areas. Its title no longer refers to a racial group but uses a camouflaged racial definition of 'qualified person' (those who may hold rights under the Act and live in the areas):

Any person who is a member of the population group referred to in Section 2. [which in turn stated:] Every area to which the provisions of the Act apply shall, subject to the provisions of this Act, be reserved for occupation and ownership of persons who are members of the population group of members of which the House of Representatives consists. (Rural Areas Act 9, 1987)

Thus the construct combines a category of people, a category of geographical areas, a system of political representation and a system of management. The Act made it possible for a missionary society to hold the land rights, if it had held land prior to the application of the Act of 1909. By another definition (xxi), the Act ensured that missionary societies could only hold the land 'in trust for the inhabitants thereof who are qualified persons'.

Land was vested 'in the Minister in trust for the community for division, allotment and disposal by the Minister' (Section 7). A Board of Management consisted of at least eight persons elected by entitled persons or nominated by the Minister (Section 23, 24). The Board was empowered to carry out most public functions and since 1963 the number of paragraphs describing its regulative powers had increased from 41 to 62.<sup>159</sup> For example:

[F]or preventing a person from conveying any article, load or burden in such a manner as to obstruct or inconvenience pedestrians and vehicles in any street or on any sidewalk, and for prohibiting the wheeling of wheelbarrows, cycles and vehicles, other than perambulators and bath chairs, on any sidewalks, except for the purpose of crossing in proceeding to or from any premises, and for prohibiting the throwing of fruit peelings and other objects which may be dangerous to persons or vehicles, onto any street used by the public. (Rural Areas Act 9, 1987, Section 27. 46)

The origin of the concern about wheelbarrows may be found in a description of porters navigating crowded streets on the way to the railway station in Cape Town shouting 'Mind the barrow! Mind the barrow!' (Steenkamp 1975: 17). In the vivid legal imagination of drafters the areas were miniature versions of Cape Town. At the height of the political and economic crisis of apartheid, the list created an illusion that people in some of the poorest areas of the country needed detailed regulation for amusement parks and wheelbarrow traffic, and protection from thrown fruit peelings. Perhaps it was a show of concern, linked to a legal construction of the Rural Areas as places where a small group of efficient farmers make use

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<sup>159</sup> They include the preservation of public health (1), 'compelling owners and registered occupiers to keep their houses and erven [plots] clean' (2), preventing the disposal of night soil (5), regulating sewerage and drainage, providing for sanitary conveniences (10), regulating, restricting or prohibiting the washing of clothes (12), the slaughtering of animals (13), sale of food (14), water supply (18); providing for secure buildings (23, 24), regulating livestock keeping (25) and fishing (26), traffic (27–29), the keeping of dogs (31), noise and the use of obscene language (32), tobacco smoking (34), grazing of livestock (42), advertising (45), transport of goods (46), public busses and taxis (48), circuses and amusement parks (49), the use of pedal cycles (50), parks and swimming baths (52, 53), aerial systems (55), fences (56), 'regulating and controlling the furnishing of information from the board's records' (57), fixing and payment of charges for the board's services (61) and 'generally for maintaining order and good rule and for the convenience, comfort and safety of the inhabitants' (62). (Rural Areas Act, Act 9 1987, Section 27).

of the land and the rest live in well-functioning towns (see footnote 159).

The Act again placed extensive power in the Minister's hands, for if the board failed to 'make, amend or repeal any regulations under Section 27 as in the opinion of the Minister is necessary or desirable', the Minister could direct the board to do so, or do it himself (Section 28). The Minister could deprive the board of its powers and appoint others to fill its functions on the advice of any committee or 'of his own accord'. The state therefore had virtually unchallengeable control of the board and rural communities, linked to the detailed environmental and health regulations. It could also transfer land to boards, which could dispose of it. The Minister's extensive power (Section 7) did not protect residents against losing land rights, a major fear as the conflict about the 'economic units' had shown. The Rural Areas Act 1987 may represent the apex of 'seeing like a state' (Scott 1998).

### 9.3 Land reform 1990–2000

#### 9.3.1 Transition period: 1990–1994

It is striking that the Rural Areas in Namaqualand continued to exist on the legal basis of Tickets of Occupation granted up to 150 years ago. Henk Smith explained:

The question why the reserves continued to exist is relatively easy to answer. Communities presently see the reserves as advantageous because rights of occupation area safeguard against the insecurity that comes with living in white areas, and the reserves offer security in the face of lack of employment, retrenchment and retirement. The question whether the reserves should continue to exist in the long term involves a more difficult political issue. (Smith 1989: 8)

It remained important to fight for the areas during the years of transition to a new political situation. In 1991 the de Klerk government launched its White Paper on Land Reform (RSA 1991) (Chapters 7 and 8) and proposed various tenure reform bills. Namaqualand communities met on 9 February 1991 to consider the implications of the announced changes, and agreed on four major demands, as noted in an LRC memorandum:

(1) Communal ownership and farming must be encouraged, and protected against private ownership (although open to all races); (2) historical land claims must be addressed; (3) more land must be set aside as communal trust land; and (4) no new laws must be enacted without consultation and opportunity to make representations. The White Paper and the Bills disappoint all these demands and do not satisfy the minimum expectations of communities. (Smith 1991: 1)

From 1991 to 1993, the government passed legislation to empower the Minister to abolish previous legislation, transfer trust land to local management boards and to 'upgrade' user rights to full ownership,<sup>160</sup> as in other parts of South Africa where the government made rapid transfers of land to local institutions regardless of their democratic standing in this period (Claassens 2001). The Abolition of Racially Based Land Measures Bill (and subsequent Act)

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<sup>160</sup> Abolition of Racially Based Measures Act 108 of 1991; Upgrading of Land Rights Act 112 of 1991.

did not repeal the Rural Areas Act 9 of 1987. Henk Smith (1991: 2) reported that Namaqualand communities objected to the Rural Areas Act 9 of 1987 because it entrenched the power of the management boards and the unrepresentative House of Representatives. Furthermore, the Act promoted privatisation of trust land through the lease or sale of economic units. While the 1991 White Paper acknowledged poor development planning in the past, Smith (1993) noted that 'in the context of Coloured reserves, such problems are also the result of the policy of privatisation'. The government withdrew an announced 'Rural Development Bill' of 1991 after resistance by communities who objected to the lack of protection of informal rights for the many men and women who did not have the status of 'registered occupiers'. Nevertheless, as Smith points out, provisions of the bill were 'enacted in the guise of a General Laws Amendment Act' (108 of 1993) which allowed the central state 'to grant land to the local state and government supporters at a time when new central and local state structures [were] being negotiated' (Smith 1993: 33).<sup>161</sup> This Act promoted the conversion of use rights to family lands in the commons to full ownership. Many women saw this as a threat since it was normally men who were registered as rights holders, not women. The then largest ever congregation of women met in Namaqualand to protest against the granting of full ownership rights to 'registered occupiers'. Researchers have pointed out that many women feared losing properties to repay men's debts or in the case of divorce: 'Women's security of occupation thus largely lies with their husbands. Women believe that issues of access to and control over resources and decision-making need to be addressed to improve their position as women' (Archer and Meer 1997: 92). Civil society organisations and local groups resisted government initiatives because of the risks of losing use rights, lack of consultations, neglect of gender concerns and the general lack of legitimacy of the government that proposed the measures (Cross 1992).

The political changes in 1994 provided a new impetus for land reform. In July 1994 the new Minister of Agriculture, Derek Hanekom, met representatives of ten Namaqualand communities in Steinkopf, and in September of the same year the Namaqualand Land Convention was hosted by the Department of Land Affairs. Since then, a number of actors have networked to demand and promote land reform, including the provincial office of the Department of Land Affairs (established in 1995 and based in Kimberley), the Surplus People Project, the Legal Resources Centre and the Provincial Department of Agriculture (Springbok Office) and individuals and groups from the communities (Wellman 2000: 12). The SPP (1995: 4–5) reported that land restitution claims and the demand for tenure reform and more land were all linked together. However, the national 'land reform products' were not readily applicable to Namaqualand, so actors searched for appropriate pre- and post-1994

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<sup>161</sup> 'The Minister may, subject to any condition determined by him, at any time after consultation with the board of management concerned transfer to such a board of management any land, situated in an existing or incorporated area, which is held in trust by him for the community concerned.' Inserted by Section 4 of Upgrading of Land Rights Act No. 112 of 1991, as amended 1993.

legislation to pursue the political goals of land reform.

### 9.3.2 Historical rights and restitution

Many residents in the Namaqualand Rural Areas express a sense of having lost land that historically belonged to them or their ancestors. However the prevalent view has been that Namaqualand rural land claims cannot be addressed under the restitution programme, due to the Constitutional 1913 'cut-off date' and dispossession primarily having taken place in the 18<sup>th</sup> and 19<sup>th</sup> centuries (SPP 1995: 3).<sup>162</sup> Based on legal advice and resolutions made at meetings in 1994, the major emphasis has therefore been on redistribution to redress past injustice, as 'restitution with another name' (DLA 2001a). At a meeting in Pella in September 2002 a DLA official again explained that dispossession 'did not happen after 1913 and it was not racially based ... We said at forums that we attended in Namaqualand in the past, with SPP and LRC and the Land Committee and its successors, that people will not submit claims to rural areas' (Official of Provincial DLA, Pella Loods Committee, September 2002). However, a number of claims were submitted. During 2002 an external consultant had been hired by the provincial Land Claims Commission to conduct an initial verification of claims. The report was to have been submitted by June 2002 but was at the time still in draft form. The provincial DLA official responsible for Namaqualand said that 'Namaqualand does not get any feedback regarding their land claims and the communities are in the dark'. He had asked for information from the provincial Land Claims Commission office but regretted that he had been unable to get information (Official, Provincial DLA, Loods Committee Meeting, Pella, September 2002).<sup>163</sup> SPP staff reported that they had asked that Act 9 land claims be prioritised had been unofficially informed that there were 170 restitution claims in Namaqualand, but had to foresee that they would not have exact information on these during the implementation of the Trancraa transition phase (SPP facilitator, Loods Committee Meeting, September 2002).

Some commercial stakeholders have played down the significance of a history of dispossession, by stressing the low population density of original owners or placing conquest in a distant past that is no longer morally or politically relevant. A senior official in a mining company expressed an ambiguous view of historical rights that, while not unsympathetic to original owners, obscured agency and responsibility:

The company was an outsider. There was these so called 'coloureds' in this area, all along, they probably never, let's call it, 'owned' the land, it was more of aboriginal ownership, so they just moved all over, wherever there was grazing, so that was never an issue. And then

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<sup>162</sup> 'Restitution' is granted only to those who have lost land owing to racial discrimination after 1913, a date firmly fixed in the public's mind. The Constitutional tenure reform mandate (Section 25 (6) in the Bill of Rights) guarantees redress for tenure that has become insecure as a result of racially discriminatory laws or practices, and has no time limit (Makopi 2000).

<sup>163</sup> He said told the provincial Land Claims Commission that 'they must come and talk to the people. I have been saying this ever since we started with the Act 9. The people want to know what is happening with their claims ... But you can take the horse to the water, but that is all: You cannot drink for it'.

probably a hundred or a hundred fifty years ago, whenever the white guys came into this area and said, 'well we got to here, that's our farm', and bought it and took ownership of it, or got ownership of it, in those days from the state, I would say, whatever years ago. And then it would become a farm with a deed and a paper. And that's where the issue started, the problem of these aboriginal rights, as they presume, and I suppose quite rightly, that the land originally belonged to them, or that it belonged to nobody, because everybody had the right to farm the land. (Senior official, Mining Company, Interview 2001)

An owner of a private farm (male) in the Pella area questioned the right to restitution claims but gave qualified support to the land reform programme as compensation. He explained that his great grandparents had acquired his farm 'more than hundred years ago', though he did not know exactly when and from whom: 'The title was so old I did not understand it. The measurement they used were from olden times.' (Interview, Oct 2001). Despite the protection of his ownership to date, he believed that the recent land invasions in Zimbabwe spelled policy changes and threats to his tenure security:

PW: Some people feel that it is unfair that they should pay to get land back, because it was at some point taken from them unfairly?

Farmer: That's why the whole land reform process started in the first place. [But] that's a long time ago. You can't punish the current population for the sins of the past but somewhere you have to compensate them and that's the government's way to do it. I can't say it's fair or unfair, but if you can claim land that you lived on 200 years ago, or your ancestors lived on 200 years ago, then someone can some day come and claim this farm because 500 years ago their family lived here. Where do you draw the line?

PW: Well, the Constitution of South Africa drew the line at 1913?

Farmer: Yeah, but they are just going to draw up a new law and move that, depending on who's the government. If Robert Mugabe was the government, he would have probably moved that way back to the 1700s before the settlers came to South Africa and claimed Namaqualand as a result. I think that white farmers on the land think [that] it will go the same way as Zimbabwe in the long term. It's not in the next five years or so, but in 20 to 25 years' time, we will be where Zimbabwe is now. The economy will not grow. No jobs available. People won't get rich again. Like in Zimbabwe, everyone is poor. There is no money. (Namaqualand farm owner, man in his thirties, October 2001)

Disappointments over widespread exclusion from the restitution process affected tenure reform during 2001 and 2002, particularly in Komaggas. Some saw the restitution clause as reflecting the marginal position of South Africans classified as 'coloured':

In South Africa, our government is telling us that [in] the land reform process they build on the original Land Act of 1913, on the retraction or the transformation of that land act. That is not the correct starting point for me, because the whole Khoi, San, Nama groups have been dispossessed before 1913. So what the present government is actually doing, they are reconfiguring the land patterns of this country on the basis of the privileged position – interesting, it is a contradiction – but the privileged position of so-called Africans. But the Nama people are Africans, the Khoi are Africans, we are Africans, what else? (Rev. Pieter Grove, Uniting Reformed Church, Komaggas, October 2001)

Reverend Grove referred to a history of contested claims to land with reference to an original grant by Queen Victoria. He noted that Komaggas residents wanted a legal base for land claims, such as early maps, but argued that instead of basing claims on 'what the Queen gave you' one ought to use a deeper understanding of residents' historic rights as a

dispossessed people:

So, my position is that the rights of these people reside not in what this current government, the previous apartheid government or the Queen or the colonial government says *should* be their recognised title, but in the fact that they have resided here historically, let's call it their indigenous rights. But that is at this stage not a very widespread understanding in these areas. People are extremely legal-minded here – I think it is because they have been robbed so often. So they only believe in some kind of law that tells them, this is this and this is that. They don't judge on the basis of justice ... People make this whole thing a legal battle and not a battle of historical rights. (Rev. Pieter Grove, Komaggas, November 2001)

Grove said that and '*then* of course it is a totally different thing, and *then*, for instance, the issue of De Beers claiming diamond rights from whatever legal source becomes a point of contention'. Diamond rights were contested mainly when the Richtersveld Community in the diamond-rich northwest corner of Namaqualand launched a land claim against the state diamond mining company Alexkor in 1998 under the Land Restitution Act 28 of 1994. When diamonds were discovered in the 1920s, the Union government claimed the land in terms of the former colonial power's Crown Lands Act. In 1998 the community claimed restitution of 85 000 hectares of land taken from them in 1926 and compensation for diamonds removed since then. The Land Claims Court (2001) dismissed the claim, arguing that the land had been lost at the time of colonial annexation (1847), i.e. before the 1913 cut-off date for restitution under the Act. In 2003 the Constitutional Court (2003) had another say about the 2001 judgement, confirming the right of Richtersvelders to restitution and confirming that annexation did not per se annihilate land rights. In a sense it supported Reverend Grove's demand justice, based on a recognition of historical, indigenous land rights but focusing on colonial law: not what 'the Queen gave you' but what she acknowledged she had not taken away by mere conquest.

### 9.3.3 Redistribution of land

Related to the 1913 cut-off date, in Namaqualand redistribution has been pursued as 'restitution with another name' (DLA 2001a). However, the standard mechanism for land redistribution was not deemed appropriate either.<sup>164</sup> Yet residents, the government and civil society created an extensive land redistribution programme, which at the time accounted for about 23% of the total land area (1.35 million ha) redistributed in South Africa after 1994 (Anderson and Pienaar 2003).

*Meent* or 'commonage' refers to the historical practice of setting aside land for public use around towns, usually granted in ownership and free of charge by the state to

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<sup>164</sup> The Settlement/Land Acquisition Grant of up to R17 000 would only buy enough land for about 15 small stock (Rohde, Benjaminsen, and Hoffman 2001: 259). The higher Land Redistribution for Agricultural Development (LRAD) grants introduced in 2001 were also seen as inappropriate because of the cost of the land needed for a viable farm enterprise (SPP staff member, interview, 2001).



municipalities or churches.<sup>165</sup> Land reform objectives may be achieved by changing rules of access from benefiting commercial farmers to benefiting small-scale peasants. In 1996 Anderson identified 314 000 hectares of municipal commonage in the Northern Cape Province, yet only about one third of this commonage had been used for land reform (Anderson and Pienaar 2003).<sup>166</sup> Instead, the government bought land from farmers and mining companies in Namaqualand, adding 245 550 hectares of land for the benefit of residents of the Act 9 Areas and 73 750 hectares for other towns (in total, close to 7% of Namaqualand). Residents call the existing Act 9 common land *ou meent* (old commonage) and the redistributed farms *nuwe meent* or 'new farms'. The process was funded by a 1995 planning grant from the DLA and with the SPP as consultant (Jordaan and Laan 1998: 14; SPP 1996b). The first six farms (28 000 hectares) were bought in 1996 and handed over to Concordia in April 1997. In November 1997, the Minister of Land Affairs handed title deeds to community representatives in Komaggas, including land bought from De Beers mining company (Jordaan and Laan 1998: 17). Blackman Ngoro (1997) reported on 'new pastures for Namaqualand shepherds' and showed photos of people dancing with joy, the Minister of Land Affairs driving a donkey cart to the hand-over ceremony and 'old-timer' Joseph Grace (aged 88) receiving the title deeds.

The 'new farms' were transferred to the Transitional Local Councils governing the Namaqualand Rural Areas on the condition that they should benefit poor residents of their communities. The DLA explained that farmers will lease the land from the Transitional Local Council 'and abide by the Land Use Management Plan and the Grazing Agreement stipulated by the Department of Agriculture which will also 'help to increase productivity and enhance the capacity of the land as part of its training of emerging farmers'. (DLA 1999a: 3). In each area a Commonage Committee (*Meent Komitee*) was established to assist the local council with farm management. Farmers were to gain access by applying to the *Meent Komitee* and would get approval for a certain number of livestock. From 2001 the new farms were vested in the relevant municipality.

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<sup>165</sup> Access was regulated by title deed conditions or municipal regulations. User fees could not exceed cost and land could not be sold or leased out (these rules were confirmed in early 20<sup>th</sup> century court cases but have since been violated through commercial leases to white farmers that excluding black residents from poor urban settlements of the *location* (Anderson and Pienaar 2003: 2-3).

<sup>166</sup> The first such 'commonage' project was implemented in Pofadder, which again became a pioneering town. Pofadder is the municipal head quarters of Khâi-Ma Municipality in which Pella is located. Pofadder is known as an archetype sleepy, Afrikaner, rural town – a farmer told me that some South Africans think it is purely mythical.

Table 12: Act 9 Areas in Namaqualand and redistribution

	A: Old commons		B: New commons			C: State farms		A + B + C	
	Ha	Share of Act 9 area	Ha	Share of distributed land	Increase*	Ha	Increase*	Total (ha)	Total increase*
Leliefontein	159 182	13%	32 627	13%	20%	0	0%	191 809	20%
Concordia	75 693	6%	40 760	17%	54%	21 437	28%	137 890	82%
Pella	48 276	4%	34 912	14%	72%	11 751	24%	94 939	97%
Komaggas	62 600	5%	27 228	11%	43%	0	0%	89 828	43%
Steinkopf	329 000	28%	110 023	45%	33%	143 611	44%	582 634	77%
Richtersveld	513 919	43%	0	0%	0%	196 089	38%	710 008	38%
Total/av.	1 188 670	100%	245 550	100%	21%	372 888	31%	1 807 108	52%

Source: Based on SPP 2003: Steinkopf Verslag (p. 4)

Notes: Richtersveld area includes 162 445ha of 'Act 9' area included in the National Park on a contract basis. A: 'Old *meent*' or Act 9 Area. B: Redistribution land (under Act 126). C: State farms provisionally approved for transfer to Act 9 Areas communities as part of a land reform initiated by the DLA in 1997. Farms vest in the Department of Public Works. Farmers communities accessed the state farms (still the case in 2004, personal communication, Department of Agriculture). In accordance with a Namaqualand District Planning process and a 1999 report by the SPP to the DLA, municipalities had caretaker responsibility for the farms (SPP 2003: 4). \*) The indicated 'increase' is relative to the area before redistribution; the bottom row gives the average increase for the six areas.

The total cost was estimated at R27.5 million (DoA 2001).<sup>167</sup> Through the redistribution programme, land available to the Act 9 Areas has increased by 21% (Table 12). Redistribution is quite uneven among the areas (e.g. 45% of the redistributed private farm land was obtained by Steinkopf), but small areas gained large proportional increases (Pella 72%, Concordia 54% and Komaggas 43%). Per capita increases in land varied from six hectares per capita in Komaggas to 14 in Steinkopf. The average resident got eight hectares, or about the land necessary to sustain one sheep or goat. The increase is about 120 hectares per household engaged in farming (estimated at 2 000 by DoA 2001), or enough to support about 15 small stock units per household at DoA recommended stocking level. Theoretically they were each enabled to add about 15 sheep or goats to their herd but in practice the direct benefits accrued to fewer households.<sup>168</sup>

In addition, state farms in Namaqualand (372 888ha or close to 8% of the total area) were provisionally allocated to the Act 9 Area communities of Concordia, Pella, Steinkopf and Richtersveld (Table 12, column C). When state farms have been transferred the land

<sup>167</sup> At about R112 per hectare the total cost was about R27.5 million for the land allocated to the Act 9 Areas. The financial cost of the 'new farms' was about R1 000 per capita in the six areas or R13 700 for each of the 2 000 households engaged in farming. The price was also given as R6 260 per large stock unit or about R1 000 per SSU (sheep or goat) that a beneficiary farmer was (theoretically) able to add to her or his herd (DoA 2001).

<sup>168</sup> The 2 000 households corresponds to only 0.3% of the estimated 675 000 households in need of land in 'former homelands/Bantustans' (Aliber and Mokoena 2003). A similar expenditure on these households would amount to R9.3 billion or about twenty times as much as the 2004/5 state budget for tenure reform and redistribution (R475 million). Walker (2004: 7) pointed out that the government could exceed its redistribution target of 30% of commercial land by purchasing all the 30 million hectares of farmland in the Northern Cape; area is thus an inadequate measure of redistribution.

accessed by residents of the former 'Act 9' Rural Areas will have increased from their original 25% to 38% of Namaqualand, their total area having been expanded by 52% (Table 12).<sup>169</sup> Including the state farms, redistribution to 'formerly disadvantaged communities' in Namaqualand will have reached 14% of the total land area (Table 13), or about 23% of the commercial land (farms and mines), not far off the national redistribution target.

Table 13: Overview of land redistribution in Namaqualand 1996–2001

	Hectares	Share of total area
Namaqualand	4 800 000	100%
Act 9 areas before redistribution	1 189 000	25%
1) Redistribution farms (Act 126)	246 000	5%
Act 9 Areas after redistribution	1 425 000	30%
2) State farms allocated to Act 9 areas	373 000	8%
Act 9 areas + new farms + state farms	1 807 000	38%
3) Other redistribution land (Act 126)	74 000	1%
Total redistribution in Namaqualand (1, 2, 3)	692 000	14%

Note: The transfer of state farms had not been completed. Based on SPP (2003: 4)

The redistribution policy has been evolving over time. A 'Municipal Commonage Programme' was developed from 1995 with support in the Green Paper and the White Paper on Land Policy (DLA 1996; DLA 1997b), funded under land reform legislation by the de Klerk government<sup>170</sup> and eventually described in detailed guidelines (DLA 1997b: 50-51). In principle, land redistribution should be accompanied by integrated land development<sup>171</sup> and lead to secure tenure (DLA 1997: 81). The guidelines required that priority be given to poor farmers (with an income of less than R1 750 per year) but this has not been achieved, owing to power relations and the distance to new farms and in many cases inadequate infrastructure (Rohde et. al. 2001: 261). In 1999 the Minister of Agriculture and Land Affairs ordered a review of the programme and from 2000 policy statements stressed that all commonage projects must both accommodate subsistence uses and be 'stepping stones for emergent farmers' (DLA 2000). During the implementation of Trancraa in 2001, NGO staff talked about a 'moratorium' on land redistribution and had been told informally by an official that Namaqualand could not expect further allocations for redistribution due to the high

<sup>169</sup> The relative increases in area vary from 20% in Leliefontein to 43% in Komaggas and 97% in Pella. The amount of redistributed land varies from 6ha per capita in Komaggas to 32ha per capita in Steinkopf and 54ha per capita in Richtersveld.

<sup>170</sup> Provision of Land and Assistance Act 126 of 1993 (Section 10 (1)(c) provides for grants or subsidies to a municipal council to buy land for commonage). Hence the term 'Act 126 land' is used to refer to the redistributed farms.

<sup>171</sup> The Development Facilitation Act 67 of 1995 requires 'structured interaction and consultation between various departments and levels of government' as well as participation and skills development in land reform.

allocation in the past.<sup>172</sup> Nevertheless, through redistribution residents and civil society developed new relations with the government. The 'Namaqualand network' provided coordination and policy orientation, including creative use of the old legal category of *meent* and land legislation from 1993.

The municipal commonage programme has started to change the map of Namaqualand but not challenged private property rights. Instead, state sponsored redistribution has solved problems for farmers and helped mining companies dispose of exhausted land. The Okiep Copper Company started offering farms to the government in March 1999. A manager explained that 'we had a lot farms around in this area, because in the old days they just bought up everything with a remote chance of having copper, and they bought up the whole area'. Today the Company reasoned that 'the outlying areas are not interesting any more, it is not worth it, so let's get rid of the land'. One consideration was that as a large land owner the Company could not 'put all the land at once on the market, so [they] started slowly getting rid of the land.' The Manager talked about the changed power relations between land users, but concluded that redistribution was 'good value' for the Company:

The price was slightly below market value, but the problem is [that] the land was located next to Komaggas communal area and it was always over the years fighting [due to] land rights. Because the area is not fenced, so the guys move over to the next farm, the neighbour's farm. So you would not get a commercial farmer to buy that area, with the risk. It is a political issue. You can't chase the guys off the land. Let's say, a white guy in history, he would take it to court, and the court would get it settled quickly, put up a fence and that's it. But it is, yeah, a difficult issue these days. So we were in a way happy to take less for the farm, but at least get our money and get out of it ... and at the same time it is also some advantage to us that we can say: 'Yes, we have done something for the community'. So it's good value. (Senior Official, Okiep Copper Company, November 2001)

Similarly, during 2002 an increasing number of farmers contacted the SPP to offer their farm for redistribution plans, apparently linked to new property taxation on its way (SPP staff, interview 2002). Sellers value the public land reform programme but so did many residents. Land redistribution in some respects confirmed an old story that *it is our land*.

#### 9.3.4 Land and dignity

In Namaqualand, despite a history of government-controlled tenure land is linked to dignity and resistance. The expressions '*Grond is baie emosioneel*' and 'Farming is a way of life' frequently come up in discussions about land. In Spoegrivier, Leliefontein, a farmer expressed a sense male pride in relation to farming: 'I am a man like my father, because I plough just like my father. When I walk behind my donkeys and plough, my wife is very proud of me, because I have something, I do something, and I am making something of my life' (de Swardt 1993: 13). A farmer in Concordia was quoted as saying that that 'our grandfathers

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<sup>172</sup> Among 98 municipal commonage projects 1996–2002 (nationwide), 71 were done in the years 1998 to 2000, after which the number dropped. The request for funding for the 2003–5 period was R13 million or 3% of the budget for land redistribution (Anderson and Pienaar 2003: 1, 6).

and great-grandfathers farmed here. This is our world, this is our way of living. All we are asking is that we are treated as adults. We do not want to be under the Minister any longer. We want to decide ourselves' (Wellman 2000: 14). In Soebatsfontein, a community of about 250 people between Leliefontein and Komaggas, a beneficiary of land distribution interviewed by Wellman (2000: 24) said that 'with this land the Government is giving back to us our human dignity. And for that we are grateful ... Fifteen thousand hectares is not enough; but it is better than nothing. We hope we may be able to get another one or two farms, then we can take good care of the land and there will certainly be something left for our children and grandchildren. Now I can pass away in peace. That feels good.' Efforts during the Trancraaa process in Pella and Komaggas 2001–2002 in diverse ways continued to touch upon experiences of ownership and rights to life and equal worth.



## 10. PELLA

### 10.1 Into Pella

#### 10.1.1 Introduction

Pella is located on the Gariep (Orange River) in Khâi-Ma Municipality in the northeast corner of Namakwa District Municipality and has a population of about 4 100. To reach Pella from Springbok one travels about 160 km on the N14 through a magnificent landscape of open plains and rocky outcrops. The N14 cuts through the southeast corner of Pella and continues to Pofadder and on to Upington and Kimberley. Most people live in Pella town around the mission station and cathedral, located in the middle of the Pella Rural Area and about midway between the N14 and the Orange River. Pella is situated on a broad and sloping plane and enclosed by the Pella Mountains. After a new tarmac link road was completed in June 2002, a new welcome sign was put up, which proclaims: 'Welcome to Pella – Forward Ever, Backwards Never' around a welcoming South African flag.

Pella land is held by the state in trust for the community. The state has offered to transfer the land to residents and has passed the Transformation of Certain Rural Areas Act, Act 94 of 1998 (Trancraa), which sets out the major steps and requirements in an eighteen-month 'transition phase' which began in January 2001 and was to be completed by June 2002, later extended to January 2003. During the Trancraa process Pella experienced tensions between political parties, different interests and governance levels. Nevertheless, the Transformation Committee and the main facilitator, the Surplus People Project, the Department of Land Affairs and the Municipality succeeded in implementing a comprehensive consultation, which culminated in the referendum on 7 December 2002. They also made efforts to affect land use and development opportunities, although these proved difficult to sustain due to lack of resources. This raises questions about the policy of tenure reform and the responsibility for realising the constitutional promises of secure tenure and tenure redress. The Trancraa case may illustrate some processes of constituting land tenure as a human rights issue, between legal reform, politics and land use as it has been shaped by history, environment and economic context. I try to understand how actors in a civil society–state network try to change tenure institutions and perhaps respond to residents' claim that *it is our land*. I start out by describing some features of Pella society, land and history. I then document the Trancraa process from the second half of 2001 and explore how various tenure and development issues were addressed, and finally the referendum on land ownership on 7 December 2002.

#### 10.1.2 Land

One may roughly divide Pella land into town (*dorp*), plains or pasture land (*veld*), mountains (*berge*) and the river area. The southwest portion is gently sloping veld, with mixed grass

cover, interspersed with rocky outcrops and a long red sand dune. Residents use Pella land in many ways, including gardening, livestock farming, collection of minerals, firewood and reeds for house construction, fishing in the river, tourism, a little hunting of birds and mammals and collection of honey. Along the Gariep are small garden plots (used by about thirty residents) and larger areas with a potential for irrigation (*besproeiingsgronde*), but the most important land use is livestock keeping (*veeboerdery*, often just *boerdery*). Pella receives about 100 to 200mm rainfall per year, less and more erratic than in central Namaqualand (rain fed farming is impossible and livestock production subject to climatic cycles).<sup>173</sup> A Pella stock farmer told that ‘in the 50s, 60s and 70s and 80s we had droughts. One can say that for two to three years we had rain, and then droughts for the rest. In the 60s we had a drought for nine years’ (Elderly Pella man, October 2001).

The northern and eastern portions are dominated by steep, rocky mountains with scattered grazing areas; mountains are named according to natural phenomena or past events – ‘like here you don’t see the sun, *Sorêmites*, and here the name means that which is round, *!Hubu Gamas*’ (Pella farmer, Resource Mapping, October 2001). Although difficult to access, the mountain pastures are used during the frequent droughts and a few families reside there for long periods of time. Three mountains have large crosses on the top, reminders that the Pella land has been consecrated by the Church, as some elderly residents said. Graves, caves, springs, a dry waterfall and so on are found in the mountains. Among the trees on Pella land are *Koker-boom* or *Quiver Tree* (*Aloe dichotoma*), *Kameeldoringboom* or *Camel Thorn Tree* (*Acacia erioloba*), and *Peule-boom* (*Prosopis juliflora*).<sup>174</sup> Wild predators include greyback jackal, big-eared jackal, cerval (*Rooikat*), leopard and mountain eagle. Other mammals are baboon, springbok, duiker antelope, aardvark, and porcupine.

### 10.1.3 Town and residents

Pella is the main town in Khâi-Ma Municipality in the northeast corner of Namakwa District

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<sup>173</sup> Early missionary Father Simon was a keen observer land, climate and livestock: ‘Your investment grows for two or three years, and then a large part of it is lost during the drought that inevitably follows. You can hardly count on one good season in three.’ However, the soil was good and ‘as soon as rain falls the ground is covered with flowers and magnificent pasture ... if this rain falls at the right time our plains are immediately covered with verdure and they look like the plains of Europe. The cattle can browse certain grasses a week after rain ... If you put the leanest cattle in these new pastures, in less than a month they will be fat and ready for slaughter’ (1959: 105-6).

<sup>174</sup> *Prosopis* spread from neighbouring private farms from the 1950s, particularly in the river area. As an ‘alien’, the trees were the subject of a public eradication campaign in the Working for Water programme, which residents appreciated for the employment it offered.



and has a population of about 4 100.<sup>175</sup> Almost everybody at Pella speaks Afrikaans, but a minority prefer Nama and use that at home.<sup>176</sup> Most people belong to the Catholic Church; other churches include the Anglican, the Dutch Reformed and the Calvinist. Most people live in Pella town (*dorp*) around the old mission station. The streets are wide and generally neatly laid out. Gardens have green hedges, wind-pumps, sandy front and back yards. Residents say the town was 'greener' in the past, when more water was available per household from springs and wells, and gardening more common. Almost 80% of houses are brick houses, some are corrugated iron or wood frame and reed houses. Services were reported to have improved over the past eight years but less than 20% of households had a tap inside the house and the bucket latrine was the most common form of sanitation.<sup>177</sup> Relatively secure residence has been one of the benefits of living at Pella.

Some individuals live temporarily or permanently at stock posts scattered around the Pella land or on redistribution farms. Some 70 households (around 10%) are outside the main *dorp* area.<sup>178</sup> In the past, Pella residents were registered, but did not have a formal title to their houses. In the 1996 consultations about revision of Rural Areas Act 9, group reports supported that individuals gain title to their residential plot (SPP/IDS 1996: 34), now carried out by the provincial government.<sup>179</sup> A man (64) said that he desired no title to his house: 'They can't take it away, because I own nothing'. He meant, I think, that one cannot take the bare minimum away from anybody, an idea that recurred in residents' views the right to a livelihood. A woman (40) explained that she had experienced tenure insecurity after marrying an *inkomer* (immigrant) so she welcomed the right to settle freely and advocated title to

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<sup>175</sup> The number of residents at Pella has grown from 300 in 1890, to 500 around 1950 and 4 100 (SPP 2003), a figure that is somewhat uncertain as the census for 2001 gave 2 926 (StatsSA 2004b). Pella's population is about 40% of the residents in Khâi-Ma, the land area about 10% (Khâi-Ma is about 8 300 km<sup>2</sup>). The population density is about 5 per km<sup>2</sup>, five times as high as that of the municipality in general (NDMT 2000). The Census 2001 gave the racial distribution as: 215 African (7%), 2 695 coloured (92%), 16 white and no Indian for Pella Ward (StatsSA 2004: 1). Census 2001 reports a large increase in adult (15–64) males in Pella from 363 in 1996 to 840 in 2001 (by 130%), probably related to retrenchment from mines (StatsSA 2004b: 1).

<sup>176</sup> Crawhall (1997) wrote that some Pella residents reported that they 'were told that Nama was a useless language, that our traditions were nothing. Our history was hidden from us.'

<sup>177</sup> The number of houses that use electricity for lighting increased by more than 50% from 1996 to 2001, to 519 or 82% of houses. The number of flush toilets grew from 51 to 177 (28%), while bucket latrine was more common (261, 41%) and many had no toilet (108 or 17%) (StatsSA 2004: 7). The number of houses with water was 108 (17%), and the majority have water source inside the yard (462 or 73%). Others get water from boreholes (30), a community tap (9), the river (6) or a dam (6).

<sup>178</sup> Klinghardt (1982: xiii) lists a total of 61 households at stock posts in the different parts of the commons. Today 30 households were at the new farms (but often temporary) while between 30 and 40 were at the old common land (Group discussion, October 2001). The dwelling in the *meent* (a stock post or *veepos*) could come in addition to a house in town or be the only place of residence.

<sup>179</sup> Residents who paid for the surveying cost could obtain a *grondbrief* or title deed to their plot. In 2002 200 of these 670 allotted plots had been transferred under individual title (SPP, Meeting, September 2002).

houses.<sup>180</sup>

Pella land is rich in mineral resources but there was no organised exploitation at the time of my field study. A sillimanite mine at Swartkoppies was a major employer from 1954 until it closed down in 1998 and granite was also extracted from Pella land. Large employers today are 'Black Mountain' mine of Anglo-American Ltd. at Aggeneys and neighbouring Klein-Pella farms owned by Karstens Boerdery, where dates, table grapes and vegetables are cultivated at large scale. Residents also work as occasional farm labourers on white-owned farms.<sup>181</sup> Residents reported very high unemployment rates. The number of stockowners has grown from about 100 in 1995 to 160 in 2002 (The Farmer's Association register 2002).

Census 1996 found that 35 of 427 *households* had no income (8%), 301 households (70%) had an income of less than R1 000 per month. In 2001 the census found 627 households. Of these 138 households (22%) are given as having no financial income; 339 households (54%) had less than R800 per month, and 480 households (77%) less than R1 600 per month. Only 12 households had an income above R6 000 per month (StatsSA 2004: 7-8). A municipal overview of households that qualify for the 'equitable share'<sup>182</sup> shows that about 350 of 600 households have a monthly income below R 1150 (Pella Ward Office, 2001). The number of households who had an income only increased from 392 to 489 (by 25%), while the number of households increased by 46% and population by 63% (StatsSA 2004: 5) in the period.

About 1 200 *individuals* (69%) in 1996 and 1 600 individuals (55%) in 2001 had no income. In 1996 two thirds of the individuals who did have an income earned between R200 and R500 per month. Assuming that the income of individuals was the mid-value of the bracket in which they fall, average income in 1996 was R180 per individual (all). A few high incomes gave a highly unequal distribution of total income with 4% of individuals getting 42% of the income and 7% getting 55% of income.

In 2001 the number of individuals with an income had risen markedly from about 600 to about 1300 individuals (about 45% of all). Of those with an income, 294 (23%) had less than R400 per month, 1092 (83%) less than R800, and 92% less than R1600 per month. The

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<sup>180</sup> 'A person should have the right to your own this piece of land that your house stands on: it is our house, it does not come from the municipality, you must get the title deed to it, to really be able to call it your own' (Interview, November 2001). She said that this was currently far too expensive, 'you must have you land surveyed and pay a fee of R5 000 to get the title deed.' So she felt that she had to 'buy the land. Only then you own it, and do not pay annually anymore', and the cost barred her from getting what she saw as a more secure form of tenure.

<sup>181</sup> I witnessed people sitting early mornings in Pella central area waiting (often in vain) for trucks to pick them up for casual work on surrounding farm areas. Photographing a truck with a load of workers, on-lookers said: 'This is how we Pella people are being exploited in 2002, driven on the back of a truck, working all day for 25 Rand.' A neighbouring farm owner said that he normally picked up day-labourers in the Pofadder area, and paid them R40 to R50 (about 6Euro) per day.

<sup>182</sup> A nationally funded poverty relief programme implemented by municipalities and which guarantees poor households a small amount of electricity and 6 000 litre of water per month free of charge.

average income was R380 per individual overall and R850 per individual who had an income.<sup>183</sup> Income distribution was still highly unequal with 4% of individuals getting 39% of income and 8% cent of individuals getting half of total income. These are crude indicators, but suggest prevalent and deep income poverty in Pella, with many having no income, most earners getting very low salaries and very few being high income earners.

Public amenities in Pella include the modern brick buildings of the *Raadsaal* (Pella Ward Office), and the *Progress Hall* (for large gatherings), the library, an *Escom* building. Opposite this current centre of power is the former: The Roman Catholic Cathedral in the middle of the mission station compound, which includes Pella Primary School, which is a public school on the mission station compound and educates children up till grade 6, residences for the Fathers and Sisters, and a small date packing facility. These buildings were neatly painted in yellow or white, among date palms: Pella's Cathedral surrounded by the impressive Pella Mountains is a well-known tourist attraction. A hiking trail through the mountains has been promoted by the municipal office in Pofadder.<sup>184</sup> The *Kultuur Koffie Kroeg* and a cultural festival established in Pella by Christina Jannatjies (Ouma Toekoes, who sadly passed away in 2005) received praise by visitors. The only shop in Pella was previously owned by a Thünemann, the Bishop's brother, and is now owned by a former policeman who bought it in 2000 and says that he appreciates the monopoly it maintains (Interview 2002). The town has a *drankwinkel* (liquor shop) and four *shebeens* (after 1994, the local ban on sale of alcohol was removed), a café/dancing place, a police station, kindergarten, and a nurse's office, and a sports stadium. Transport is a problem for many, for example to get to the doctor in Pofadder or public offices in Springbok.<sup>185</sup> There are known cases of HIV/AIDS in Pella but according to the nurse and police inspector the disease is often regarded as stigmatising, and the HIV prevalence was not known. The nurse reported that alcoholism and associated violence is a major health issue. Young educated people often have to leave Pella to find employment. The number of individuals with secondary education increased from 328 in 1996 to 720 in 2001 but the 15 individuals who had higher education in 1996 had left by 2001 (StatsSA 2004: 2).

## 10.2 Pella history

### 10.2.1 'We yearn for the things of our grandfathers'

Pella was made in a history of conquest and struggles over resources in an arid

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<sup>183</sup> The legal minimum wage in South Africa was R650 at the time and the old age pension R620.

<sup>184</sup> A neighbouring farmer told that Australian visitors 'nearly went crazy when they saw this land: Those mountains were breathtaking for them. Many people want to come and walk in these mountains, to see the wild, to sleep in the veld' (Farmowner, Pella, Interview, March 2002).

<sup>185</sup> When asked in 2001 how they got to work or school, 55% said 'not applicable', 800 said by foot, 300 by bus, 80 as passengers in car/minibus/taxi, 60 by other means (which must include donkey carts), and 30 by car (StatsSA 2004: 4-5). A resident once remarked that of the *bakkies* (farm pick-ups) you see in Pella not a single one is new: indicting lack of economic growth and enterprises.

environment. In this *dorsland* (thirstland) there were few water points before boring of wells in the 20<sup>th</sup> century but *Kamas* or *Kamasfontein*<sup>186</sup> was a place of natural springs and therefore strategic location. A retired farmer had only gone to school for one year before being sent to work in the mines at the age of ten, saying life was hard, as the result of a history of wars and land dispossession.<sup>187</sup> He had a historical vision of a land shared by Nama, San and groups of mixed descent, followed by loss of land to settlers. 'We have a lot of history to tell, as the old people told us.' He defined land as 'the lost land':

We were talking about how we lost our lands: *for here land means our lost land*. [hoe ons die gronde verloor het: *terwyl hier staan as grond onse verlore grond*]. So at the moment, Sir, peace may come to South Africa but for these lands. Here is no love and here is no peace. This land made you free [hierdie grond wat vry gemaak het], for when the Lord Jesus said, 'land, there must be land', then there was land. And today we feel so heavy and bitter for the things that are happening to us because we cannot move forward and up. We who did not attend school and did not have a share in things, *we yearn for the things of our grandfathers, what they have told us about* [verlang vir dinge van ons se oupas, wat hulle vir ons vertel het]. (Pella, retired farmer, (b. 1927), November 2001. Emphasis added)

He recalled a closeness of indigenous and the first immigrants, a time of freedom and a better life before new waves of immigration: 'My grandfather who came from down country found the Nama people here and the wild Bushmen ... the Bushmen ruled here. ... Here, as Grandfather told us, come what may, the world was free. There were no farmers, no whites and no blacks'. He said that Bushmen and Nama 'played the same role. They were one, among Nama and Bushmen'. He praised the closeness to the land:

These people were nature people. The people were so much nature people that when the lizards stand up, or if the owls howl hoarsely or if they see the star standing like this, then they can tell what will happen, as we were told by our old people. If the moon stands like this, then it will be so. If it rained and a rainbow appeared then they would say there will be more rain or it will be hard or it will be a gentle rain. All this has died off.

Now these are the things that today we have to buy, such as water, things that the Lord did not sell. There is no such thing that the Lord has said that what is on the earth must be sold, but everything is now sold ...

For the major thing is land. Land, Sir, is life, and water is the first thing, for without water you cannot live. Now if you have to buy water and you cannot pay for it, then you will perish, is that not true? These are the things that hurt us so. Our descendants have no privileges. They have nothing for we have nothing for them. This is a big thing, it is not a small matter. As I said, if things continue to go so wrong, then there is no love here, only things that conflict with each other.

And then the parties came, and got stronger, and it has hurt us. In Pella there is no love and there is no peace, and that has caused us to be stuck. You do not see this among the whites: they are free, they have their farms, their lands. But it should have belonged to the people who found it here. *They* ought to have been free, they ought to have been set free today. That is the story, Sir. Today, we should have been running things together if I have got my understanding right. (Pella, retired farmer, November 2001)

<sup>186</sup> An elderly farmer listed the springs of Pella: Kouroe, Namies, Aggeneys, Gamsberg, Dabenoris, Rosynebos, Eenfontein and Achab. They indicate how Pella has been, 'hoe die Pella gewees het' (Interview, November 2001). The name of the municipality, Khâi-Ma, recalls this name and origin.

<sup>187</sup> This farmer had been active in the first phase of land reform after 1994 but was now no longer participating in Trancraa and the committees. We spoke at group discussions about Pella history in November 2001 and March 2002.

Living off the land was consistent with God's intentions but undermined by conquest that triggered conflict, land losses and commercialisation that caused the scarcity and inequality today. He said that 'the Bushmen fled to the desert ...and that is how Pella started. So then the church took over, and when I was young it had control'. He presented the history as materialised in the unequal property rights to land, the vulnerability of subsistence, having nothing to pass on and lack of freedom. Towards the end of his talk he placed Pella history in its regional, colonial context, summing up the South African history of conquest and genocide, a history that created a new meaning of land as an exclusive possession rather than a shared space. Yet, then land became the cause and base of resistance:

Pella people had the land and *the people who came, came to take the land away*. It was their property, their inherited land.<sup>188</sup> ... The people arrived in 1652 and came out from the Cape. They came with stock and took the land, and with sugar, tea and even tobacco. They first took the land in the Cape. They asked the old Bushman for his land, and he took some with his hand and gave it. Then he [the newcomer] said 'no, he did not want land in *that way*'. So he bought a young ox and cut himself some riems [strips of leather], and then he said he wanted it like *that*, and *then* the Bushman gave the land. And then he lined up the Bushmen and shot them dead with a cannon, and so the others ran away. (Look, people at that time did not have guns, only the cannon.) And then they told the people: 'Look, you have to move away'. ... And that is how I got the history from Grandfather. The people who came and fought against apartheid started at the time when land was taken away from the people. And that is how they overcame it. We were not given all dates but were told this. Apartheid ended in 1994. So you can imagine, from 1652 to 1994, the apartheid<sup>189</sup> law existed. (Retired farmer, Pella, Interview, November 2001. Also quoted in Chapter 1)

### 10.2.2 Constructing Pella as a mission station

#### *Failed claims for government protection*

The land that grandfathers told about was already affected by immigration and mission. Some settlers achieved government 'grazing licenses' to *Kamasfontein* as early as 1776, when still outside the colonial boundary. The London Missionary Society made the first station in the area in 1812.<sup>190</sup> Missionaries tried to induce pastoralists to settle but gave up in 1825 (Klinghardt 1982: 30).<sup>191</sup> From 1840 the Rhenish Mission Society again tried to make a settled community, encouraging people to cultivate, but there was not enough arable land and people continued to move between northern Bushmanland and Namaqualand in search

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<sup>188</sup> 'Pella se mense het die grond gehad en die mense wat gekom het die grond kom weg vat. Dit was hulle eiendom, hulle erfgrond.'

<sup>189</sup> He and other discussants also identified the 1940s as the time when 'apartheid' came in through the church, so the word has two meanings: the long history of racist dispossession and the shorter history of its more intense enforcement through law from the mid-20<sup>th</sup> century.

<sup>190</sup> Having been forced to flee Warmbad north of the river, they named it Pella after the Palestinian town that was once the refuge for persecuted Christians and situated across the river Jordan.

<sup>191</sup> For this background section I have relied to a great extent on Klinghardt's (1982) thorough Master thesis and social and historical analysis. I also draw on a few resident's accounts. In November 2001 and March 2002 I had group discussions with six Pella elders, who noted down major events in Pella history (see Table 14, page 171).

of pasture. Land was 'steadily whittled away by White settlers and graziers' who entered in increasing numbers from the 1840s' (Klinghardt 1982: 31) but the Pella area was controlled by the Nama until around 1850. In 1851 a Nama leader, Kaptein Witbooy, wrote to the Cape Governor to ask that 'the abovenamed place [Pella] may be granted to me and my community as otherwise we shall have to become vagrants' (Kaptein Witbooy 1851), sending the letter with a missionary. The attempt to obtain colonial government protection against settlers was unsuccessful, and Witbooy and other pastoralists were forced to move north (Klinghardt 1982: 32).

Rhenish missionaries protested against settler occupation of land and in 1859 applied to government to survey lands for Pella and Steinkopf. The government responded that it was ready to recognise land 'to which the communities had just claim, namely, individual titles to arable lands, with commonage under certain regulations'<sup>192</sup> and two years later instructed the Surveyor-General to prepare Certificates or Tickets of Occupation that would vest land in the Civil Commissioner of Namaqualand and the missionaries 'in trust for the natives'. However, this was not done and a state of conflict persisted. The Civil Commissioner in practice supported the claims of settlers but in 1863 investigated and decided to recognise the rights of about forty applicants whom he saw as 'respectable and deserving Bastards' (that is, residents of mixed descent) while rejecting those who 'led only nomadic lives in the vicinity of Pella and made no sizeable contribution to the economic well-being of the community at the Mission Station' (Klinghardt 1982: 35–36). Land rights were granted to those who conformed to a discourse of civilisation and economic development.

While missionaries had claimed an area of about 276 000ha on behalf of Pella residents (which included all the water sources in northern Bushmanland and would give effective command of twice the area) the Civil Commissioner proposed to reduce it to about 130 000ha. This was almost three times the area eventually granted, but still seen as too small to sustain the community (Klinghardt 1982: 36). Pella continued to receive new immigrants who had been forced to move away from land further south, causing pressure on land and war between dispossessed Nama groups and recent settlers: in 1868 the Pella settlement was attacked and destroyed. Burger commandoes and the police later trapped and wiped out groups of indigenous people in the Gamsberg. The Rhenisch Missionaries decided to give up claims to Pella and the government started dividing the land into 6 000 to 12 000ha lots leased to stock farmers. This opened the way for 'settlers to take over permanently the lands and springs they had for so long coveted, and for the Roman Catholic Church to establish itself on Pella' (Klinghardt 1982: 39–40).

#### *The Roman Catholic Church: the holder of Pella land for a century*

The Roman Catholic Church had worked in Namaqualand from 1865 and had been looking

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<sup>192</sup> (Klinghardt 1982: 33. Quoting Mellvill. 1890: 4).

for a site in Bushmanland that could be a base for expansion into Greater Namaqualand. A priest came to the Pella area with an English-speaking farmer and on behalf of settlers he applied to the government for a mission station in 1874 and received a Certificate of Occupation to 12 500 hectares after only two months (Surveyor-General 1874; 1881).<sup>193</sup> In Klinghardt's view the government favoured the Church for its disciplined mission work, which was integral to colonial power (Klinghardt 1982: 43, 52). With donations from France, Father (later Bishop) Simon headed the construction of the Pella cathedral in 1875, using local materials and labour. However, with the few people settled at the station still had to trek to other areas to survive but the government turned down requests for more, partly due to pressure from settlers (Klinghardt 1982: 46). Only in 1881 did the Commissioner of Crownlands survey and grant a Certificate of Occupation to the Roman Catholic Mission Station for an area of 56 340 *morgen* or 48 300ha (Surveyor-General 1881). The Certificate granted a revocable right of use and administration to the Church but protected government rights of access, rights to minerals and to any improvements without paying compensation. The Certificate did not indicate that land was held in trust for indigenous people, but residents have stressed formulations about the rights of church followers. The area of the 1881 Certificate included five farms that had previously leased by government to settlers who probably saw the Certificate as securer and cheaper than annually renewed grazing contracts with the government (Klinghardt 1982: 47-48). Father Simon wrote that 'Pella, the desolate and inhospitable has been transformed into Pella, the haven of rest and consolation' (Simon 1959: x). This 'haven' was partly implemented through the hard work of generations of nuns, including pioneer Sister Francoise-Marie who offered medical treatment, food aid and education (Thünemann 1975). The missionaries document a remarkable persistence in the service of Pella.

While its tenure of land was revocable, the Church gained dominion over land as the basis for granting permits and privileges to those who accepted its position, a base for the social construction of 'land' and 'community'. Klinghardt wrote that 'the Catholic missionaries were now able to set about creating a new community according to their own ideas' and that support from the Church made 'the position of the White settlers at Pella ... virtually unassailable for the next hundred years', while other groups 'were reduced to a position of complete social, economic and political inferiority because the natural resources vital to their survival had passed into the hands of the White settlers' (Klinghardt 1982: 48). The stronger position of settlers of European descent made Pella different from the areas in Namaqualand proper. While people of mixed descent were in a subordinate position, Father Simon praised their work ethic and skills in racist terms: 'The Coloured are by far the best race ...the

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<sup>193</sup> Three other mission stations in Bushmanland that did not get legal recognition eventually disappeared (Amandelboom, Schietfontein and De Tuin): 'here European penetration was too determined and took place before the missionaries had dug themselves in' (Marais 1939: 85).

mixture of European and native blood results in a combination of intelligence inherited from the white man and agility of the Hottentot' (Simon 1919: x).

A group of elderly residents did not mention the Certificates, but rather that 'white farmers (*wit boere*) got farms' in 1877 (see Table 14, page 171). A resident said that first people had the land (San, Nama and Baster pastoralists), then government gave it to the Church, and then 'The Church holders gave the farms to the whites so that they should come to the Church and their children should come to school. And that is how they got the land. This proof of sale will show you that they got the land for free. They did not buy the land' He said that it happened seven years after the church was completed in 1875, when that 'Bishops came to Pella' and went on horseback to scattered *boer* farms: 'And so the father started a congregation and baptised people. From that time they moved closer to the Church because the Church gave them their farms' (Pella elderly farmer, male November 2001). An implication was that the *wit boere* did not have proper ownership: 'When the landowner arrives and says, they must take their jackets and go, then he must go, for the land was not legally bought' [by the white farmers]. Two elderly Pella men said that 'all the land around here used to be Pella land.' White farmers got *pag plase* (lease farms) from the government: 'Arouab to the van Huys, Eyties to the Connors, Klein-Nous to the Connors, Sandfontein next to Klein-Pella to Niehmöller.' They held that Pella should get back land: 'It is all *Pella grond* that white farmers are now sitting on: Arouab, Witsand and Klein-Pella, Paul se Put, Khawas, Khoeboeb. It was all Pella land' (Interview, November 2002).

### 10.2.3 Regulations in land governance

Land use regulations have a long history at Pella and were for many decades dominated by the white land-holding families who had let their leased farms be incorporated in the Certificate of Occupation from 1881. In 1927 the Bishop established a local council with a set of written regulations (Klinghardt 1982: 89). It had been proposed by the white farmers, partly to prevent the application of the 1909 Mission Stations and Communal Reserves Act to Pella, which they feared could threaten their exclusive rights but also to meet demands by other groups at Pella. A particular set of rules, the 'Regulations to be Observed by All Living on Pella Mission Ground', concerned the original mission station (Simon 1927a).<sup>194</sup> The 1927 'Rules for the General Government of Pella' stated that the land was 'given as a farm to the Roman Catholic Church' and that the 'Head Missionary' had the right to grant and withdraw rights to settle, use pastures and water, build houses or engage in trade and to enter contracts with outsiders (Simon 1927b: Rule II.6). Land governance was based on six units made up of the five loan farms plus an area by the river inhabited by other groups. 'Each inhabitant shall have a fixed place of residence. The inhabitants shall not be permitted to

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<sup>194</sup> Users must pay annual grazing fees (per head of stock) for up to 400 small and 40 large stock (above these thresholds, special approval was required and the rate was ten times as high). Outsiders could only be admitted by the head missionary and against payment, with reduced rates for Catholics.



roam about at will with their flocks but shall remain in these districts, with an exception being made only in time of droughts' (Simon 1927b: Rule III). The council consisted of 'five Europeans and five natives' presided over by the head missionary. Six of these were the leaders of the districts (five white farmers and a representative of residents by the river), the other four were elected by secret vote, and would by implication have to be 'native' (Simon 1927b: Rule IV). Although not representative, there was an idea of a management system that involved different racial groups.

Table 14: Selected events in Pella history (as noted by elderly residents)

Year	Event or comment
1825	Jakobus van Neel was the leader at Kamasfontein (later Pella)
1847	Dirk v. Neel - missionary
1868	Dirk v. Neel is murdered by Bushmen
1868	The Damara people are still running naked in Pella
1868	Bishop Simon starts mission. People are proselytised.
1875	Building of the church is completed
1877	White farmers get farms
1886	Father's residence built
1899-1903	Anglo-Boer war. People from Pella get killed.
1914-	First World War. People are mistreated.
1914	Jan Visser buys Witsand – gives half to his son-in-law, Pieter van den Heever
1929	Benade (police man) gets Klein-Pella
1932	Bishop Simon dies and Bishop Vasse takes over
1933	Klein Pella becomes inhabited.
1935	People's arms are taken away from them.
1940	The Witbank channel is constructed.
1940	Father Eich takes over. Lives at Onseepkans. Parish council consists of 10 'Corporals' (5 whites, 5 coloured)
1940	Church holds meeting. Joey de Manco (a Baster) comes to Pella
1940s	Beginning of apartheid in the church.
1940s	Klein Pella is sold for the debt of £800.
1945	People who fought in World War II ask to get Witbank.
1950	Pella is 48 000 morgen in area.
1952	First motor car in Pella – belonging to Shop owner Theunemann
1953	Bishop Theunemann says he is the boss – 19 brown people walk out of meeting. Brown people have no rights in Pella
1954	People in Pella are turned into 'coloureds'. Swartkoppies mine is started
1957/8	Witbank people are chased away from their land by a D.S. Visser
1958	Whites and coloured farm together in Pella. Brown people say it is their land.
1958	Lanka (a white) says that all coloured must go across the river.
1960	A surveyor draws up new boundaries. The boundaries are changed. Pella gets smaller (The Haaskooitjie) Lime is still burnt at Pella. The Pound is replaced by the Rand.
1960-61	The bridge at Onseepkans is built.
1961	Passports, Poll tax
1972	People's livestock are destroyed by whites. No law to stop it.
1975	Roman Catholic Church hands over land to the Department of Coloured Affairs
1975	Five coloured form the Advisory Council, with a coloured Superintendent from Upington
1976	David Curry buys land from Pella (illegally) for R3 000 for water pipeline for the mine.
1988	The Advisory Board replaced by the Management Board.
1992	The Management Board replaced by the Transitional Local Council.
1994	First democratic elections

Source: Group discussion (History workshops) with *Paul Waterboer (b. 1927)*, *Dirk Waterboer (1920)*, *Maria Kraai (1912)*, *Rosina Bezeudenhout*, *Dirk Waterboer II (1919)*, *Stoffels Waterboer (1929)*. Only March 2002) In *Pella Progress Hall (November 2001)* and *Ward Office (March 2002)*. Points were given verbally, noted on cards by the interpreter and displayed on the wall in chronological order.

#### 10.2.4 Making a 'Coloured Reserve'

Mellvill, the government surveyor, had found about 30 families (300 individuals) living at Pella (Mellvill 1890: 16. Para 97) and noted that *trekboers* of European descent and others benefited from the mission station. Against his inclination, he was ready to accept the holding of land in common (Mellvill 1890: 17, note 101). He suggested a separate area for *trekboers*: 'I am of opinion that a reserve of this kind should be made, as the nomadic white residents in the country are sadly in want of some civilizing influence, such as that afforded by a village, with its churches and schools, places of business, etc.' The idea of a 'reserve' with special facilities for whites was to some extent realised with the establishment of Pofadder,<sup>195</sup> to where public institutions were gradually moved in the first decades of the 20<sup>th</sup> century. Bishop Simon reported that in good seasons thousands of springbok used to come to the plains at Pella, where they were hunted for meat (Simon 1959: 106-7) and according to one writer, a failed or abandoned policy to protect the game also played a role when land was privatised.<sup>196</sup> Government started allocating farms under private individual ownership from 1908, a process that continued till the 1960s (SPP/Pella Grondkomitee 1996); from 1927 to 1958, 130 boreholes were drilled in the area (Louw 2000).

In 1938 heads of 'Boer and English' families tried to gain full ownership to the farms they had once let be incorporated in the Pella mission land, arguing that they were the original holders of the land (the 'pioneers') and that their exclusive ownership was required to curb overgrazing and destruction of the veld.<sup>197</sup> Claims to land were justified in terms of environmental protection but did not fit the scheme of things now anticipated by government. In the 1940s the Church was put under pressure to relinquish power to government. The increased emphasis on race in the second half of the 20<sup>th</sup> century included concerns about protecting and developing citizens defined as 'coloured'. A report by an inter-departmental committee reported on 'matters affecting coloured persons on coloured mission stations, reserves and settlement' (Union of South Africa 1947) expresses sympathy for the poverty

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<sup>195</sup> Named after the Nama leader Claas Poffadder who controlled the area and reportedly accepted a settlement of white settlers and the London Missionary Society in 1875. 'They abused the trust of the Nama people', said retired Father Mallery, Pella (personal communication, January 2002).

<sup>196</sup> In the 1890s, a large part of Bushmanland was a protected 'game reserve' but during droughts the state provided rifles to poor settlers to avail themselves of meat from the mass-migration of 'trekbokke'. Steenkamp wrote: 'The Bushmanland nature preserve was protected by a series of explicit laws which laid down in great detail what could be done and what was forbidden. That much having been accomplished, virtually nothing was done to see that the laws were enforced. Consequently the Bushmanlanders did pretty much as they pleased.' Once the last game was gone, government abandoned the game reserve and increased the allocation of farms under leasehold or freehold (Steenkamp 1975: 66-67, 92).

<sup>197</sup> 'Give us pioneer families, Boer and English, the lands with which we helped the Church. Let the other English people and the Germans keep their houses and gardens in Pella (village), and the Church the land it had before we gave our farms. We shall look after the Coloureds who have lived with us and our parents, but let the rest live on the old mission lands and in the 'River' district. ... Only if Your Lordship consents to give us our lands in this way can we hope to stop the large numbers of sheep and goats from destroying the veld and so impoverishing us and our children...' (RCMP/9. Petition 8 July 1938. Quoted from Klinghardt 1982: 93).

and lack of adequate land resources: 'if everyone is supposed to make a living out of the land, most of these places are now completely over-populated. If sufficient land must be given to each person to enable him to make decent living, many will have to be removed. Fortunately, this state of affairs has already compelled many to seek outside employment' (Union of South Africa 1947: 8). Development should be two-pronged: 'in the improvement of both, i.e. agriculture and labour or occupations, lies the salvation of the people' (8). The report advocates the fencing of the Namaqualand Rural Areas, noting that, 'the Coloured in Namaqualand have reason to complain. The *trek-farmer*, mostly from Bushmanland is never satisfied unless he is trekking, whether it rains or shines' and that they 'labour under the delusion that the Reserves also belong to them because these are Crown land'. It said that coloured residents saw Bushmanlanders as their 'farmer-neighbours' who should be given assistance (Union of South Africa 1947: 55). Thus, new segregation efforts were partly motivated by the goal of protecting residents as well as curbing sharing practices and movements. In the report Pella is defined as a 'Coloured Reserve' and treated under the heading 'Mission stations on Crown land not subject to the Act' (Union of South Africa 1947: 46–47). The authors stress that Pella is 'Crown land' with a revocable permit, and also claims that the Church wishes the Government to take over the administration of Pella in order to 'confining itself to spiritual work, the care of neglected children, orphans, and aged helpless Coloured persons.' However the Church wanted the title to the mission station itself and irrigated land by the river. The committee lists 15 European families and 60 coloured (600 individuals) at Pella, a school with 160 pupils and four coloured and two European teachers. The report asserts that the 'position in regard to overstocking is serious'<sup>198</sup> and that 'some of the inhabitants will have to move out'. The Committee proposes that 'the position would be eased if the few well-to-do Coloureds are taken over by the Department of Lands and placed on their settlements near Mier. The Europeans should also be removed from Pella and should be given assistance to make a living elsewhere ... farmers such as the Hollenbachs should be helped by the Department of Lands to obtain land' (Union of South Africa 1947: 47). The Committee thus renews Mellvill's pledge from sixty years earlier to support the white settlers at Pella. The rationale is first one of sustainability and only at the very end of the report does the Committee mention new policy requirements: if new legislation is applied to Pella, 'the Europeans cannot be governed by the same law as the Coloureds, and for this reason the Government should assist in placing them elsewhere' (47). The Committee's main recommendation is therefore that Pella's Certificate of Occupation should be withdrawn and that 'the settlement be granted to the Coloureds on new terms; that they be brought under the new legislation and have an Advisory Board' (Union of South Africa 1947: 47–48). Thus,

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<sup>198</sup> It found 150 cattle, 750 donkeys and 22 000 small stock. Nine European families owned a total of about 6 200 small stock and 50 of the 60 'Coloured' households owned livestock, an average of about 250 small stock each (12 500) (Union of South Africa 1947: 46-7).

racial segregation is presented as a solution to the problem of overstocking. When planning to move people, the Committee disregards land rights, ties to kin and place, and rights to decision-making, while racial classification determines where surplus farmers should be moved and their entitlement to public support. Discourse of paternalist protection and development is used to justify a stricter policy of segregation, with common disregard for individual rights of Pella residents of all groups.

Elders noted that ‘apartheid came in through the church’ from around 1940 when they were told to sit at the back and white residents in front. The bishops ‘got vicious’ and then the people did too, one elderly resident said, and expressed responses of protest and resignation: ‘In 1953 the Bishop called a meeting with the coloureds and told them that he is the boss – he and the white people – and that they [the coloured] have no rights. Nineteen people got up and walked out of that meeting. We did not agree. However, we left it at that, and stayed on’ (Pella elder, male, March 2002). Around 1957 Father Mallery came to Pella and found that ‘apartheid was in full swing’, though white and coloured families still lived together and sometimes intermarried. He said that he had felt like ‘instigating the Non-Europeans against the government’ but became central in Pella governance for many years: ‘I was the *raad*’, he said.<sup>199</sup> He said that at the time most residents were engaged in farming and moved around according to where there was grazing, primarily to the seven other fountains of Pella: ‘The old pastoral way of life was still alive. People were free as the wind. There were no taxes, no clinic and no doctor.’ Population started growing partly because of the Swartkoppies silimanite mine established on Pella land in 1954 and partly due to apartheid resettlement policy. Pella was again the place of refuge: During apartheid years ‘Pella was opened to all those who came to work ... all survived on Pella’ (Father Mallery, personal communication, January 2002). The population grew from about 500 in 1950 to about 4 000 in 2000. The economic base was shifting from farming to mining.

Elders said that in 1954 they ‘were turned into coloured’ (‘Mense van Pella word “kleurlinge” gemaak’) (Group discussion, November 2001). A man remembered the two major life events of being married and redefined: ‘They came here in 1954 from the Cape and made us all Cape Coloureds, for all the Namas and the Bushmen were already dead<sup>200</sup> and all the Damaras<sup>201</sup> were made Coloureds. Not a single one was exempted. In 1952, I got

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<sup>199</sup> Father Mallery (82), personal communication, January 2002. Sent by a French missionary society, he had arrived in South Africa from France in 1951 at the age of 32, came to Pella some years later and stayed ever since.

<sup>200</sup> However, two Nama speaking men in their sixties stressed the continued relevance of Nama identity. They came to Pella in the 1950s and started working for the owner of a mine close to Pella where Namas were most severely abused: for example there were different salary levels for Namas (the lowest), coloured and white employees. Their employer called them ‘hotnots’ (Afrikaans for ‘hottentot’, and strongly derogatory) and told them: ‘Your brain is as short as your hair: coloureds have longer hair and better brains and work better.’ They said, ‘we just believed it’ (Interview, Pella, November 2002).

<sup>201</sup> In Pella used collectively about black groups from Namibia. Note the observation below that some were ‘chased away’.

married and in 1954 we were declared Coloureds' (Retired farmer, November 2001). Enforcement of racial segregation threatened residential and land tenure security. An elderly woman talked about 'Langa's law', which may aptly convey the experience of being at the hands of officials. She had a dark complexion but said:

We were all burgers and we chased the Damaras away. But there was a white man called Langa [an official]. Langa's law was that black people must leave the land permanently, and even if you had a yellow [light complexion] or whatever colour man, you had to leave. I had a yellow man. I refused to leave. Langa did not care, he said that we must leave or he will come and evict us himself. Luckily he did not come and evict me. (Group discussion, Elderly woman, March 2002)

These statements bring out how policy tried to homogenise, and yet reinforced conflicts, in a heterogeneous community. Some residents could use the new politics of race to get white and black residents expelled ('chasing the Damaras away'). Elders noted for the year 1958: 'coloured people say it is their land' (*'bruin mense sê dis hulle grond'*) (Table 14). The proportion of community members regarded as being of European descent decreased from 65% in 1895 to 18% in 1950 and 10% in 1960 and below 1% in 1980 (Klinghardt 1982: 57). The departure of white farmers laid the ground for physical and social distance between owners of private farms and Pella farmers who remained on the church or state-claimed 'communal' land. An elderly farmer discovered the mission station as 'coloured land'. Before 'the white man and the coloured farmed together. But then the coloured did not see any chance for that anymore ... Then the truth came out that the land belonged to the coloureds. It is not the white man's land. Most of them came running (oorlopende) from overseas. The white man is from Holland. They came in 1652 and found the Nama here' (Retired farmer, male, November 2001, quoted in section 10.2.1). However, he continued, the 'coloured reserve' did not restore original ownership for it 'gave the land only to us [in Pella ... but this land belonged to the wild Bushmen.' Furthermore, elders claimed that boundary changes continued to reduce Pella land, for example that in 1960 'a surveyor draws up new boundaries... Pella gets smaller: The Haaskooitjie' ('the little hare cage') (Group discussion, November 2001. See Table 14). Nevertheless, the area indicated in from the 1881 Certificate (48 300ha) was apparently the one still used.

However, Pella residents experienced land losses due to changed practices. All livestock herders, whether 'private' or 'communal', depended on scattered rains and grazing in an open landscape but the meaning and practice of private property changed under the impact of national policy. Many neighbours fenced their farms in the 1950s and 60s, which restricted the access of Pella farmers to surrounding land. The owner of a farm in the area explained that in his father's time (the 1940s) 'there were no fences. They took their stock, they went to Upington, they grazed there, and they grazed in Namaqualand. There were no boundaries so they grazed everywhere'. In 1960 his father 'erected the fences and stuff so other people can't go through here', which he found well justified: 'I mean it's his farm, it's his

property. This farm was terribly trampled for the water – it is the only water resource in the area so a lot of animals went through here. (*Hierdie plaas was verskriklik uitgetrap van die water. Dus die enigste water in die groot omgewing*)' (Farm owner, Pella area, October 2001). He said that his father was able to significantly increase his herd size after that. Therefore, residents stressed these changing practices in addition to the earlier allocation of farms under private ownership. The elderly farmer quoted in section 10.2.1 summed up the marginalisation and poverty associated with loss of land and lack of information and, as found elsewhere in Namaqualand, mentioned stories of maps that testify to the greater areas once controlled by residents and sustain hopes about restoring them:

Pella got smaller. The church and Weidener controlled it [manager of the Swartkoppies mine on Pella land]. The farms and everything else had been taken away from us by then. They chased us into the mountains. You did not know what was happening at the time. You were isolated from everything. That was when one of the farmers got on a horse and rode to Dabenoris to tell him about the map.<sup>202</sup> He represented them and went to see a lawyer. He consulted a white man, and that is why we were kept in the dark. From what my grandfather told me, that map was kept a secret until 1994 when we were enlightened. All the details have not yet been revealed but there is some hope. (Retired farmer, Pella, March 2002).

#### *Modernising land management*

Pella was declared a 'Coloured Reserve' in 1973 and elders note that 'the Church gave the land to the Department of Coloured Affairs' while it retained ownership of the mission station in Pella town and an irrigated plot by the river. From 1974 Pella was governed by the Administration of Coloured Affairs assisted by an Advisory Board (*Advies-raad*).<sup>203</sup> In 1976 Pella land was appropriated for a water pipeline from the Orange River to the Black Mountain mine at Aggeneys and Pofadder town, a deal people remember with bitterness.<sup>204</sup> The Rural Coloured Areas Act 24 of 1963 provided for a top-down regulation of livestock management and land use. Government had seen investments by the church as inadequate for modern town planning and rangeland management, and tried to force sub-division of land, stock reductions and carrying capacity planning through against the resistance of Pella farmers. Klinghardt (1982: 193–224) documents in detail how authorities and farmers clashed over the implementation of this legislation. In 1976 the Advisory Board criticised the development plans, particularly stock controls and subdivision of grazing land, but suggested a

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<sup>202</sup> Referring to an old map possessed by the Bishop (*Die kart van Pella*): 'There is a map that indicates when and how Pella was started ... Now why will the Bishop not tell people the truth so that the community may know where it starts and ends? ... A lot of things were given on that occasion [the granting of the Certificate 1881] and something was obtained but it is oppressed. The map is probably in Pretoria and it is currently being sought for.' Exclusion from decision-making and knowledge caused bitterness and suspicion and remained a theme in the Trancraa process.

<sup>203</sup> Act 24 of 1963 required either an Advisory Board (with less power) or a Management Board.

<sup>204</sup> The decision was forced through against the opposition of Pella residents. After failure to reach agreement during meetings, officials presented council members with a letter stipulating the price of R3 000 for the 33ha land, confirmed in a servitude (Notarius Publicus 1981). Benefits for Pella included new pipes, water tanks and taps and a reduced rate for drinking water but a Transformation Committee member studies the issue and noted that the result was that 'Pella land was sold and the water line brings free water to Black Mountain Aggeneys' (Diergaardt 2002).

compromise of accepting the plans in return for getting more land. A public meeting in May 1977 became a confrontation between about three hundred residents and bureaucrats from the Administration of Coloured Affairs. The main official said that the government wanted to introduce camps, boreholes, windmills and dams, pens, dipping, medical treatment and facilities for loading livestock,<sup>205</sup> but could only assist people who were 'seen to be making progress'. He argued that Pella pastures were being destroyed by overgrazing, owing to the presence of 22 000 heads of livestock on land that could only carry 7 000. He argued that 'the main problem facing the Administration was the large number of animals on Pella, and therefore the numbers of small stock and large stock had to be drastically reduced. As far as he was concerned, seven or eight fulltime farmers<sup>206</sup> could make a reasonable sort of living on Pella' (Klinghardt 1982: 198–9). Pella residents argued that his field observations did not prove that degradation was occurring and said that roads and allocation of land for mining played a role in addition to livestock. One farmer said that only 7°000 heads of livestock (a third of the current stock) did not appear to justify the level of investment proposed by the government. Several asked government to provide additional land, for example nearby state farms but this was rejected for 'it was not the policy of the State to give just anybody a bit of ground, neither was it under any obligation to do so'. Furthermore farms were far away and 'he had absolutely no guarantee that it would be used and cared for in the proper manner' (Klinghardt 1982: 200). The administrator asked the meeting to approve the development programme but this led to protests and official were forced to leave through an angry crowd. For a while the Advisory Board insisted that it would only accept rangeland development if government provided more land. However, the Administration demanded full implementation and in 1978 forced the Advisory Board to accept it, dictating the minutes: 'The Advisory Board accepts unanimously the planning of Pella, and confirms also that this decision may not be withdrawn again in the future' (Official Minutes 31 August 1979, quoted in Klinghardt 1982: 222). Thus, top-down planning and corruption were key elements in Pella's short history of government administration and modern rangeland management was introduced with disregard for political rights, land rights and livelihoods.

### 10.3 Democracy and land reform

#### 10.3.1 Changes in local politics

Elders noted the democratic election in 1994 as the last event in their historical overview (Table 14). In 1995 Pella residents were able to elect local government leaders for the based on non-racial legislation and from 1995 to 2000 a Transitional Local Council with six members governed Pella. In the 1999 national elections a journalist toured Namaqualand

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<sup>205</sup> Farmers remembered and appreciated the investments in infrastructure in the 1980s (Interviews, 2001 and 2002).

<sup>206</sup> In 1977 there was about seventy-five stock farmers, forty six registered (Klinghardt. 1982: 15-16).

and ended up by casting his vote in Pella and argued that voting ANC or National Party (NP) was 'a two-horse race in a one-horse town. I have no doubt about which horse was the winner.' (Matshikiza 1999) 'One horse town' was not an accurate characterisation in a place where at the time the Transitional Local Council had three ANC and three NP members. However, Matshikiza was not wide off the mark about the national elections: The ANC won clearly (62%) over the New National Party (NNP) (33%) and the Democratic Party (DP) (2%).<sup>207</sup> In 2001 Pella became integrated as a *wyk* (ward) in the Khâi-Ma Municipality. In the 2000 municipal election the ANC got 57% against the Democratic Alliance (formed of NNP and DP) with 43%. In the 2004 national elections the ANC (68%) again performed well against the Democratic Alliance (30%).

### 10.3.2 The 1996 consultations about revision of the Rural Areas Act 9

In 1994 representatives of Pella participated in the Namaqualand Land Convention and presented a land claim for 484 000 hectares of the old Kamasfontein area which included the eight permanent springs at Kouroe, Namies, Achab, Gamsberg, Aggeneys, Groot Rosyn and Dabenoris and Pella. The claim was widely regarded as untenable under the Restitution Act of 1994 because land was lost before 1913 and because South Africa did not acknowledge aboriginal land rights (SPP 1995; SPP/Pella Grondkomitee 1996: 3). A Pella resident also said in 2001 that 'we did not want to wake sleeping dogs.' Instead, in 1996 the first land redistribution took place through the Municipal Commonage Programme, supported by SPP, the provincial DLA and facilitated by a local Land Committee (section 10.3.3).

In 1996 the DLA and the SPP carried out a community consultation on the Rural Areas Act 9 of 1987 in Pella.<sup>208</sup> In her opening prayer a resident expressed that this concerned the development of Pella and the SPP facilitator took her clue and said that the Act 9 'is a constraint on development and we shall have to revise this Act before we can do real development planning in our areas' (SPP/IDS 1996: 2-3). He explained that Pella shared its legal status with 22 other Rural Areas (noting that 'we' always used the term 'coloured reserves, *'kleurling reservate'*'). Following the Land Convention in 1994 and the Minister's decision to review Act 9, the meeting should reveal and incorporate community viewpoints and suggestions (SPP/IDS 1996: 8-9). He justified the revision by referring to new

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<sup>207</sup> Source for election results in this section (Independent Electoral Commission 1999; Independent Electoral Commission 2000; Independent Electoral Commission 2004).

<sup>208</sup> The Pella consultation was chaired by an SPP coordinator [later member of Parliament for ANC], and attended by three other SPP staff, by the official Department of Land Affairs, Northern Cape Office responsible for Namaqualand (first visit to Pella) and three officials from of the Department of Housing and Local Government. The transcribed proceedings (SPP/IDS 1996) are 45 pages of which half is the SPP presentation, 8 pages presentation by officials and the rest group reports and discussion with Pella residents. I was impressed that consultation transcripts prepared in 1996 were available to me five years later in the DLA Library in Pretoria.



Constitutional rights<sup>209</sup> and mentioned land with caution: 'I know that there is one thing that people are very worried about, that we shall lose our land rights (*grondregte*)', but said that a revision of Act 9 would be necessary to give tenure security (SPP/IDS 1996: 20-21). He argued that individuals or families believe that they have historical rights in parts of the commons, while the Act required formal leases and annual contracts between stockowners and the council, though not always implemented. He concluded that 'we do not rent grazing rights. We are farming illegally on the state's land, ladies and gentlemen. What the Act says and what we do in reality are two different things.' The Act said that land was held in trust by the Minister while residents said it belonged to them: 'So, what the Act says and what people assume, that differs too' (SPP Chair, SPP/IDS 1996: 22).

Participants discussed future land tenure in groups. Major messages were that the Ministerial trusteeship should be ended; that land should be returned to the community (*gemeenskap*) and that the local government (*plaaslike owerheid*) should become the titleholder, although groups placed different emphasis on the power of community versus local government in planning and decision-making. The land should remain communal (*moet gemeenskaplik bly*), for as one resident said 'if someone has the cash to buy land, what will then happen to Pella?' (SPP/IDS 1996: 34). The groups recommended strengthened cooperation between local government and land users (SPP/IDS 1996: 35, 38). Residents expressed (i) that land reform should bring economic empowerment by improving public services and investments in agriculture (SPP/IDS 1996: 29); (ii) that control of mineral exploitation should be transferred to local government (SPP/IDS 1996: 30-31); (iii) and that residential security and fear of future property taxes were major concerns. Both the information and responses assumed that Pella would remain the unit of local government (SPP/IDS 1996: 33-43; SPP 1996a: 26-31). The faith in the community and local government probably reflected trust in the well known and expectations about democratic renewal; it would be tested during the coming years, also during Trancraa.

Winding up the consultative meeting, the SPP Chair emphasised further consultations during law drafting and said: 'Ladies and gentlemen ... We have heard what you say, how you feel about things. It has been recorded on tapes and written down,' and promised that the report would bring out 'what Pella people want' (SPP/IDS 1996: 43). Probably in many ways it did, but when the time to act on the consultations with implementation of Trancraa the demarcation had changed the local government situation significantly.

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<sup>209</sup> For example to freedom of movement while Act 9 only granted the right of residence to registered occupiers, 'or as we say those with *burgerskap* in the areas' [the old notion of community citizenship] (SPP/IDS 1996: 13). The practice of banning someone from the area was inconsistent with administrative justice. In addition, the Constitution emphasized local government in development, the old Act 9 central government.

### 10.3.3 Redistribution

In the 1996 Consultations (above) restitution and redistribution were not addressed.<sup>210</sup> However a few participants mentioned the need for land and a woman farmer said that 'it is drought, our animals are dying, we haven't got any land, and they are holding us just on the line, we are unable to move ahead. We would appreciate if Mr Derek Hankom could give us back our land. Thank you.' (SPP/IDS 1996: 29).<sup>211</sup> In response, the SPP Chair introduced 'someone named Father Christmas': a DLA official who told the group that he had just confirmed on telephone the first purchase of farms for Pella and that 'we can work with you and the government of the day and be of assistance to expand your area in a way that will be useful to you' (SPP/IDS 1994: 33, 44). The Father Christmas metaphor captured that rights-based restitution had been replaced by grants of farms. Before leaving the DLA official warned that 'he would not be able to bring a farm on every visit to Pella.' However, he worked with land reform in Namaqualand through the Trancraa transition phase.

The DLA, working with residents, the SPP, the LRC and Department of Agriculture, Springbok, has purchased and transferred four privately owned farms (of a total of about 35 000ha) to local government (from 2001 Khâi-Ma Municipality), under conditions that they are to be used for the benefit of Pella residents.<sup>212</sup> Two state farms (12 000ha) have also been provisionally approved for transfer to municipalities for the benefit of Pella residents, and were accessed by farmers at the time of field research. Including them, the government has transferred land of a value of about R3.8 million for the benefit of Pella farmers or about R24 000 for each of the estimated 160 stock farmers in 2002. The total area accessible to Pella residents has thus almost doubled, from the 48 000ha of the Act 9 Area to about 95 000ha or 950km<sup>2</sup> today. New farms (Table 15) were bought by government from individual owners and transferred to the Transitional Local Council (refer Section 9.3.3).

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<sup>210</sup> The farmer quoted in section 10.2.1 reminded about the land claim in 1994 and asked whether the discussions he heard was specifically about *Eenfontein*, 'which was renamed Pella' or also Kammasfontein and other springs and farms that belonged with it. The Chair pointed out that the legal reform process was only about Eenfontein, Pella, that is the Act 9 Area (SPP/IDS 1996: 28).

<sup>211</sup> SPP and Pella Grondkomitee (1996: 13-16) had also reported that farmers said that the condition of the veld was very poor and they had suffered high rates of stock losses. The report had noted that 'since only 14 farm full time with livestock, 26 people drawing a pension and only 18 unemployed have livestock, it looks as if less people make a living from livestock, and we must ask if we want to buy more land or if we should develop other opportunities, such as irrigation, with the financial support [subsidiegeld]' (1996: 16).

<sup>212</sup> At between R60 and R120 per hectare, the cost was about R2.7 million (DLA Northern Cape 2001b). The officially recommended carrying capacity for the four farms is equivalent to about 2 200 small stock units in total, which gives a price of R1 200 per small stock unit.

Table 15: New farms for Pella residents

Farm	Title deed no.	Area (hectares)	Price (Rand) <sup>1</sup>	Official stocking rate on yearly basis (SSU) <sup>2</sup>
Dabenoris No 44	T 5388/97	12 140ha	R734 000	870 SSU
Section 1 (Springputs) of Klein Pella No 40	T 62409/98	4 280ha	R489 000	320 SSU
Hoogoor Nr 37	T 17391/99	13 500ha	R822 000	650 SSU
Section 1 (Varsfontein) of Eyties Nr 144	T 18508/99	4 990ha	R609 000	370 SSU
Sum purchased farms		34 910ha	R2 654 000	2 210 SSU
Guadom Nr 29	State Land	6 440ha	(R644 000) <sup>3</sup>	310 SSU
Houniams Nr 28	State Land	5 310ha	(R531 000) <sup>3</sup>	260 SSU
Sum state farms		11 750ha	(R1 175 000)	570 SSU
Total new farms		46 660ha	(R3 839 000)	2 780 SSU
Old Meent (Act 9 land)	Trust land	48 280ha	-	2 300 SSU
<b>ALL PELLA LANDS</b>		<b>94 880ha</b>	<b>-</b>	<b>5 010 SSU</b>

Source: (DLA Northern Cape 2001b)

1: Total price, rounded to nearest 1000. Prices varied between R60 and R120 per hectare. Attorney, valuation and transfer cost are included (between R5 500 and R9 500 per property).

2: (DLA Northern Cape 2001a: Section 3 gives official stocking rates). SSU: small stock units (equivalent of 1 sheep or 1 goat for one year). 'The total carrying capacity of the lands that are available to Pella farmers is thus according to the official carrying capacity only 5071 small stock units for the twelve months of the year'.

3: The value of state farms is a rough estimate based on R100 per hectare. The state farms have a low stock carrying capacity but include potential irrigation land of much higher value.

An official map (Figure 4: 'Community of Pella') shows that redistribution has changed the landscape, though only taken small steps towards restoring the old Kamasfontein. Also, residents took over farms that are distant and often accessible only by road – the distance from Eyties in the southeast to the state farms in the northwest corner is about 80km.

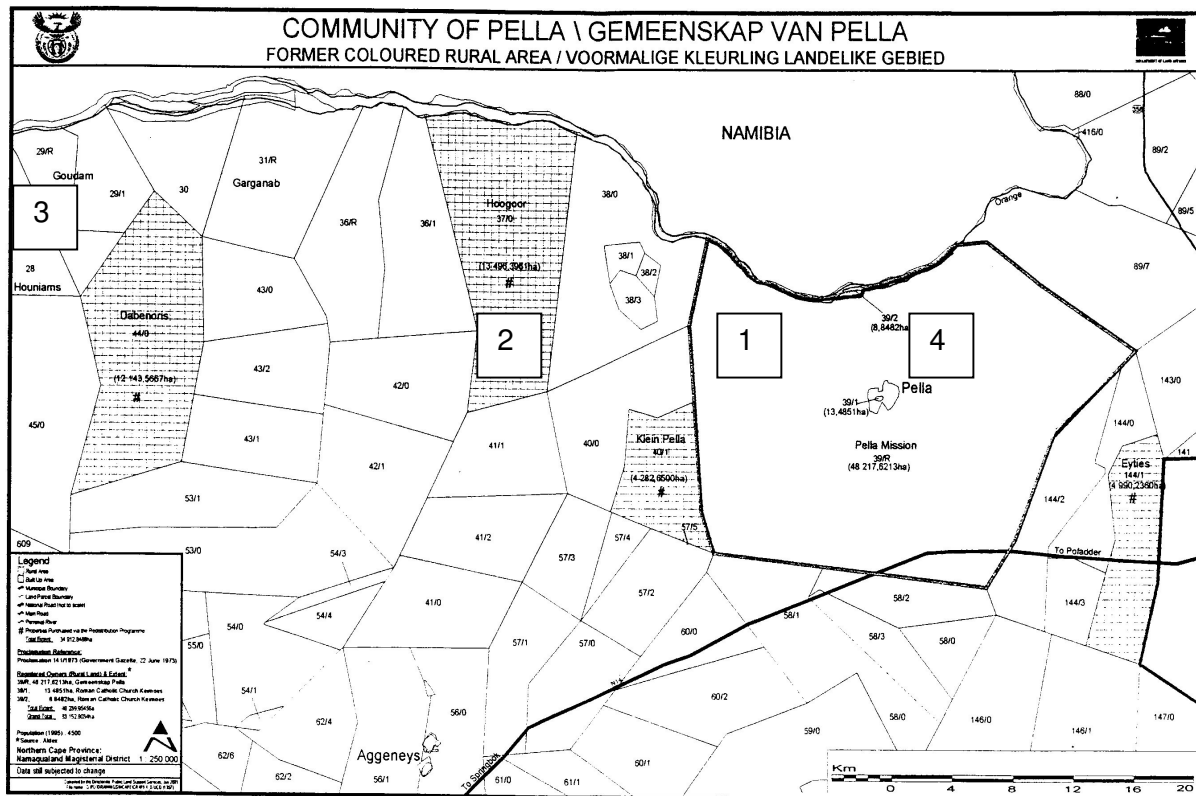


Figure 4: 'Community of Pella'

Source:(Directorate of Public Land Support Services 2001)

1. **Ou meent:** Old commonage, or Act 9 Area, property number 39/R) (48 300ha about 51% of total land accessed by Pella farmers). Khâi-Ma Municipality has the management responsibility.
2. **Nuwe meent:** New commonage or new farms (Hatched). Four formerly privately owned farms (Springputs of Klein-Pella, Eyties, Dabenoris and Hoogoor) purchased by Government and transferred to Pella Transitional Council (from 2001 Khâi-Ma Municipality) for the benefit of Pella residents (35 000ha – 37% of land accessed).
3. **Two state farms:** Provisionally approved for transfer to Pella (*Guadam* and *Houniams* – 12 000ha or 12% of land accessed) are in the upper left hand corner (unhatched).<sup>213</sup>
4. **Land owned by the Catholic Church:** the mission station in Pella town (property number 39/1 – about 13ha) and irrigated land by the river (property 39/2 – about 9ha).<sup>214</sup>

### *Livestock and land redistribution*

Around 1980 there were about 70 stock farmers in Pella<sup>215</sup> and livestock numbers had been reduced from 19 000 in 1977 to 12 000 in 1979 due to drought; in 1995 the SPP and the Pella Grondkomitee (1996: 13-16) reported that 104 individuals in 96 households (29% of all)

<sup>213</sup> Committee members said that, 'The title is not officially transferred yet but it is set in motion and will hopefully be transferred. We doubt that they will go to another entity.' (Group discussion, October 2001; see sub-chapter 11.1 on land committees).

<sup>214</sup> Which at the time was leased to a commercial farmer from outside Pella, who used it to cultivate Lucerne as a fodder supplement.

<sup>215</sup> Under the policy of the time the Department of Coloured Affairs only recognised half of them as 'bona fide farmers'. It was paradoxically reported that of the annual income 'from livestock farming' R16 000 was by 'farmers' and R13 000 by 'non-farmers'. Klinghardt estimated that 17% of economically active males depended on farming for their income (1982: 15–17).

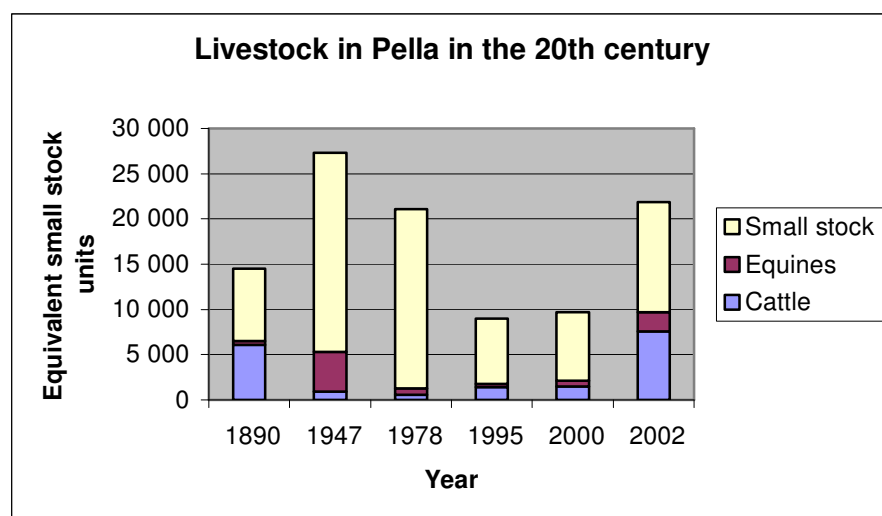
owned livestock, though only fourteen individuals were fulltime farmers.<sup>216</sup> The report noted that since relatively few could make a living from livestock 'we must ask if we want to buy more land or if we should develop other opportunities, such as irrigation, with the financial support' (1996: 16), but this did become the major strategy.

With the 47 000ha of new land, the average endowment of the estimated 600 households in Pella increased from about 80ha before redistribution in 1996 to about 150ha in 2001. For the estimated 162 households that keep livestock it is now about 600ha<sup>217</sup> and in 2002 they owned an estimated 22 000 small stock units (SSU).<sup>218</sup> If the figures from 1995 and 2002 are correct a remarkable recovery from around 7 000 to 22 000 SSU took place.

Table 16: Livestock in Pella 1890, 1947 1978, 1995, 2000 and 2002

Year	1890		1947		1 978		1995		2000		2002	
Stock	Heads	SSU %	Heads	SSU %	Heads	SSU %	Heads	SSU %	Heads	SSU %	Heads	SSU%
Cattle	1 010	42 %	160	4 %	100	3 %	170	14 %	160	13 %	1 260	35 %
Equines	60	2 %	740	16 %	120	4 %	60	5 %	100	8 %	350	10 %
Goats	8 000	56 %	22 000	80 %	18 500	94 %	3 040	42 %	2 990	39 %	7 420	34 %
Sheep							2 770	38 %	3 060	40 %	4 730	22 %
		SSU		SSU		SSU		SSU		SSU		SSU
Sum (ssu)	14 420	100 %	27 400	100 %	19 820	100 %	7 190	100 %	7 610	100 %	21 810	100 %

Sources: Mellvill 1890: 9–16; Union of South Africa 1947: 46–47; Klinghardt 1982. 11. SPP/Pella Land Committee 1996; Pella Weidingsregister 2000; Pella Dip figures 2002. Figures rounded to nearest ten.



<sup>216</sup> Of the herds 7% had less than hundred small stock and 65% less than fifty. Only seven households (8%) owned more than 200 stock. The larger farmers had to hire land from surrounding farm-owners to sustain their stocks, or keep stock on islands in the Gariép.

<sup>217</sup> However, this is less than one tenth of two of their closest farmer neighbours with private ownership, who own, respectively, 8 000 and 10 000 ha of land. The Bushmanland rule of thumb is that a commercially viable farm should be at least 5 000 hectares. A former owner of a farm in the area said that land reform beneficiaries need '3 000ha with water on' (Interview, September 2002).

<sup>218</sup> About 1 250 cattle (35% of SSU), 350 horses and donkeys (10% of SSU), 7 400 goats and 4 750 sheep (together 55% of SSU) (Dip figures April 2002. G. J. Fredericks, Chief Animal Health Inspector, Department of Agriculture, Steinkopf, interview September 2002).

Figure 5: Livestock in Pella 1890, 1947 1978, 1995, 2000 and 2002

*Experiences with land redistribution*

In October 2001 the Mayor of Khâi-Ma confirmed that land redistribution had allowed more residents to buy animals and that common to use retirement packages from mining companies to buy livestock. There was still an unmet need for land 'because more people see it as the only way of survival in the area. Especially for families ... and older people who are too old to go and seek work on the mines' (Mayor of Khâi-Ma, interview October 2001). She confirmed the link between land and self-worth, saying that new land:

... increases your self-worth, or it brings back your confidence (*dit verhoog jou selfbeeld, of dit bring jou self vertrouwe weer terug*). For example, it does not matter if you have two sheep or two goats, you can now farm on a farm, whereas before you had to keep your two sheep in your backyard.<sup>219</sup> Individuals who used to tend someone else's stock, and receive maybe one sheep for it, have now also made their own stock post and their own herd. This has strengthened the living standard of the people – and the person in you, the person you really are. The oppression that was once there has gone. Before you were only someone who looked after somebody else's livestock, but now you can also be a farmer.<sup>220</sup> (Mayor of Khâi-Ma, ANC, interview October 2001)

Another ANC leader also stressed the role of the state in restoring justice and confirmed the DLA view of redistribution as restitution with another name. In his view, the ownership of original holders was never truly extinguished:

*Land that previously belonged to people, belongs to them.* They farm, they irrigate, they mine and they get ownership of the land. What is happening now is that land, which had been previously owned by them, becomes theirs again. It is systematically bought back by the state and given back to the people to whom it belonged. If people have historical proof land is returned through arbitration [restitution]. Whatever the processes, people get their land back ... and can farm and make a living on the land; they can go back to the small *kraals* behind the houses where they live; they can open plots where they can farm and irrigate; they can find minerals. And even the land on which your house in town stands, if you can get a title deed, then you have ownership and then you have security. (Vice-Chair, ANC Pella, Group discussion, October 2001. Emphasis added)

Here, again is the view of an original ownership restored and the direct link to livelihood practices of individuals. The stock count 2002 found 38 farmers (23% of all) on the new farms so the majority of stockowners (close to 80%) have only gained the indirect benefit from redistribution. However, a stock farmer with his animals on the old land said that the granting new farms was 'one of the best things the new government had done' and believed he benefited through reduced pressure on the *meent*.

Many residents noted the constraints of lack of training, inadequate water supply and

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<sup>219</sup> However, in arguing the importance of land for livelihoods and dignity, the Mayor may have disregarded that access to new farms in practice favoured larger stockowners rather than the individual with 'two sheep or two goats'.

<sup>220</sup> 'Dit het die lewenstandard van die mense verhoog – en die persoon in jou, wie jou werklik is; die onderdrukking wat daar gewees het is nou weg. Jy was maar net iemand wat iemand ander se vee opgepas het, maar nou kan jou ook 'n boer wees'.

roads, lack of follow-up by the municipality. Only a few farmers command transport and some have found the cost of travel too high. The Mayor of Khâi-Ma believed that there had been 'no human capacity development' on the farms and that farmers 'keep practicing in the old way' and less than 5% paid required fees: 'You must pay for the grazing and ensure that the farm is kept in good condition. So it is difficult to instil in people that they must pay for something that they have used. They won't pay' (*'Hulle wil nie betaal nie'*) (Mayor of Khâi-Ma, interview, October 2001). Therefore the municipality had to 'carry the farms', which it was not able to do. Similarly, Meent Committee and Transformation Committee members stressed that management plans were not implemented and that the Meent Committee could merely give advice to a slow-working municipality. They expressed disappointment and hopes about extended public support:

With the purchase of the farms, people got too excited. In their excitement they did not pay attention to the farms' infrastructure. Therefore, the farms were neglected: now the fences are down and the pumps don't work ... that is a low point. I can almost say that our people were cheated and therefore we need to look for assistance to repair the infrastructure. Despite the big shortage [of land and support], people are still positive, the state promised to help with that ... the people are still going forward. (Group discussion with Meent and Transformation Committee, October 2001)

However, the Department of Agriculture (DoA) fears that increased stocking rates are not sustainable and may undermine the benefits of additional land. The Department considers the overall sustainable stocking limit for the 95 000 hectares of Pella land to be around 5 000 small stock units (SSU) or nineteen hectares per SSU.<sup>221</sup> It had insisted on compliance with stocking regulations as a condition of getting further land. In instructions to Pella Meent Committee about the 'Management of the farm Springputs', the DoA held that the carrying capacity (*drakrag*) of the 4 300ha farm was 315 ewes and suggested that if the figure was exceeded 'it is likely that the farm shall be completely eaten up (*opgevreet*) and over-grazed (*oorbeweï*) within only a couple of months. In that case the Government land reform programme shall be completely wrongly executed. The consequence will be that no further land is bought for Pella' (Department of Agriculture, Letter, 1998).

Meent and Transformation Committee members said that farmers found it difficult to accept these management principles: 'We as a community had never farmed with this kind of farming methods. You had a few goats and that's how you went on. We never really had a farm that we had to manage. We are not contesting the department rules, it is just that it is a bit hard to understand and adjust to.' They said they were changing from subsistence to commercial farming and for some it was 'hard ... to think commercially ... Hopefully it will come right, if, of course, the Department of Agriculture agrees to give us more money, then we can slot in' (Committee member, Pella, October 2001). In practice, farmers often brought

the number of animals to the new farms that they deemed appropriate and questioned the recommended stocking levels.<sup>222</sup>

Thus, in late 2001 in Pella most discussions about land reform started with the new farms. They respond to a right to redress and illustrate the possibility of changing ownership patterns and improving the access to land and livelihoods for some individuals. They demonstrate a public commitment to change and civil society involvement. The programme did not challenge the rights of farm owners. The voice of the critical and historically aware Pella elder quoted in section 10.2.1 did question the purchase of land he regarded as rightfully belonging to Pella: 'I don't agree that I should buy the land. From who must I buy it? God left the land to everybody that he rules over, not only some people. The government or the people who are in charge are causing a war. We have a property right. Why must I buy it?'<sup>223</sup> (Retired farmer, Group discussion, March 2002). Nevertheless, many residents appreciated that in fact the government did do so. To what extent new farms contribute to strengthening human capabilities depends on a range of additional factors, particularly tenure, technical support and finance. Because the new farms were granted for the benefit of the Pella residents and yet controlled by a new, larger municipality they became contested in the Trancraa process (see Sub-chapter 14.3).

#### 10.3.4 Elders comment on 1994 and land reform

Older residents with whom I spoke about history were not so involved in current reforms but had views on changes. An elderly woman reviewed changes for women from a conservative perspective. She said that the traditional role was to 'herd the stock when your husband is not around' and with resigned acceptance that 'the man is on top and the woman must stay under: the woman does not have the stamina, the man is still in control' (Elderly resident, November 2001). She also argued that women were held in high esteem today, partly due to national policy: 'The government gave the woman equal civil rights. They got those rights yesterday. I have just forgotten the date but I have the documents of Mandela, those white and green papers.' Concluding the group discussion on history (refer Table 14, page 171), three elderly men stated about 1994:

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<sup>221</sup> The DoA official stressed this figure in a community meeting in January 2002. However, in April 2002 local people assisted by the Animal Health Inspector found almost 22 000 SSU on the land (about 4.4ha per SSU).

<sup>222</sup> The DoA estimated the carrying capacity of the 4 900ha new farm Eyties to 366 SSU, but in January 2002 two of the nine farmers using it reported that they kept 1 700 stock on the farm. They argued it was impossible for them to maintain a viable herd and livelihood within the official limits. The users of one new farm stressed that their main problem was water and lack of funds and skills to maintain pumps and reservoirs, while the municipality never responded to requests for assistance (Interview with two farmers, male and female, on Eyties, Pella, January 2002). An official argued that 'there is a huge difference between one user and nine users and the impact it has on veld management' and that the currently relatively good veld condition would not last 'if the rainfall suddenly stays away as often happened in the past?' (DoA, personal communication, March 2002).

<sup>223</sup> Nelson Mandela (1994: 85) quoted colleague Gaur Radebe: 'You people stole our land from us and enslaved us. Now you are making us pay through the nose to get the worst pieces of it back.'



Elder 1: About what has been promised when we voted in 1994, few of those promises were kept. Since the voting took place, our voices have just got weaker. 1994 stands for a better life, a good life and freedom in the land and in this part of the world. At the moment the new laws, like the municipal law and other laws, are hurting us. At that time, the ANC came and opened doors for us and made things a bit easier. What is still missing is that they must give old people a rebate on their house taxes.

Elder 2: There was new life. Then we were given the right to meet like this. We were allowed to come together and talk as we are doing now about what is troubling us and for advice. We can go anywhere and we can tell the people we have elected to go out and represent us.

Elder 3: We are truly privileged. In 1994 Mandela was elected leader. De Klerk was the former leader. I knew De Klerk's work but I didn't know what Mandela would do. Then I went to look and saw that Mandela is offering us opportunities for a better life. De Klerk did not offer us anything ... And later people voted for Mbeki. I voted for Mbeki, because, number one, Pella was given farms. Parts of what the coloured people did not get in the past, they now got. It came as a help to everybody. That is what happened in 1994 and why we can say: they delivered. You can see what it meant to the coloureds as opposed to the whites. During apartheid we could not see what they did, for they were only open among themselves. Now they have respect for you, and you have respect for them. (Group discussion on history, March 2002)

The elderly men acknowledged a harsh economic reality and the sense of having little to pass on. However, 1994 marked a deeply appreciated change and land reform responded to the longing for the land that the grandfathers told about. Land reform delivered, if only partially, on the promises of 1994.

#### 10.4 Community membership, rights to land and farming

There are different answers to the question about who owns Pella land. Land tenure is inherently contentious because it is about socially sanctioned claims: that is, about what actors regard as theirs and what others recognize. Here I discuss some experiences from Pella around the theme: *Dis ons grond, it is our land*, which may combine many meanings and claims. To keep livestock on the common land, *boer op die meent*, is a dearly held and defended right. People who are unable to keep their own herd due to poverty or employment elsewhere also defend the right. Some poor households said they 'planned to take up farming again' as soon as they could obtain stock. Livestock provide a form of security and several individuals with employment also kept livestock: 'One has to keep a backdoor open', said the school head master in Pella about his herd of hundred goats. An elderly farmer and a widower lived alone in his house at Annakoppe but had to get to Pofadder on a weekly visit to his doctor: When his twenty-year old *bakkie* (farm pick-up) broke down, he was in trouble: he sold most of his goats to be able to repair the car, and was thus able to stay on in his home (Elderly resident, Annakoppe, November 2002). In Pella, as elsewhere in Namaqualand, livestock farming is praised as a 'way of life', a form of freedom. A policeman had returned to Pella after working ten years in Cape Town. Asked why, he said:

I actually just wanted to start farming again, since I grew up here, at Annakoppe, this little

place outside [the town], and ten years was enough for me in the city. Many times I sort of became depressed because I missed the open land, the *ruimte* [the open spaces]. I missed the *ruimte*, and besides I wanted to start farming because it is in my nature. Ja, I missed the freedom, the open spaces and the freedom. One of my dreams was that my *lyties* [sons] may also enjoy this: This free sort of lifestyle, my sons. (Police Inspector, Pella, Interview March 2002)<sup>224</sup>

Residents generally assert a right of access to land. Residents speak about *boorling* (born member), *burger* (Rural Area citizen) or *inwoner* (resident), where the two are apparently equivalent. Since a birth right or long residence was important, the rights giving status was not completely subject to administrative discretion. Residents generally appeared to agree that immigrants (*inkomers*) could achieve *inwoner* status over time by living in the reserve for a number of years: five years and good behaviour were cited as criteria. Today, the status of *inwoner* is challenged by many factors, most of all newly acquired rights of full citizenship. In a Trancraa workshop on rights and *inwoner*-status (Section 12.4.2), four of five groups reported that rights to land is based on having *resident* status in Pella; a fifth group stated it to be a general right of citizens above 18.

In Pella (and also Komaggas) respondents said that a *boorling* or *inwoner* has rights (*regte*) to keep livestock, collect firewood, make a *veepos* (stock post) and stay there. A woman said: 'Noone can prevent you from farming or tell you that you are not allowed to have livestock and so on. It is entirely up to you if you want to farm or not. ... Say for example there is a person who wants to come and put up a stock post at the river, then he may. No one will tell him not to come and put up a post at the river or demand to know what he is doing here. You are entitled to it' (Elderly stock farmer, Rooiklippe, 2002). However, there was tension around family rights in farming. In different parts of the Pella meent certain families had a greater control. A woman said that 'the Bassons have moved from the Pella Meent to the Mik area; the Cloetes are in the area that we are in now; the Waterboers are mostly ... and so on' (Elderly stock farmer). While these families may dominate a locality, they no longer had exclusive rights and could not reject someone from another family from grazing or from making a *veepos*. An exception was Annakoppe, as discussed in Trancraa meetings (Section 11.3.3). A resident suggested that the pattern of family ownership could be the basis for future management (Police inspector, March 2002). He argued that if families were given responsibility for certain sections, they would have incentives to invest in infrastructure and to manage the veld. The Chair of the Meent Committee agreed that 'old' families once had an unwritten agreement about dividing the *meent* between them but said that that such an arrangement could be 'undemocratic'. There was competition between individuals and groups. A woman small-scale stock farmer said: 'The big farmers want to

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<sup>224</sup> One of Pella's 'white farmer' neighbours used similar words to explain why he returned to Bushmanland, after having worked with the army and being stationed in the city, which gave him a feeling of claustrophobia (Farmer on Boomrivier, interview March 2002).

push out the small ones, but we all have rights here' (Interview, Annakoppe, January 2002).

#### 10.4.1 'We all have rights here'

#### 10.4.2 Household examples

I interviewed members of 34 households for a qualitative understanding of land use and land rights.<sup>225</sup> Of the 96 adults living in the households (51 were women and 46 men). About 1/5 of the adults had paid employment (9 women and 11 men), 1/3 had a government old age or medical pension (14 women and 17 men) and close to half were unemployed with no income (27 women and 17 men). In 10 of the households a woman was said to be the head, in 22 a man. The average monthly income was R1 400 (about Euro 175) per household and R340 (About Euro 45) per capita. The household income was distributed on salary of R640 (46%), public pension of R580 (42%) and farming R125 per month (9%). Remittances were indicated by three households, but not noted for all households. Of the 34 households, 20 owned livestock, ranging from 10 to 500 small stock units, and an average of 130. About a quarter of the adult women and about four out of ten of the adult men said that they were involved in farming. In all households except two the respondents said that they had rights to the *old meent*; the two were right holders on new farms, temporarily giving up the right to access the *old meent*. All households except one said they had rights to apply for access to the new farms.

#### *The meent is free for all*

Two brothers in their sixties, Nama speakers, lived and farmed on a *veepos* just north of Pella town. They say 1994 brought some good things, such as electricity, and their sister in Pella got a subsidy house. In their parents' time they lived at Mik where life was good and cheap and water plentiful. They made the *veepos* some four years back to be closer to town. They pay water tax now, but not grazing fees. They each receive a pension. The 55 small stock belong to their brother in Springbok. They make nothing from farming for the brother cannot not afford to share. Their own stock died in droughts a few years ago: stock mainly succumb in winter when there is little grass and it is cold. They say they would like to see the herd grow to 600–1,000 goats, an economically viable herd. Yet, since 'there is more drought than grazing', 600 would probably be more realistic. Goats are always around the *veepos*, they could not go far any longer due to age '*ons kan nie so ver loop nie*'. The veld is as it has always been, but dry at the moment. The animals survive on the *peule boome* (pods of the *Prosopis juliflora*), but they can easily get ill from the pods. They own a donkey kart, which they bought for R600 several years back, but they have not been able to get hold of or afford a donkey. One of them attended one transformation meeting and the other has seen a notice

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<sup>225</sup> Households (34 in total) were generally selected randomly from different areas of Pella town, but five were contacted during visits to the meent or new farms. A total of 96 adults and 50 children lived in the households visited. Of the respondents fourteen were men, nine women and eleven couples.

about a referendum. They ask us what it is about. After telling, they comment: 'The community is the owner, and the meent is free for all'. Other than that, 'we just live here, and don't really understand. Only those who attend a lot of meetings really understand. But those who have a few small stock should cooperate and go forward together ... But look at farming: there are no improvements; there are always droughts, people should come and make things better' (Brothers, pensioners, Pella, November 2002).

*Mr AJ: Poverty means we have no rights to the land that we own*

The interest in farming is distributed across rich, middle income and poor households, but some are too poor to farm and, thus, to benefit from land. A household situation illustrates the indirect way in which some benefits of redistribution reach vulnerable individuals. A resident, Mr AJ, said that he had rights to the community land but due poverty could not exercise them. He was born in Pella around 1950. We talked in October 2001 on the ground in front of the reed house he shared with his partner. They spoke *Nama* among themselves. They said 'the people are shy to talk Nama, they choose to talk Afrikaans (*die mense is skaam om Nama te praat, hulle verkies Afrikaans*). None of them had any employment at the time. They said they had no income, except occasionally from casual labour. They needed R500 per month to get by. They used to live on the Pella *meent*, but their house burnt down and now one was no longer allowed to build there. He said that the ban came three years ago for no good reason and he needed to take it up with the *raad*.

Mr AJ first stressed that he was a born resident of Pella, 'ons is boorlinge hier'. He said that many things might have changed after the 1994 elections but not for him. 'No I was not here. I was in Upington. I do have rights. I have the right to farm here and have the right to be in this country. This is my country. I am talking my heart out.' So at first he stressed that the idea of rights was about being Pellanaar – since he was away, they did not get stronger in 94. Then he reaffirmed his rights in Pella, and his citizen right. He also said he has 'no rights to the *meent*, even though he owns the land', along with other people. He used to own livestock, but sold it when he left to work elsewhere. Now he wanted to farm again, but could not afford it. He could take other people's animals for a 50% share in the products, but no one had offered that. Each person should have some livestock. Mr AJ did not attend meetings, he said, and had not heard about the transformation process. But certain people were telling the council what to do with the land, he told: 'It's an *oorlog* [war] between the political parties.'

In July 2002 Mr AJ and his partner had moved to the river where we met him just coming back from rowing someone across who mainly stays on the Namibian side but comes to Pella to shop. Mr AJ had now got a job as a herder (*veewagter*) for one of the bigger Pella farmers, a committee member who kept some stock on a new farm, some on the old land and some outside Pella. His herder's salary was R200 per month. His partner and her son were also helping and he was negotiating that they also get paid. Meanwhile, they all got

most of the food they required and lived in the stock owner's *veepos*. In June Mr AJ got three ewes and a ram as additional payment: he moved closer to his dream of becoming a stock farmer. He was better off than  $\frac{3}{4}$  of a year back: he and his partner gained a new foothold when he got a job as a herder, small benefits of land reform were trickling down for redistribution increased the demand for labour by the main beneficiaries, the big Pella farmers. Pella farmers otherwise commonly hired herders from outside, since Pellanaars regarded the working conditions as harsh, but Mr AJ did not have much of a choice.

*Living from goat farming – 'We do not have time to run to meetings'*

Ms and Mr Cloete are stock farmers and have a *veepos* by the river, where they also live. They got their whole income from livestock, which was unusual, and were looking forward to being old enough to get a pension (Interview, July 2002). They owned about three hundred goats (including hundred and seventy young animals), from which they could get an income of eight to ten thousand rand per year. They had four stock posts in the mountains, and moved here in times of scarcity. During drought they may also have feed goats by buying Lucerne from the farmer (from outside Pella) who was renting the irrigated church-owned land nearby. In the 1980s, Mr Cloete had worked for government in the construction of wind pumps and watering facilities on the meent, but the work had been abandoned. After 1994 things got better at first, but now it seemed to be getting worse because they were required to register their stock and pay fees, while there were no services.

In their life, they depended on each other and on their health. Mr Cloete had to carry his stock across the first difficult pass to go into the mountains. He jogged the eight kilometres to Pella in 45 minutes, for example to get supplies. Lately he had built a cart from discarded items and wheels, which made transport easier. Their hope was to get a donkey one day, but fodder would be a problem. One person always had to be with the goats, to protect them against theft and predators, therefore their participation in community life was limited. They took turns participating in Easter and Christmas ceremonies in the church. In July 2002 they had not heard of the Transformation Act or referendum on land ownership. 'We do not have the time to run in meetings', Mr Cloete said, and expressed that people managed the land today and should continue to do so. However, there was a bad need for improved infrastructure (roads, water, health services and marketing facilities): 'If they do not make some laws, the land will go down the drain. The laws should make certain that infrastructure is made on all sites, and nothing else' (Ms and Mr Cloete, July 2002).

*Change is taking very long*

Another stock farmer, Mr B, lived with his retired mother and his sister in Pella, but spent most of his time at the stock post by the river. Formerly Mr B had worked, but he came back to Pella in 1993 to take care of his ailing mother. The family's income now included the mother's pension (R620 per month) and farming (about R250 per month). He owned about

50 goats and said he sold about ten per year. They sold ten ramb lambs for R200–250 each in January 2002 and expected to sell fourteen or fifteen in January 2003 making around R 3 500. However, stock farming was highly uncertain: rains, drought, diseases and livestock predation by jackals and leopard may all wipe out year's of work. Many stock die from exhaustion during winter, when it is dry and cold. Risk is ever present, and there is no insurance other than the herd it self and access to land. Mr B stressed that he goes anywhere in the *meent*. He chose the river area for the water, but will soon have to go to the mountains, if the grazing does not get better. In that case he would go together with Mr Cloete: they can help each other carry the stock across the pass, give each other company and take turns getting supplies from Pella while the other watches the herds.

When we met at the stock post, the farmer's mother, Ms I was there, having helped with the milking of goats. We were sitting in around the little outdoor fireplace/kitchen surrounded by a low stonewall, Mr B, on empty tin can, turned upside down, Ms I talking leaning on the stonewall, sky blue, the rocks red, the landscape dry. I asked about changes after 1994:

Mr B: No I do not see any changes. Nothing. If it is going to happen, it will probably be after I have died.

Ms I: Change is taking very long. You do not actually know what is happening. You do not hear anything and you know nothing. You cannot actually say if things are happening or not.

Mr B: We will see if those who are still alive will reap the benefits. We will see if anything is going to change.

Ms I: We are impoverished, struggling and hungry. Things are just getting more difficult ... I do not know if the government cares or not. If the government really cared, then it would bring about change. It would make improvements. (Farmers, Rooiklippe, mother and son, July 2002)

The words are not about rights but about threatened capabilities, about uncertainty, not knowing. Similar to a comment of one elder who talked about poverty and lack of knowledge in the past. They obliquely say that they may not live to see the benefits of the political revolution in their country. People did not otherwise say that they were hungry due to lack of land and income, nor that that they were dying of poverty-related diseases. They did not often blame the government for its policies. In this exchange two residents expressed something that is difficult to say: Rights claiming on the boundaries of a vulnerable existence is difficult since the conditions that rights are to prevent and abet are intolerable. Ms I. felt discouraged by words 'government' and 'democracy' and ended the conversation by saying that she did not understand these High-Afrikaans words (*'ek verstaan nie daai hoh Afrikaanse worde nie'*). We walked on along the river, she walked the long way back to Pella and she had told us that her legs were getting worse but that she had no option but to walk.

So a major experience from interviews with small holders at Annakoppe, Mik or Rooiklippe was that of land as a physical source of livelihood and a constraint. Farming women and men use the land, are physically tied to it, often through livestock, and for some

the claim that *it is our land* is a claim to bodily integrity.

#### 10.4.3 Gender and farming

No one asserted that any member of Pella could be excluded on the ground of identity. Some residents said that women have a secondary role in livestock farming. One elderly woman argued that it was a recent phenomenon that women got involved in farming, and in response to the higher employment of men in the mines. However, respondents commonly asserted that the basic right of access to land belongs equally to men and women. Women asserted their right to farm, and sometimes exercised it, but more seldom than men: The 2002 list prepared by the Farmer's Association has 18 women among 162 farmers, 12%. The Farmers Association was established in 2001 to promote farmers' interest including the visibility of women farmers. A woman farmer and member of the Executive Committee said: women farmers 'are involved everywhere: They are like an old louse, they just creep in'. However, she said the Association had so far done little at Pella (Group discussion, December 2002).

A few women farmers said that they faced no special problems or discrimination as farmers. However, asked about human rights in farming, the Mayor of Pella said that there were problems with discrimination on the basis of gender and age: She had sometimes found it difficult to be accepted 'because I am too young and because I am a women. The farmers, for example, will invite me to a Meent Committee meeting, maybe to come and listen, but as soon as I want to make an input then everybody will oppose it saying, "what do I now about livestock farming?"' (Mayor of Khâi-Ma, Interview, October 2001). It appeared that while several male committee members were not active farmers, women had to justify their experience more. Men were assumed to have experience by virtue of their gender. The DA councillor for Pella said that she believed that 'there is discrimination between the sexes because men appropriate the land for themselves. Women are secondary when it comes to the land. So there is a kind of sexism in that'. In her view the women needed support to create and manage land-based enterprises (DA Councillor, Interview April 2002).

During the Trancraa process in Pella, women's participation was visible. Women were often in majority at public meetings. The main SPP facilitator remarked on a remarkable difference between Pella and the other Namaqualand areas in terms of women's participation. It is possible that SPP's support with mainly female facilitators in the period of my work played a role. Yet, participation may not imply promotion of gender equality. In an interview the first TC Chair had made it clear that he did not see promotion of gender equality as a goal for the Committee's work and that he was of the opinion that men and women enjoyed equality in the 'coloured areas'. In particular, women enjoyed a powerful position because men from outside sought access to land through marriage: 'if you were from outside the town, you took a wife from this place and this is how he got a piece of land to farm ... and that is how a woman had those rights'. He argued that women had full residents' rights

(*burger regte*) and that 'here are a lot of issues that only arose when politics came in. ... It is now an issue since this thing of women's rights, rights and those things. The people cause a big commotion' (Farmer and TC Chair, November 2001). Apparently a partly self-interested concern about redressing racial discrimination overruled the commitment to gender equality, but this was a view expressed in a conversation, and never to my knowledge expressed or promoted in official meetings.

At a workshop in January 2002, a woman asked whether land rights belonged to the household or the individual was interrupted by a man who was concerned with community cooperation: 'Ons moet as een man opstan' (we have to stand together as one man), with an unintended comment on the issue he brushed aside. The woman farmer came back to her point. She asked whether 'the right to farm on the commonage with a certain amount of livestock ... belong to the whole household [huishouding], ... to the man or to the woman, or both the man and the woman?' A prominent farmer (and Chair of the Meent Committee and Farmers Association (called FA here) and TC member) told her that 'the right is not a family question or a family household right, it is individual'. She came back for clarification:

I want to come back to the family story for the reality is that even if I don't own livestock, I must go and work if my parents own livestock. So that means that every individual who is born here can farm with livestock, even if you are part of a family you can get benefits [*uitkeer*]. When you reach the age of 18 you can benefit. So I don't agree with FA that it is only about one person [dat dit gaan op een person nie]. So we can all farm, man or woman. (Farmer, Pella, Planning Workshop, January 2002)

The Farmers Association Chair said that was what he had tried to say. Here is a twist on the meaning of 'family' or 'individual' right. The woman, perhaps correctly, interpreted FA to say that the right to farm resided in *one* individual within the household. She ascertained that 'right' meant not a man's right but the individual right of the man and of the woman, and she rooted the equal land right in the equal duty of girls and boys to herd their parent's livestock. On another occasion the FA Chair had another exchange between a prominent farmer (called Nina here):

FA: But Nina started farming just a year or two ago. She worked in [a town] most of the time. After your husband retired, you bought stock and started to farm.

Nina: No, let me tell you, Oom. I grew up as a farmer's child. And I may have had a husband, who worked on the mines, but I always kept my livestock. (Exchange, group discussion, December 2002)

He stressed her dependence on husband and overlooked *her* ownership of stock, while she pointed out her experience and individual stock ownership. At this point a younger (male) ANC leader stressed the increasing number of independent woman farmers ('*vroue boer wat aleen op haar eie boer*'). He said about the Farmers Association: 'It is only a man's thing. It mainly benefits the men, because the man is the head of the *kraal* or the *veepos*, you know, and not the woman along with the man. If it benefits the women it will be one or two women who stand on her own feet, who want their rights' (ANC Vice-Chair, December 2002). He



said that men were normally in control of selling and buying of stock: 'But if we go to Oom FA's [using his name] *veepos* to buy some of his goats or sheep, his wife won't make a price. You must talk to him, not his wife. He is the only person who has the right to sell them to us'. The FA Chair agreed that 'I manage the farm and she benefits. It is as simple as that, because whatever I decide, we are a couple, we are a part of one: I and my wife are so ... have agreed that you do this on the farm and I do that' (FA Chair discussing with younger ANC leader, Group discussion, 10 December 2002). The small turn form 'my wife and I *are*' to 'my wife and I *have agreed*' makes a clever and significant distinction. Thus, the issue of gender and farming was debated in Pella, also by men.



## 11. TENURE REFORM IN PELLA: INTO THE PROCESS

### 11.1 Trancraa implementation

Trancraa was formulated within the context of local government legislation,<sup>226</sup> but before all the legislation and administrative structures were in place. From 1995 to 2000 the six Act 9 areas had their own Transitional Local Councils (TLC). From 1998 a National Demarcation Board determined new local government boundaries. A pamphlet on Trancraa informed residents that the Act 9 Areas could be incorporated in new local authorities: 'Until you know whether your TLC is going to remain as it is now or be incorporated it will be difficult to decide if you want them to be the owners of the commonage' (SPP/LRC/DLA 1999). Implementers therefore awaited the demarcation of new municipal boundaries and the local government elections in December 2000. Trancraa prescribed a 'transitional period' of 18 months, extendable by six months (Section 9). The SPP,<sup>227</sup> Transformation Committees, municipalities and other actors implemented Trancraa in the six Rural Areas of Namaqualand from 19 January 2001. Public interest lawyers from the LRC provided training and legal advice. The SPP and Transformation Committees met almost every month, while the DLA, municipalities and the SPP held quarterly steering (*Loods*) committee meetings in each municipality to review progress and make decisions.

Table 17 gives an overview of the somewhat complex land tenure situation that was the starting point for Trancraa in Pella. The table, produced by the SPP and communicated to Pella residents in February 2002, also communicates the prize or promise of Trancraa that after the process certain lands will be transferred from the state to the owner of residents' choice.

Table 17: 'To which lands have Pella residents got rights?'<sup>1</sup>

<b>Land</b>	<b>Area</b>	<b>Status</b>
Act 9 trust land (old communal land)	48 276 ha	<i>Held in trust by the Minister of Land Affairs – shall after January 2003 be transferred to the entity chosen by the residents.</i>
Redistribution farms	12 143 ha	<i>Bought by the Department of Land Affairs for the Pella community and transferred to the Pella Transitional Council under certain conditions. In terms of Article 12 of the Notification of</i>
Dabenoris No 44		<i>Establishment of the Khai-Ma Municipality the land falls under the</i>
Springputs No 40	4 283 ha	<i>administration of Khai-Ma Municipality until transferred to the entity</i>
Hoogoor No 37	13 496 ha	<i>of people's choice.</i>
Eyties No 144	4 990 ha	<i>In principle approved for transfer to the entity that takes over the</i>
State farms		<i>Act 9 land. The Municipality has been appointed as overseer in the</i>
Guadom and Houniams	11 751 ha	<i>transitional phase.</i>
<b>Total</b>	<b>94 940 ha</b>	<b><i>'After the Referendum all these lands shall be transferred to the entity/entities of peoples own choice'</i></b> <sup>2</sup>

Source: SPP: Pella Transformation News, February 2002

1: Op watter gronde het Pella inwonersregte? 2: Al hierdie gronde sal na die Referendum oorgedra

<sup>226</sup> Municipal Structures Act 117 of 1998 and the Municipal Systems Act 32 of 2000.

<sup>227</sup> Because of the long distances, the SPP did not apply to facilitate the process in the other two Northern Cape communities, Eksteenkuil and Mier.

word aan die entiteite(e) van inwoner se keuse. In the Steinkopf Newsletter of the same time, the SPP qualified the statement: 'may be transferred'.

## 11.2 Committees and the Trancraa process in Pella in 2001

### 11.2.1 Land committees

Pella has several committees involved in land reform, the Meent (Commonage) Committee (*Meent Komitee*), the Executive Committee of the Farmers' Association (*Boerevereniging*) and the Transformation Committee (TC, *Afrikaans Transformasie Komitee*).<sup>228</sup> The committees had a considerable overlap in membership reportedly because relatively few individuals were willing to do such unpaid work.<sup>229</sup>

The *Meent Committee* was established to assist the Transitional Local Council with the management of new farms received under land redistribution (it had 8 voting members, 3 women and 5 men, and an advisory member from Department of Agriculture (DoA). It was commonly criticised as having no formal power, only advising the municipality and unable to enforce decisions or allocate resources (Meeting with members, Oct. 2001). During 2002 it was turned into an official 'municipal entity' and new community members nominated (6 community members, 4 men and 2 women, and DoA advisor; chaired by a municipal staff appointed later in 2002). The *Farmer's Association* was a professional interest organisation formed in 2001 by farmers in Pella and not an officially required institution. Its Executive Committee had six men and three women members.

The *Transformation Committee (TC)* was a temporary, statutory committee created under Trancraa. Members were proposed through consultation between SPP and local leaders and included two representatives from each of six local organisations.<sup>230</sup> The composition and mandate were discussed and approved at a community meeting in August 2000 and approved by Pella Transitional Local Council (TLC) in October 2000 when the constitutive meeting was held.<sup>231</sup> In October 2000 the then Chair of the TLC, later Mayor of Khâi-Ma Municipality, forwarded a draft notice and other information to the Minister of Agriculture and Land Affairs stressing that 'the residents of Pella are of the opinion that a local committee would be best placed to lead the community during the Transitional Period due to their understanding of the history of the people and the sensitivity of the issue of the

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<sup>228</sup> A Land Committee (Grond Komitee) that facilitated land redistribution from 1996 no longer existed.

<sup>229</sup> For example, four of eight members in the Transformation Committee were also in the Meent Committee. The Chair of the Transformation Committee was also member of the Meent Committee (2001) and the Farmers Association Executive Committee. The Chair of the Farmer's Association Committee was member of all the other committees. A woman farmer was member of the TC, the Farmers' Association Executive Committee and the Meent Committee elected in 2002.

<sup>230</sup> The Transitional Local Council, the Meent Committee, a 'Local Development Forum', Small-Miners Association, Farmers Association and a Tourism Committee (SPP/LRC/Pella TLC 2000).

<sup>231</sup> There was tension around the representation on the committee. In Pella the Democratic Alliance Chair claimed that TC members had been nominated at a meeting with poor attendance or limited prior announcement (Interview, November 2001). Municipal councillors had the right to meet in the TC but the DA councillor did not choose to do so.

future ownership of our land ... we are anxious to sort out the future ownership and management of our land so as to enable sustainable development to take place and would greatly appreciate your assistance' (Pella TLC 2000).

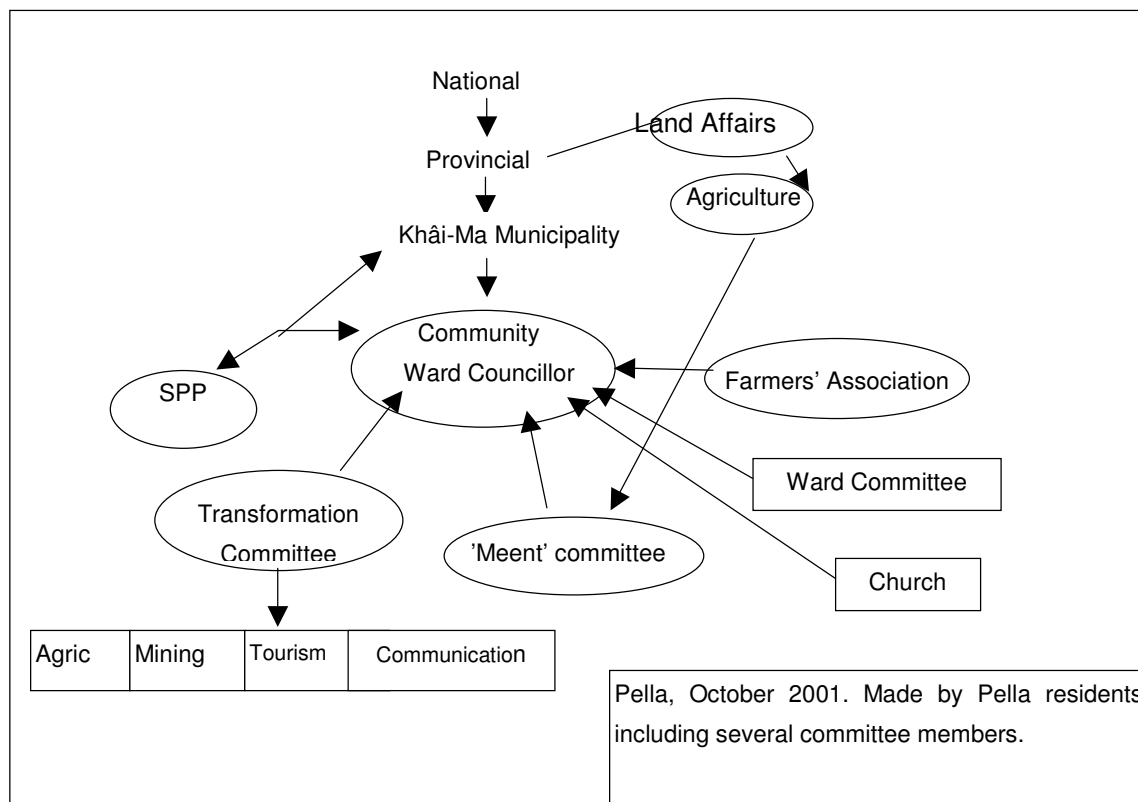
In July 2001 the Minister of Land Affairs and Agriculture announced that the process was taking place in the Rural Areas of Eksteenkuil, Mier, Steinkopf, Pella, Leliefontein, Pella, Komaggas and Concordia, including the purpose, composition and tasks of the TC:

- (1) Continuous submission, communication and liaison on the implementation plan for the transformation process;
- (2) The determination of all residents as defined in Section 1 of Trancraa; Enquiry and determination of all rights held by residents in the land;
- (3) Conflict resolution and mediation;
- (4) Drafting of a land use and administrative plan;
- (5) To hold public meetings so that all residents are informed about the possible entities to which the land could be transferred;
- (6) To arrange a referendum whereby all residents will vote on a choice of an entity to which the land should be transferred.

Public Notice, Government Gazette 6 July 2001 in terms of section 3 (4) (a) of the Transformation of Certain Rural Areas Act, 1998 (Act No. 94) (DLA 2001c).

In Pella there were 12 TC members (five women and seven men) of whom two nominated by the municipality. The Chair was a former Chair of Pella TLC (for ANC), and the Vice-Chair was the current Vice-Chair of Pella ANC (both men). The Secretary and Cashier were women. TC sub-committees should address agriculture, mining, tourism and information.

Figure 6: Role players in land tenure reform, Pella



A group of committee members and other residents identified actors in the land tenure reform in a diagram (Figure 4). It emphasised the vertical line of national policy through the DLA (provincial office in Kimberley) and the Department of Agriculture (in Springbok) to the official committees. Participants emphasised the TC and sub-committees, seen as close to the SPP, which was said to facilitate between community and municipality. A participant explained that 'SPP is independent of government but in the community it must play a leading role. ... non-governmental organisations are chosen by government to work with the communities. The community cannot choose them, not even the municipality', but he stressed: 'We *did* ask for SPP' (Committee member, Group Discussion, October 2001).<sup>232</sup>

### 11.2.2 The Trancraa process in Pella in 2001

In *Transformation News No. 1* (August 2001) the SPP informed residents that the Transformation process had started:

Remember that this committee is not going to make any decisions. The success of this process depends on the cooperation and involvement of the community. IT IS THE FIRST TIME IN HISTORY THAT THE RESIDENTS ARE GIVEN THE CHANCE TO DECIDE FOR THEMSELVES ABOUT THE FUTURE OWNERSHIP AND MANAGEMENT OF THEIR OWN LAND. YOU MUST NOT MISS THIS OPPORTUNITY. Emphasis in original – the text was accompanied by a drawing of a sleeping person. (SPP/Pella TC 2001: 2)

The newsletter stressed the difference between the temporary Transformation Committee the permanent Meent Committee. It explained that the Minister would only permit a transfer of land if provisions were made for a balanced protection of land rights: 'Nobody can protect your rights if you are not aware of them. Therefore the Transformation Committee will initiate a process of identifying your rights. You therefore see that it is absolutely necessary that you cooperate to ensure that your rights are protected.' Finally, it raised questions about livestock numbers, the sustainability of land use, rights to farm and the costs of infrastructure maintenance, asking residents to communicate thoughts, fears and suggestions to the TC.

In October 2001 committee members explained that after a slow start on the Trancraa process, they had started working in January 2001, held a community meeting in June 2001 and the first official TC meeting in July. A member said that 'we are asked to think for our selves, and we are not used to that, so it is hard'. The TC leader Trancraa is 'not an affiliation of political parties and does not represent a political party' but is made up of community leaders, chairpersons, secretaries, farmers and community people awho should carry out a non-political, community-oriented process of gathering information and making recommendations (TC Chair, Meeting, October 2001). He later stressed that 'In order to pass the test we must know where we stand on the ground, share information with people, and put

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<sup>232</sup> The SPP's contract with the DLA to facilitate the transitional phase of Trancraa (2001–2002) in Namaqualand was worth R2 million (personal communication, SPP facilitator, Pella). In addition the DLA, local government and LRC incurred costs, adding an estimated R1 million to the costs, in total

the ball in the community's court – this is what we found out and this is what can happen, but we, the community of Pella, have to make the decision' (TC Chair, Interview, November 2001). Thus he down played an political import of Trancraa.

In the second half of 2001<sup>233</sup> several residents appeared to be unaware of Trancraa and the TC. The Mayor felt that 'we need the different laws to be defined and explained to people, because each of us interpret things differently' (Interview, October 2001). It was also my impression that some TC members did not separate tenure reform from the general land reform and development process. One said that 'elsewhere people have got their land in different ways such as through the constitution and restitution, but Pella has particularly got their land through the transformation process' and another said 'the TC also assists with transition phases, with the buying of the land, the transforming of the land'. The TC Chair later said that 'we did have the problem that we did not understand what the people wanted from the TC, how the government thinks, and what we at the grassroots level consider as legal' (TC Chair, Interview, November 2001). The meanings of Trancraa were still open.

Lax follow-up by the government caused difficulties in the early part of the implementation period. The role of the SPP was initially ambiguous because it was had not received the official appointment. In October 2001 the DLA finally selected the SPP as the official facilitator for the six Namaqualand Rural Areas. Perhaps it illustrated a distant stance and a limited role of national DLA in a process driven by a civil-society network. Anyway, the SPP's main facilitator in Pella<sup>234</sup> informed TC members that she was hoping to get funding soon 'which will help our work considerably'. In August 2001 the SPP and Pella TC (2001a) applied through the municipality to Minister Didiza for a six-month extension of the implementation period. In November 2001, government had still not replied and the SPP facilitator found it 'impossible to do everything and to have a referendum in addition to everything else ready' by July 2002 (the extension till the end of 2002 was later approved).

### 11.3 TC meetings and land tenure issues

In October 2001 I attended my first TC meeting in the Pella Ward Office. The meeting started with a prayer, thanking participants for coming and asking for a successful outcome of the deliberations.<sup>235</sup> Organised around the reports of the four sub-committees on agriculture, mining, tourism and information, TC meetings explored land tenure and development issues, in the October and November 2001 meetings mainly irrigation development by the river,

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equal to R100 or about 12 Euro per resident. The budget for the work by the Pella Transformation Committee was R32°000, covering communication, transport and information.

<sup>233</sup> From October 2001 to December 2002, Francios Jansen and I visited Pella twelve times for the research, spending about ten weeks there, living at the Kultuur Koffie Kroeg. In 2001 I visited Pella once in October and once in November, participating in a TC meeting each time.

<sup>234</sup> She had worked for SPP during several years and in Pella since 1996. I have not used names for NGO staff, officials or residents.

<sup>235</sup> I recorded parts of the discussion and have a 20-page transcript from the October 2001 meeting. If not otherwise stated, the quotes refer to my own transcripts from TC Meetings.

mineral resources and historical rights to land. I shelved an assumption that livestock farming would be the main issue in the Trancraa process.

### 11.3.1 Irrigation development – history and prospects

Pella land along the Orange River is suitable for irrigation and of high commercial interest. Residents say that this land was under more intensive cultivation in the past, based on the flooding of parts of the riverbed or on irrigation. They had also crossed the river to cultivate fertile land on the shore and hills on the Namibian side and used islands in the river for grazing. In 1905 the fathers had constructed a lift-irrigation scheme and reservoir at Rooipad where fruits and vegetables for the station were produced. However, the engine broke down in 1930, had not been repaired when a public committee noted that water could be lifted from the river but it would be expensive (Tomlinson Commission 1955: 46-7) and the cultivation was not taken up again until 1970 (Thünemann 1975: 13). In 2001–2 the Church still owned the irrigated land.<sup>236</sup> A young Pella leader remembered the sweetness of gardening by the river<sup>237</sup> but said that knowledge of gardening had died with the older generation.

The Rural Areas Act 9 from 1987 restricted the use of the common land to livestock keeping and small-scale dryland farming but did not make provision for such land uses as irrigation farming, tourism and mining on common land (SPP 2003: 39). Residents had enjoyed access to land but been excluded from commercial development and therefore also for developing appropriate tenure arrangements for such economic activities. Some Pella residents claimed that neighbouring farmers had been and remained interested in getting control of the land (personal communication and later TC meetings).<sup>238</sup> Visiting Pella lands along the river in 2002 an agricultural development consultant exclaimed: 'This is a gold mine, there is no reason that anyone in Pella should be poor'. The neighbour Klein-Pella owned by Karsten Boerdery (Karsten Farms) produces grapes and dates at large scale, and the large date plantation and green vinyard are visually very striking in the arid landscape (as the photos in a farmer's magazine show, Streicher 2001). Klain-Pella is a significant employer for people from Pella.

During the earli Trancraa process the TC Sub-committee Agriculture investigated the

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<sup>236</sup> Members said that the Bishop [of Keimoes] had recently 'made the mistake' of renewing the agreement to lease the 9ha irrigated land by the river to an outsider until 2006. However, the Bishop had announced that the plot should be transferred to the community after that (SPP 2001c: Point 4.3). A visiting consultant delighted members with the view that 'lease contracts are meant to be broken'.

<sup>237</sup> He said: 'My grandfather had land at the Orange River. I hear from the community that his land was there. Vegetable gardens were planted there and we lived from it. I was five years old. I saw that garden, I still remember: I see just that garden with maize, pumpkin and cauliflower' (Young ANC leader, 2002).

<sup>238</sup> An ANC leader told me that during the apartheid era a neighbour invited members of the Pella Management Council (*Bestuursraad*) to his farm and treated them to an extravagant dinner with alcoholic drinks. He brought up the issue of development of Pella lands along the river and eventually presented council members with a contract according to which he would lease the land and in return provide grazing land elsewhere to Pella (four hectares to one hectare by the river). However, Pella council members rejected the proposition and left for home.



status of rights and presented an overview of 288ha of irrigable land of which most was unused, while some 40ha were allocated to eight families.<sup>239</sup> In September it wrote to the Department of Agriculture to demand information irrigation development. The SPP staff stressed the high commercial value of land and argued that not all community members could get access to the limited areas available. She inquired about what process, criteria and rental rates to use to determine access to the land without creating unhappiness in the community and urged the TC to investigate how rights could be protected, work on a management plan and consult the community. This reflected a major thrust of the SPP efforts to study and find solutions for a balancing of rights in development: 'Everything must be in place ... I am sure the municipality will be happy if you have the cooperation of the community and they have agreed to whatever system you decide on' (SPP staff, TC Meeting, October 2001). Here a leading TC member was 'dissatisfied with the steps you have just discussed', particularly about getting in people on poverty criteria who 'do not really count' (*'mense wat nie werklik kan tel nie'*). He also worried about the payment of lease fees to compensate other community members: 'You are too weak to pay taxes, and you are still taxed, and then you sit with the problem ... you have to be very realistic when considering people who don't really have an income'. This could be a concealed statement of self-interest but also suggested that the real constraint was capital. In response, the SPP facilitator raised the possibility of a 'joint venture' model and stressed the need for the TC to weigh the gains and costs of a partnership: 'Yes we are giving away some of our rights to the company, but they will give us the capital to develop the land'. However, a member expressed his suspicion of outsiders:

This is one of the reasons why the people say no regarding rights to the *Meent*. It is a pity that I have to mention it, but if you ask what we think, then I have to say I am one of the people who get terribly scared [*verskriklik bang*] when I see that a white man is running everything, related to all the bitterness back then. Unfortunately we are not the kind of people who are very knowledgeable when it comes to the fine print. If you slip behind, you are the loser, and if you lose you sit with nothing. And that is why our people are so scared, but with the right people [*die regte mense*] this thing can work. If it is not the right people, then we can lose everything. (TC member and farmer, TC meeting, October 2001)

The issue of fear versus trust in the 'right people' returned throughout the process, particularly regarding the high-value land at the river. Another uncertainty among members concerned water rights: the government had reserved irrigation rights for 4 000ha of land for 'formerly disadvantaged' communities along this part of the Orange River in 1998, but this was yet to be confirmed and implemented. However, SPP suggested the free legal support from the LRC ('They will go through the contract and show us the weak spots') and a consultative process with the community and government departments. From here the TC

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<sup>239</sup> Individuals apparently got their possession of land confirmed in the 1990s by the Transitional Local Council (TLC) but this had not been followed up. SPP (1996: 17–18) had noted a list of 31 farmers (of which 2 women) who had access to irrigable plots by the river.

and the SPP continued to engage with a market-bureaucratic complex from which Act 9 communities had to a large extent been excluded in the past. In the November TC meeting, members of the Sub-Committee Agriculture had been in contact with the Landbank, which had requested a business plan, environmental impact study and a sustainability assessment (making the Sub-Committee a little frustrated). The SPP staff maintained: 'It sounds as if before one can go and talk to the Landbank, we first have to resolve all the problems around irrigation. Who is going to do what and where and so on ... they will not talk with you unless you can put a plan on the table' (*Hulle sal nie met jou praat voordat jy nie 'n plan op die tafel sit nie*).

In the January 2002 TC meeting, the Sub-Committee Agriculture reported on two community meetings where it had asked for people's verbal or written inputs. Some residents had stressed the risk of conflict ('we have little land and are many people') and the SPP facilitator worried that the irrigation project 'could become a flop, and it has already lasted five years – the thing must get off the ground' (TC Meeting, January 2002). The following day, the representative of DoA Springbok reminded residents that a full study of irrigation development on a 112ha area at Rooipad had already been made in 1996. The estimated cost at the time was three million rand, and the project had been shelved due to lack of funding. The current estimated cost was at least six million rand, and packing facilities for grapes another two million or so (Doa, Irrigation Meeting, Pella, January 2002.) The Ward Councillor suggested that since the DoA did not have resources, a 'Plan B' could be to use government LRAD funds.<sup>240</sup> The DoA official said LRAD was only for acquiring private property, whereas in this case long-term leases appeared more appropriate. He advised the community to seek partnership with an external investor and approach government for water rights, while the SPP offered to consult the LRC on how Pella could seek partners through tenders.

Thus, the SPP and the TC revived links between major actors relevant for irrigation development on Pella's banks of the Gariiep. In this and other cases addressing land rights was to address the changing terms of individual and community participation in the wider economy. At first the attitude was one of development optimism and socially sensitive commercialisation. The debate concerned not only changes in tenure but, indeed, 'Transformation of Certain Rural Areas', addressing a legacy of marginalisation, where land and appropriate land rights were just some among a range of (missing) entitlements. This was for me characteristic of Trancraa in Pella, and may have to be in efforts to reconstruct tenure as part of an economic transformation. The irrigation issue remained central throughout the transition phase of Trancraa (see Sub-chapter 14.2).

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<sup>240</sup> Land Redistribution for Agricultural Development, subsidy scheme for purchase of land from 2001.

### 11.3.2 Small-scale mining

The case of access to economic exploitation of Pella's mineral resources initially demonstrated similar development optimism. Small-scale miners in Pella collect and sell semi-precious stones. According to one of them, about a hundred families are engaged in this activity on part time basis: Some had learnt the trade from other residents and some had gained experience working for mining companies in the Richtersveld and elsewhere. Small-scale miners sell their collections to individual buyers, mainly from Johannesburg, operate in a legal grey zone, and lack financial assistance and equipment (Small-scale miner, Pella, Interview May 2002). Some Meent and Transformation Committee members said that residents had a social right to do small-scale mining in case of need (Group discussion, October 2001). A local policeman called mining a 'survival strategy, a right of life'. He said he had spoken to some about applying for legal rights but the administrative and financial hurdles were insurmountable.

At the TC Meeting in October 2001 the TC Vice-Chair (Pella ANC Vice-Chair as well) presented a political plea for mineral resources development on behalf of the Mining Sub-Committee (sometimes referred to as *Mynbou-Sub*), of which he became the leader. He said that small-scale miners worked more or less alone and were subject to exploitation (*uitbuitery*) by purchasers who paid only a fraction of market values. The Sub-Committee had made contact with 40 Pella small-scale miners and liaised with the municipality, the mining commissioner in Springbok and consultants working on the municipality's Integrated Development Planning (IDP) but only obtained limited new information on minerals and semi-precious stones in the area. The Sub-Committee Chair advocated organisation of small-scale miners and development action: 'Let us establish the body so that we can get the process started. Let the mapping of the places be done so that the claims can be finalised. Let's compile a list of what is there, let's get samples, analyse it, let people know that there *is* a market, and *where* the market is, people are interested! This is the price, this is the quantity they want, the life span of the diamond and the rose quartz and so on' (Chair, Mining Sub-Committee, TC Meeting, October 2001). He advocated a Khâi-Ma Small Miners Association or Section 21 Company (a not for profit company) to process applications and, as in the irrigation case, requested public support to enable participation in the economy: 'Let there be a market, let us look at funding, be it from the state, a private institution or a joint venture. The Development Bank is a good possibility. If you have a good business plan then there is great possibility that you get funding. This is the road ahead for the small miners.' He admitted that he might be 'going off the course of the Transformation process, but this is an opportunity we should not miss. We have moved away from the past but now we have got the people who can help us [to move further]' (Chair, Mining Sub-Committee, TC Meeting, October 2001). The statements express optimism about linking Trancraa to municipal planning, improved application procedures, public funding and job creation. The SPP praised

the report but warned: 'It does not matter if you get involved in different things, as long as you are aware that our time with the Transformation is very short'.

The struggle to obtain information from government or specialists was a recurring theme during Trancraa. In November 2001 the Mining Sub-Committee noted that it had spent fruitless time 'digging for new information' and attending meetings and that the Provincial Department of Minerals and Energy had confirmed that reports and maps on geological prospecting existed, but that they could not be released pending new legislation. SPP confirmed that this had been a problem in all the Namaqualand areas. The Chair of *Mynbou-Sub* said that small-scale miners, for their own reasons, would not give exact information either but were interested in how they could get past bureaucratic and financial obstacles. He reported on a meeting with 45 Pella miners where an official had explained the procedures of applying for a permit, including the need for an 'environmental report' and payment of 'rehabilitation fees'. He lamented that 'it takes a year and three months before you get your permit' and that various departments had reported that they had no funds to help small miners with the costs of getting permits, for 'these guys are only focused on one thing and that is to start mining. They want to start exploiting the minerals and selling it.' He advocated going through the municipality since it would only pay R1 000 per prospecting permit while individuals had to pay R10°000 (Chair, Mining Sub-Committee, TC Meeting January 2002). He had taken the issue up with the Municipal Council.

Mining was thus another engagement with the market-bureaucratic complex, but it also raised the risk of land use conflict and tensions within the TC. The Chair of *Mynbou-Sub* said that 'I fight with Agriculture, the Meent, Tourism [i.e., the sub-committees] and so on. The land is not appropriate for irrigation or livestock, but everywhere you look you see livestock!' The TC Chair was loyal to farming but also interested in the prospect of finding diamonds on Pella land and remarked that, '*Mynbou-Sub* does *not* have land, Agriculture-Sub *does* have land and therefore we need to plan ... The problem is that everyone works in a channel (*elke ou werk hier in 'n kanaal*). We keep others who could make a contribution out'. The Mining Chair replied that 'the land does not only belong to Agriculture' (*dit is nie net landbou se grond daai nie*). The TC Chair tried to mend relations saying that there should be land for all purposes and that one needed better information to avoid conflicts: About mining 'we want to know if there are diamonds tucked away on all those hectares of land' (TC Chair, TC Meeting, January 2002).

While recognising the subsistence rights at stake, the SPP argued that the TC should avoid conflicts beyond its powers. 'We know there are people who are busy with illegal mining activities; we know he needs to survive; we don't want to make a big fuss about it ... You cannot do anything for them because they are doing it illegally. We know the municipality will not do anything since people are unemployed – all the places have the same problem – so no rehabilitation work is done, and then it becomes a problem because you

have a man falling into the pit with his sheep or whatever' (SPP, TC Meeting, January 2002). She also pointed out that the TC would not be able to affect *where* mining would take place, since that was controlled by the state: 'we don't have any control over mining for they just do as they please'. SPP advised that the TC could not address problems of illegality, 'the small miners and the other people need to resolve that problem ... our job is to gather the information and to write a report about it' (SPP, TC Meeting, January 2002).

Thus the Trancraa task confirmed as that of studying, reporting and recommending. The Chair of *Mynbou-Sub* (and ANC leader) worked for administrative changes to improve access and benefits for small-scale Pella miners. It did indeed appear unreasonable that they had to pay fees of up to R10°000 and go through a yearlong bureaucratic process to get a permit collect and sell minerals. The illegality and secrecy around the practice made it difficult for the TC to address their situation but the Chair of *Mynbou-Sub* used the Trancraa process to promote development, linked to a campaign to gain political support from an interest group in the constituency. He was using a political space, perhaps forging a link to between the democratic rights inherent in Trancraa and economic rights, but the rights to mineral resources were weak under Trancraa and were even being constrained through a new Minerals and Petroleum Resources Development Bill discussed by the TC from April 2002 (see Section 14.1.1).

### 11.3.3 History and rights of residence and land use

#### *Annakoppe*

The forward-looking, commercially interesting land use options dominated the first TC meetings somewhat but they also addressed residents' diverse tenure rights and practices that exist within the frame of the state trusteeship. Annakoppe is a settlement in the southwest corner of Pella *meent*. Other Pella people regard Annakoppe as an example of how things were in the past with exclusive family rights to different areas, and early meetings identified it as a 'conflict area'. There are about 15 houses and 27 individuals, 'enough to put up a fight', in the words of a woman residing there. Residents say they have lived there for five generations and call Annakoppe a farm (*plaas*). A woman said that to cut a new residential plot they 'do not ask Pella, we ask our neighbours' (Interview, January 2002). Annakoppe residents generally claim exclusive rights to a part of the *meent*. There is no boundary demarcating their part but a woman and small farmer explained that 'water creates the line': since water belongs to Annakoppe residents others cannot practically bring their stock. A Pella resident could, if approved by other Annakoppe residents, come to settle here but would not immediately be allowed to farm. A Ms Ramon from a 'big farmer' family said that 'the Ramons and Diergaardts are the owners of Annakoppe', but another Annakoppe farmer disputed this and asserted her equal rights to the land (Farmer, interview, January 2002). The woman from the wealthier family said that at Annakoppe people fix their own wind

pumps and fences: they do not demand the assistance of the broader community and therefore refused to pay grazing fees (*weidungsfoie*) (Farmer and Annakoppe resident, Interviews, January and November 2002).

Annakoppe had not been demarcated as town (through a *dorp stigting*). Residents had no electricity (*krag*) and no municipal services and paid no taxes or fees. Residents demanded electricity and telephone connections but parastatals Eskom and Telkom had so far found it unviable. A woman in one of the wealthier families claimed that the municipality demanded that they must first register their plots: 'We are DA, of course, at Annakoppe we are all DA. That is why we do not have electricity. ANC does nothing for Annakoppe' (Farmer, Interview, January 2002). The TC Committee had to investigate problems at Annakoppe and were informed that surveyors had recently come to prepare very controversial plans to subdivide the hamlet into thirty residential plots and town formation (*dorp stigting*). In the November TC meeting SPP noted that this required careful consideration since 'land earmarked for town area will be cut off from Pella ... and be forever transferred to the Khâi-Ma Municipality'. The land would then no longer fall under Trancraa, and residents would not have the option of becoming landowners. It turned out that some provincial government surveyors had been in the area for another job: 'They had a little time. They had a little money. They heard that there is planning and everything going on, and they figured while here they might as well make a draft thing [survey]' (SPP, TC Meeting, November and January 2002). The TC Chair stressed that Annakoppe residents should decide 'if they want *dorp stigting* or if they want the Transformation Committee to guarantee for them' (TC Meeting, January 2002). Annakoppe is an example of powerful social practices of residential and farming tenure, which recurred as an important issue in Komaggas. The provincial surveying of plots triggered worries among residents and an investigation by SPP and the TC and the incidence is an example of how the TC and SPPP often had to navigate many different official processes (IDP planning, town planning, service provision and so on) going on simultaneously, and in addition try to protect land rights and inform other actors of the guarantees in Trancraa and other legislation.

*'How do you tell people what rights they have?'*

The Annakoppe case lead to debate about the right to settle and construct houses in the *meent* and a member argued that there ought to be some rules concerning this: 'Look at the Pella Meent and imagine the guy who does not want to pay taxes and he goes and puts up a structure on the Pella Meent. Should that be allowed?' Yet he also voiced concern that no one should hinder stock farmers from building a *veepos*: 'Temporary structures is when the guy just puts something up and it can be demolished again ... Any guy needs a shelter where he can stay temporarily – we are talking about a *veepos*. I don't think that can be a problem for grazing. You have a stock post for fifteen to twenty years. You don't have a permanent structure. But if you build a stonewall, it qualifies as a permanent structure'

Farmer, TC Meeting, October 2001). The SPP referred to Annekoppe and argued that 'we must be sensitive because they have been there for generations. We don't want to frighten people. Those people already have rights, you cannot tell the Annakope people to move, in terms of the law, you cannot chase them away. It is their place, but do we want such places to develop around in the Meent or not?' Another member asked how one can tell people what rights they have and pointed at the complex history that underlies land tenure issues:

For example I have a farm and Uncle Marcus stays close to my house and puts up a permanent or temporary structure on my farm. He has children there and his children get children there. Uncle Marcus farms there and eventually has fifty small stock, but now I decide he must leave my farm. I have a point that bites, and that makes it uncomfortable. Unfortunately it happens like that in all the Rural Areas. We have inherited the thing like that, and now we want to eliminate everything that we have inherited, roots and all. It won't happen easily.

We know what happened in the small settlements in the large Rural Areas. Lets look at where Pella started: at the church. Most people started at the Pella church, but among them there are farmers who are not really farmers. He may own one goat that he milks. There may be one who needs to get meat [from others] because he does not farm. He was just born there or got married there. They have been here for generations. There has never been a division that said 'here is an area for farming only'.

That is where apartheid came in. They said there are too many black spots in the country, and then they began to talk with the churches about making towns [in the Rural Areas]. And one of the things they left out was housing, until the churches said 'people live here, you have to improve their living standards, let them get clean water'. The church saw that they couldn't sustain everybody; many churches put together settlements and started to make a town, and this is how municipalities were born.

And now you want to tell people who have been on a place for generations that they must leave! Our younger generation will not leave easily. Whether you call them 'occupiers' or whatever. People will say 'my father was here first and I got married here, even if he was not a farmer or I am not a farmer we also have rights here'. This is an interesting problem for the Sub-Committee Agriculture. (TC member and farmer (male), October 2001)

Tenure is rooted in the history of dispossession and various adaptations to the dominant system. In his account the distinctions between those who 'occupied' and 'residents' are tenuous, as is that between farmers and non-farmers and farmland and non-farm land. He returns to the task of the TC with a fine understatement: 'This is an interesting problem for the Sub-Committee Agriculture'. I hear a historically informed and ironic comment on the Trancraa goals (and perhaps the SPP optimism about) using the TC studies, consultation and planning to resolve such complex and sensitive individual cases produced during this long history and to propose a clear and fair system of rights in a year's time. The SPP did not respond directly but stressed the need to think about issues and clarify policy: 'It must be written down somewhere'. The TC Chair confirmed a need to put things in writing:

The way the *buitemeent* is seen now, it that it is the land of Pella people [*Dit is Pella se mense se grond*]. Thinking about the future, it should be written like that, so that if a person leaves the place, it should come back to community of Pella [*dan moet dit terug kom na Pella se gemeenskap*]. In other words, you do not want to give your land away [as community]. Talking about a house we are talking about land as well, this is my view ... but there is no policy for it. We can look to the Council, but there is nothing. We are just 'talking with the mouth', we ought to put something black on white [*Ons praat nou net met die mond. Daar moet iets op wit en swart wees*]. (TC Chair, October 2001).

I think the two first responses about farmers' right to make stock posts and on historical rights suggest that land use planning and regularisation can threaten established residence and livestock practices – 'and now you want to tell people that they must leave'. In my view members were somewhat reluctant to bring these tenure issues into the official process; for example livestock farming was seldom discussed and the debate about residential rights was triggered by the Annakoppe conflict. However, in the last case the TC leader acknowledged that although principles may be clear, or suitably unclear, among community members, 'talking with the mouth' would not be adequate in the future. Members expressed a cautious support for the idea of clarifying and protecting rights but were aware of the practical and social difficulty of doing so. One reason being that they had been subject to various imposed planning efforts before and had themselves pursued flexible strategies of adaptation.

#### 11.3.4 Information, politics and ownership

Information is key to a sensitive tenure process, was central in the politics of Trancraa and a human right that Trancraa implementers promoted in many different ways. The SPP and the Information Sub-Committee of the TC had produced a *Transformation News* in August 2001 and visited households to test awareness of Trancraa and share information. The TC Chair said that the Information Sub-Committee should 'have been visiting the people's homes, visiting the community. They should have campaigned (*gepol*) or, he corrected himself, given people information (*inligting*). He urged members to 'go to the homes to plant a small seed there and then go back after a while to get feed-back and to see if the seed has started to grow. That is the only way one day to make an informed decision. The majority of the people cannot make an informed decision for they don't really know, due to lack of information' (TC Chair, TC Meeting, November 2001). Another member pointed out that Newsletters were of limited value for many residents due to illiteracy and that many needed a two-way discussion to understand issues. He advocated using political branch meetings to provide information but cautioned that it could make it a political issue: 'That is our fear but ... whether we like it or not every thing we do or talk about here is politicised' (TC Vice-Chair, also Vice-Chair of Pella ANC, November 2001).

This led a member to analyse the politics of information in Trancraa and its place within municipal planning. He argued that the TC was 'collecting information for municipal purposes ... making an input to local and central government'. He argued that 'we are striving to gather the things we want to acquire ourselves but all you do is to enrich local government whilst the community remains poor (*julle verryk die plaaslike owerheid, maar die gemeenskap bly nog arm die kant*). ... The information that you have gathered for the IDP does not come to us, but yet we work with the IDP'. Furthermore, the TC could not make any decisions, but merely report and recommend: 'We will make recommendations to the municipality for we say that the community decides about the road ahead. But the



recommendations will be taken through the TC to the municipality; the municipality will take it to the province; the province will take it to national, and *there* the decisions will be made.’ (Member, TC meeting, November 2001). According to this critique of Trancraa, the TC members feed information and advice into an upward process that may empower local government while decision-making power is ultimately centralised. The SPP responded by reminding about the real political content of Trancraa, the decision-making power at local level, since it enables the community to choose ownership: ‘We do not know if Pella is going to be part of Khâi-Ma – in a year’s time you may decide to break away to stand on your own two feet’ (SPP, TC Meeting, November 2001). The message was that being Trancraa held a reward at the end, a choice of ownership greater independence.

At his point the members (the men, who did most of the talking in the September and October 2001 meetings) expanded on the rewards of ownership. The TC Chair reacted to the idea of community independence: ‘I don’t understand what you are saying about “breaking away” ... if we break away after a year it will be with regard to the *meent* land and not the town ... even if we break away in five years’ time and minerals are found inside Pella, the minerals will belong to us even though it [the town] is municipal’ (TC Chair, TC meeting, November 2001). He advocated that the community could retain ownership of land (with its mineral wealth, he hoped) without losing municipal services. Another member stressed that in the present situation the municipality could benefit from irrigation development on ‘municipal land’, including land by the river, but in a year the community could decide that ‘this irrigation land is not founded (*gegrond*) through the Khâi-Ma Municipality but founded through the community, excluding the Municipality’. He stumbled over the terms to express the idea of community or private ownership:

Then it will become just ordinary, what do you call it ... then we have to pay tax on it, but then you pay the state for the right to that land. How do you put it, like the people on a farm, because then you are an *owner*. What I am trying to say is, the community becomes the owner of the land and will only pay that kind of tax. But not every month, for this and that, that is not going to be there [grazing fees!]. Whatever you harvest on that land, whether you make millions or you do not make a good harvest, the municipality does not know the harvest for now it is the community’s work [*solank die munisipaliteit nie die oes ken want daai is mos nou gemeenskap werk*]. (Member, TC Meeting, November 2001)

The hesitation about private property may reflecting that it was difficult to imagine ownership within the dualist property structure. However, a debate about ‘ownership’ and the options under the Act were triggered by a chain of connections from information to the relationship to the municipality, to the option of ‘breaking away’, and finally the cherished situation that the state or municipality will not ‘know the harvest’. The meeting clarified that a community owner would have to pay property tax while also being entitled to control profits from enterprises.<sup>241</sup>

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<sup>241</sup> SPP mentioned the example of a granite mine at Concordia (bringing in R250 000 per year), which after the recent demarcation was controlled by the Nama-Khoi Municipality, but which through Trancraa could revert to the community along with the Act 9 land.

The TC Chair, always fascinated with the prospect of finding mineral wealth on Pella land, said that with community ownership ... it would be neither town [municipal] nor meent [state] land, so the people whom you name to hold all that land will have to pay property tax. But then you discover marble on that land and it yields millions of rands: Those millions of rands will not go to Khâi-Ma Municipality for the entity now belongs to the whole community' (TC Chair, TC Meeting, November 2001). The vision of ownership, marble and millions was a strand in the tenure reform, but one that had so far been secondary to the engagement with development opportunities and tenure problems.

### *On the right path*

Characteristic of the work in these first months were the engagement with specific issues, either due to a commercial pressures and development opportunities, as irrigation development, or a tense social situation as in Annakoppe. The SPP and TC members sometimes used the metaphor of bringing something onto the table (*op die tafel sit*). While the reports by the various sub-committees structured the meetings and the TC Chair tied debates together, the SPP facilitator was central in asking questions, providing information, suggesting links, and encouraging action and responsibility. Members assured each other that they were on the right path – *op die regte pad*. I see the efforts under Trancraa as concerned with various forms of land-based capability expansion through addressing entitlements (such as in mining) and improve economic and political participation. The TC and SPP support created a forum and increased the capacity to engage with the land tenure dimension of resource development problems; in this respect it illustrated an ambition of a comprehensive, tenure reform and economic development policy envisaged by DLA leaders at the time. However, the TC had much work ahead of it: The envisaged politically neutral enlightenment project – studying, planning and advising on solutions regarding the location of ownership and the configuration of rights – could be problematic in some respects as members had indicated: from an internal community point of it was very demanding to address the complex and fluent rights and practices established in response to the past governments' policies of marginalisation and institutional incapacitation. Secondly, the Trancraa studies and other efforts could feed information upwards to decision-making at levels above the community. Nevertheless, the TC was putting meat on the bone of legal reform by addressing a range of tenure problems and development opportunities.

## 12. PLANNING AND WORKSHOPPING

### 12.1 January to June 2002

During the first half of 2002 the SPP and TC continued their work in Pella through meetings, studies and community gatherings, addressing various land uses and change processes. They were competing with time, among other things because the Integrated Development Planning (IDP) process by the municipality had to be completed by the end of February 2002. I will pay attention to two tourism issues (Sub-chapter 12.2) and a planning workshop in January 2002 (Sub-chapter 12.3) that illustrated a broader community involvement and cooperation with the Department of Agriculture. Towards the end of the six-month period preparations for the land referendum were initiated and political debates intensified.<sup>242</sup>

### 12.2 Tourism and contested rights to benefits and decision-making

Tourism has been promoted in Namaqualand as a solution to the crisis caused by downscaling in mining and the limited capacity of land to sustain expansions of farming. In Khâi-Ma the Mayor selected a young ANC member to assist the municipality in promoting tourism and serve on the TC.<sup>243</sup> The TC meetings in 2001 had not dealt with tourism, due to absence of members of lack of preparation, but from January 2002 tourism entered the Trancraa agenda owing to a concern that tourism had generated little benefits for Pella so far, issues about power and the role of Pella vis-à-vis the district municipality, and risks of land use conflicts with farming and mining. Members noted that the IDP had moved ahead to project identification and prioritising. The TC Chair complained that 'we don't know about these things [the IDP]... At the end of the day you just hear that this and that has been planned – tourism, mining and agriculture are going to clash later' (TC Chair, TC Meeting, January 2002). The SPP staff member said that the land was legally under the planning authority of the municipality but according to Act 9 and Trancraa 'they are not allowed to dispose of the land without the approval of the community, so the two processes must work hand in hand'. The SPP facilitator characteristically noted that 'we must prove to the Minister that there was a good consultative process and that each person was given an opportunity to make an input. We must be able to produce minutes for every meeting where people said they want a lodge, and whatever we decided about it. We don't have anything in writing and that bothers me' (SPP, TC Meeting, January 2002). The TC addressed some of these concerns with respect to a *4X4 route* across Pella land and the development of the former *Swartkoppies* mine into a guesthouse, the *Oasis in the Wilderness*.

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<sup>242</sup> I visited Pella six times during this phase.

<sup>243</sup> A meeting in November 2001 between the Municipality and the TC Sub-Committee on Tourism identified Pella as the main 'Bushmanland node' on the *South North Tourism Route*, a network of tourist guides and companies in the Western and Northern Cape Provinces.

### 12.2.1 The 4X4 route

*'They trample our land ... but what do we get?'*

'The Namakwa 4X4 Trail' runs across Pella land and is managed by the Namaqualand District Municipality, which advertises it in pamphlets.<sup>244</sup> In the 1990s, 4X4 committees in the communities had assisted the district municipality and incomes calculated on the basis of kilometres driven by tourists had been shared with the relevant Local Council, but communities had reportedly experienced a worsening situation after the amalgamation in 2000, when consultation and benefit sharing had been discontinued (SPP 2003: 44).

In the January 2002 TC Meeting, the TC Chair opened the discussion by saying that 'tourism is sitting with a problem around the 4X4 route that passes through here. In the Bushmanland region people come and trample our land, but when it comes to compensation we don't get anything, there is no income for us', which could also have implications for the balance among land uses:

If it were up to me, I would say, don't give mining and tourism much land because tourism does not mean much to us. The guy comes and drives through Pella and gives the municipality 2%, but you don't see that money, so don't give too much land away ... no one can tell me how much capital Pella can generate from tourism in a year and which could give one a new perspective on the issue: we only see tourism as the next source of income because other things are being spent. (TC Chair, TC Meeting, January 2002)

The SPP facilitator confirmed that this was a view held by many and stressed that the 4X4 route raised challenges for planning. The route had been changed in 2001 without consulting residents but it could be possible to involve a consultant to get maps and other advice: 'he can compile a report and then discuss it with the community again, also to discuss things like a lodge or a hotel to create jobs'. She asked the TC to consider where the money would come from and what type of agreement with a private developer or government the community would need (SPP, TC Meeting, January 2002). The TC Chair reacted with some pessimism about a partnership: 'I don't have the money but I have the idea ... but that man who comes here does have money'. The SPP facilitator stressed proper planning, but it did not appear adequate to address the lack capital and information power raised by the Chair.

The focus on facilitating contact with outsiders to support commercial development was reminiscent of the irrigation plans and so was the experience of dependency: having ideas but not money, needing information, continued exclusion from decision-making, such as moving the Pella 4X4 route without consultation in 2001. The TC Chair pointed out that the municipality depends on community approval: 'the municipality will not dare to let the process go ahead without the approval of the community' and stressed that 'we have to go back to

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<sup>244</sup> It runs from Pofadder to Vioolsdrif (330 km) mainly along the Southern bank of the Gariiep, including across Pella and Steinkopf land. From Vioolsdrif it connects to the route through Richtersveld to Alexander Bay (250 km). It is recommended for winter months (April to October), while the summer can be unbearably hot (NDC 2001).

the owner, we have to consult with the people'. SPP suggested that members should ask the authorities 'who decides where that 4x4 route should go? If the District Council decides, then through what kind of negotiations with local people?' (TC Meeting January 2002). The *Pella Transformation News* of February 2002 followed up with an article on the 4X4 route displaying a photo of three 4X4 vehicles crossing mountainous terrain, telling residents that the District Municipality was currently managing the route and asking 'what is the Pella community gaining from it?' It optimistically suggested that 'the decision about tourism activities rest with you!' (SPP/Pella TC 2002a). Trancraa made various promises about having *choices* – and this one was followed up with the authorities.

### *Meeting the District Municipality*

The SPP requested a meeting between representatives of the Rural Area communities and Namakwa District Municipality (held 1 February 2002 in Springbok). The meeting started with a prayer in Nama by a Richtersveld representative. An SPP staff member from the Springbok office explained the purpose of the meeting by saying that communities had repeatedly raised the problems of land use conflicts and benefit sharing. He stressed the potential positive links between the Trancraa process and tourism. After that SPP stayed in the background, while community representatives raised their concerns. Pella TC members asserted that the route had a negative impact on livestock farming and requested benefit sharing.

A representative of the Namakwa District Municipality stressed that the purpose of the 4X4 route was to benefit communities. There had been an intention to share revenues, but it had not been possible. The Council took considerable effort in planning, marketing and coordination. Travellers paid a license of R150 per stretch of the route but costs were rising and the District Municipality was running at a loss.<sup>245</sup> The official questioned whether the communities would be capable of managing the 4X4 route enterprise and stressed the secondary economic benefits to communities through demands for goods and services. He requested that communities protect the attractive environment along the route, by refraining from felling trees and throwing garbage. The meeting ended somewhat hurriedly with expressions of commitments to work together but silence from community representatives who did not follow up their earlier challenges.

The meeting gave me the impression that the District Municipality officials were reluctant to let go of responsibility and power and that they did not recognise that Trancraa could lead to community ownership and a completely new bargaining situation. In a discussion afterwards an SPP member of staff said that the same official had suggested 'that the communities are not mature enough to take over and there should be a grace period

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<sup>245</sup> The District Municipality reported an income of about R90 000R in 2000 and about R104 000 in 2001 (Equivalent to 300–350 vehicles doing the full tour).

of ten years in which they could learn how to manage land'. The SPP's new employee<sup>246</sup> wondered if the officials were 'actually concerned to protect their own jobs. You know, with the six communal lands going out of their reach, they only have the Bo-Karoo left'. She interpreted the meeting:

Actually we have not come very far when it comes to real democracy. People are still afraid of speaking up. They may have rights, but they do not *assert* their rights ... These people will raise the issue with us [the SPP] that they are not happy with the income distribution et cetera. But when they face the authorities directly, they keep quiet: They know their rights but they are not confident enough to express them when they confront authority. Next time we meet them, they will again complain about the way the 4x4 route is managed. (SPP staff, after '4X4 Meeting', 1 February 2002)

Creating the meeting was an example of SPP advocacy but for the time being the status quo prevailed regarding the 4X4 route: I sensed a muffling of the community claim for rights to economic benefits and influence, which was further confirmed when the Pella TC addressed the 4X4 case for the last time in September 2002 (section 14.1.2).

#### 12.2.2 Swartkoppies from mine to *Oasis in the Wilderness*

In the Swartkoppies case the creativity of Pella women and considerable government support produced a positive initiative that nevertheless caused some problems for the Trancraa defenders of community land rights. The background was a central part of Pella 20<sup>th</sup> century history. In 1955 a Mr Weidner obtained a government permit to carry out silimanite mining for export to Europe and Japan on a part of Pella land, paying an annual land lease to the Church. Swartkoppies symbolized the modern era of mining for a global market. When established there were about 500 residents in Pella. From then on the government, the Church and the mine organised an influx of workers. If excluded politically, Pella was integrated in terms of economy and labour. When racial segregation required that white families of Pella be moved out, the Weidener family stayed on at its secluded residence. The mine was closed and the equipment sold in 1998, the year Trancraa was passed. The family sold the houses to the municipality for R25 000 and gave up any claims related to the land, facilities or mining permit (valid till 2060). In 2000 the Provincial Government approved an application by the Pella Transitional Local Council for financial support to develop a tourist facility, *Oasis in the Wilderness*.<sup>247</sup>

In the August 2001 TC meeting, members had asked the SPP to consult the LRC about the municipality's purchase of the Swartkoppies residence on Pella land (Pella TC 2001c:, point 4.5). In 2001 refurbishing of rooms and chalets was in progress and the

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<sup>246</sup> She joined the SPP and the Pella Trancraa process from 2002. She had a background in education, civil society and human rights work. I occasionally use SPP<sup>2</sup> to distinguish her from the main Pella Coordinator (SPP<sup>1</sup>).

municipality was hoping to operate the guesthouse from January 2002 (Pella TC 2001b). A Section 21 [not for profit] Company had been formed with the Major of Khâi-Ma as the Director, and she and the Pella Ward Office managed the project. In the November 2001 TC meeting a member asked SPP to find out from LRC 'how lawful this thing can be', an example of using SPP and LRC to access law with a view to improving local practices. The main SPP facilitator had earlier suggested that the municipality was violating community land rights at Swartkoppies (personal communication, 2001) but at this stage argued against a confrontation. Later in the process the SPP facilitator called the Swartkoppies a case of 'pure theft: the municipality is now claiming that it is theirs. We are trying to work out the legal aspects and sort it out but it is very sensitive' (SPP, personal communication, May 2002). LRC lawyers drafted a solution according to which the municipality could rent the land until a new owner was identified (SPP 2002b: 4.2). This was worked out in greater detail during the last stage of the Trancraa transition phase (see Section 14.1.3). An LRC lawyer had talked about 'a new social contract' (section 8.3), the idea that the new democracy could promote economic integration while protecting the rights and interests of residents. I a certain respect the Swartkoppies case illustrated grounded work to create at least some such contracts.

In the January 2002 meeting Swartkoppies was the subject of more than a third of the deliberations, for the case also raised tensions over land use and some questions about the attractions and identity of Pella in a changing economy. The leader of the Sub-committee Agriculture asked how to respond to farmers who complained that they were not allowed access to the 400–500ha former mine area. The TC Secretary mentioned farmers' worries about plans to put up tennis courts. SPP questioned the wisdom of the project: 'Tourist professionals will tell you that tourists do not want to stay at Swartkoppies. They come here to see the river, to swim in the water and all those things ... but it is in the middle of a mine dump. We must be realistic. They come from the cities and want to see nature, they don't want to see a mine dump and trucks (SPP, TC Meeting, January 2002). The TC Chair, aligned with farmer interests went further in questioning the investment in the Swartkoppies resort. 'Not to throw rocks on anyone' he said that too much money was invested in it:

Look at the type of houses that was built there! My question is: does the tourist who comes from a mansion want to go and stay in a house that is worth several hundred thousand? Does he not want to go and stay in a simple house? That man is probably sick and tired of all that luxury. My view is that they should have put up some thatch houses ... The R1.3 million that has been pumped into that project! No one, not even the council, can tell me that Pella has generated R1.3 million from tourism in the eight years that I have been here. I don't even think they have generated R50 000. That is my personal view and I am a layman. (TC Chair, TC Meeting, January 2002)

Responding to a question by the TC Chair, the research assistant (and tour guide) argued

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<sup>247</sup> The Local Economic Development Fund of the Department of Housing and Local Government granted R1.37 million for 2000/1 and an additional R0.25 million promised for 2002/3 (SPP/Pella TC

that five ten years ago most of the tourists to South Africa 'were your high rollers and had money to spend. They did not care where they stayed. If they saw one single Kudu they would jump up and down and be happy'. However, today's tourists expected 'ten different birds, tradition, culture and accommodation that fits with it ... So you must tread a fine line when you market the place, combining adventure and cultural tourism' (F.Z. Jansen, Tour Guide, TC Meeting, January 2002). The TC Chair was satisfied: 'You have just answered my question ... I have said that they should get a few donkeys and let the people tour the mountain and get a cave or something. Forget about luxury houses. Just put a bit of water there – that is why Agriculture is saying that they don't want Tourism to make our land so full of roads' (*Landbou sê hulle wil nie hê Toerisme moet ons se grond so vol paaie maak nie*).

The SPP<sup>1</sup> member argued that the IDP and TC had to address such land use conflicts: 'It is your duty to protect the work of the community – people have been grazing there and now there is going to be a tennis court!' However, she also tried limit the involvement of the TC and warned that 'we do not want problems and arguments with the municipality'. One decided that the TC should look into the grazing conflict, because of the complaints received, but not evaluate a project already underway. The Chair of Sub-Committee Agriculture said that that he had told the Mayor that it did not have problems with the houses 'but we don't want to give you more land than we have already given you, unless you give us a really good plan'. Thus, the TC authority to advise on future land use was sometimes imagined as a power to allocate land. Here a gendered interested in farming and envy of a tourism project conceived by women may also have played a role. In my view, the conflict over grazing at Swartkoppies was a minor one, for the large mining area could be opened to grazing while only a small fenced area was needed for the guest house, garden and tennis courts and still not claim one thousandth of Pella's grazing land. Raising the costs to stock farmers was way of talking about relations with the municipality and the distribution of benefits.

The Oasis in the Wilderness project exemplifies the transition from the mining to a service economy and raises questions about what the outside world wants Pella for in future. The TC indirectly supported the transition by addressing conflicts, searching a legal arrangement that would protect Pella ownership and facilitate the rather unique public investment in Swartkoppies. The *Oasis in the Wilderness* was conceived by local women leaders and supported by provincial government. However, lack of community involvement had been a problem, the tenure arrangement was uncertain and members suggested that municipal leaders were treating community land and public investments as personal property. As in irrigation development, SPP recommended links that could facilitate commercialisation and community control at the same time.

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2002c). The investment at Swartkoppies was thus more than half the cost of the four purchased redistribution farms (which was about R2.7 mill for the 35 000 ha).



## 12.3 Regulations and a Planning Workshop

### 12.3.1 The regulation regime

Land tenure may be seen as the intersection of a 'property regime' and the 'regulation regime'. The first has to do with rights of the owner to use, transform and decide over resources and the latter with public regulations that constrain or shape the actions of rights holders (Sevatdal and Sky 2003: 32-38). Human rights linked with land tenure concern the property regime but also participation in the regulation regime and other governance. In land reform in Namaqualand right after the turn of the millennium the words *regulasies* (regulations) and *reëls* (rules) were central, as they had been for more than a century. The SPP and the LRC spearheaded the production of Grazing Regulations (*Weidingsregulasies*) and dryland farming plot regulations.<sup>248</sup> Grazing Regulations address the 'management, control and protection of grazing land' (*Bestuur, beheer en beskerming van weivelde*). The regulations prescribe a planning process but rules come into effect immediately upon announcement (Khâi-Ma Municipality 2002b: 5.2.2). The Pella Grazing Regulations were made public on 23 January 2002 (Khâi-Ma Municipality 2002a) after a year of consultations.<sup>249</sup> Definitions divide the citizens of the municipality into two categories: Pella residents and others,<sup>250</sup> and confirm the rights of Pella residents. The Grazing Regulations define *meent* as 'areas within the jurisdiction of Khâi-Ma Municipality that are made available for grazing purposes to members of specific groups among the Khâi-Ma communities' and the *Pella Meent* as 'the area that is managed for the benefit of the Pella community'. The Grazing Regulations also promote the idea of 'Pella land' to be managed as a whole: *Pella Meent* includes all the lands approved for the benefit of Pella (Act 9 Area, redistribution farms and state farms). This, in my view is consistent residents' emphasis on exclusive land rights. However, the Grazing Regulations also use a distinction between (i) residents in general and (ii) those residents who have the status of *meentgebruiker*, defined as 'a person who in terms of these regulations is entitled to use the meent'. These could be problematic for residents,

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<sup>248</sup> For example Nama-Khoi Municipality (2001; 2002). The Grazing Regulations were promulgated in terms of the 1987 Rural Areas Act 9 (valid until the Transformation process is over) and repealed regulations from the 1980s.<sup>249</sup> Grazing Regulations were debated meetings of the DLA, the Municipality, SPP and Pella Meent Committee and Farmers Associations and political leaders in January (SPP 2001b) and a draft made by SPP and LRC (dated 12 February 2001). The regulations were again discussed at a workshop in August 2001, after which the SPP sent them to the municipality for official approval.

<sup>250</sup> The two groups are: '(a) A person from Pella whose rights are or at any time were identified under the Rural Areas Act, Act 9 of 1987, and which rights were later determined under the Transformation of Certain Rural Areas Act, Act 94 of 1998 and as it is explained in the Article 12 Establishment Notice published in terms of the Municipal Structures Act, Act 117 of 1998; (b) A person who normally resides within the jurisdictional area of Khâi-Ma Municipality and who has no rights of access to the Pella meent lands' (Khâi-Ma Grazing Regulations, 2002, definitions).

who have their own rules about community membership.

The regulations state how individuals may gain rights to use the land through contracts with the municipality. The Municipality must treat residents in a reasonable and equal manner and may not discriminate unfairly against any group. It has the right and obligation to 'give preferential access to persons who are poor or disadvantaged and to women' (Article 10). This is an example of a possible institutionalisation of the promotion of human rights. It is also important for residents that the regulations establish the duty of the municipality to make an annual budget allocation for *meent* management (5.1). Section 31 provides that the rights of residents must be taken into consideration 'when the Municipality takes steps that significantly affects their ability to use the land'; they must get reasonable time to inspect grazing contracts, management plans, livestock registers, minutes and be given reasons for rejections of applications; and have the right to attend and speak at Meent Committee or Municipal meetings. However, some stipulations appear to extend a restrictive approach to land use (I am summarising selected points):

- All livestock farming must be based on a 'grazing contract' between the individual land user and the Municipality (Art. 2.1).
- The municipality must establish the maximum number of livestock permitted per user and may reduce the number of stock permitted based on departmental prescriptions (Art. 8, 9).
- The municipality is empowered to make camps within the common land and to restrict access to those (Art. 15.1).
- Farmers may only increase their herd after application to the municipality (Art. 20.2)
- No one may 'occupy, camp or put up any form of hut, protection, kraal or any sort of structure' unless they are empowered to do so by the Grazing Contract (Art. 24.1). The municipality can remove any such structure at the cost of the 'owner' if it has been constructed without the written approval of the municipality (24.2).
- No person may 'depart from the existing roads and access routes in the *meent* without special approval of the municipality' (25.1).
- Land uses that require written approval of the municipality include: collection of stones or materials, ploughing, cutting of green plants, any collection of firewood for sale, hunting (except wild cats and jackals), keeping of pigs, collection of minerals, killing or harming of donkeys, keeping of ostriches (Art. 26) 'Any livestock found on the meent in violation of the stipulations of the Regulations will be shot' (Art. 30.1).
- Monthly grazing fees are stipulated as 10 cents per small stock and 60 cents per large stock on Act 9 land, and twice the amount on the new farms.

*'Keeping the pants up' – interpretation*

During field research I was sceptical about the emphasis on regulations and planning. I had assumed that Trancraa was about identifying new owner(s), who would *then* plan or otherwise go about their use of the land, taking into consideration national law, such as environmental legislation, as other landowners. However, with Trancraa it increasingly appeared that to get the land was to get a regulation regime, and one that was more restrictive than those enforced upon other owners. The SPP and the LRC, perhaps also government, seemed to believe that the risks involved in granting people ownership – perhaps of abusing the land or encroaching on the rights of others – should be tempered by regulations. I asked a SPP Pella facilitator whether the emphasis on making plans and rules

*before* the transfer of land was justified. She argued that many residents repeatedly demanded rules and regulations and were frustrated by the ineffectiveness of the Meent Committees and municipalities in managing land (Personal communication, SPP staff, October 2001). She also argued that the plans should be seen as a resource for any future landowner, who would be in a position to change the rules made during Trancraa. In Pella, for example, a community owner could adopt the Grazing Regulations in whole or in part. Another SPP staff member felt that researchers did not pay adequate attention to land degradation, which he associated with the weak governance regime for the common land (SPP staff, Springbok, November 2001).

The Grazing Regulations contain a compromise, perhaps a contradiction, between the protection of the Pella community on the one hand and the recognition of governance rights of the municipality on the other: Land users appear as tenants of the (local) state. In the *regulasies* I see a continuation of the patronizing embrace of the former regime. The Municipality may prosecute violations through the courts and in the Grazing Contract each user must accept that he or she will carry the costs of court action if found guilty. The regulations thus represent an extensive criminalisation of common practices. For example, if a user does not get approval for a *veepos*, the municipality is empowered to remove it as her or his cost. It thus reaffirms the attitude and problem that the SPP representative had spelled out during the 1996 Act 9 revision consultations in Pella: 'Ladies and Gentlemen, we are farming illegally on the meent' (see Section 10.3.2). The SPP and LRC use a telling metaphor for the two-pronged approach of regulations and contracts: 'In order to make sure that there will be no problems with the legal enforcement of the regulations, provision is also made for the signing of contracts between each user and the municipality in terms of the regulations. The pants are held up with both a belt and with girdles' (*Die broek word as't ware opgehou met en belt en met kruisbande*) (SPP 2003: 29). Being caught with the pants down may represent the degradation of the land through environmental change or loss of government control.

In practice it appeared that farmers would often do as they thought best while the rules had limited effect on land use. A few of the bigger farmers, and the prominent members of the TC and the Meent Committee, moved whole or part of their herds from new farms to the old meent during the 2002, contrary to rules. Farmers generally did not pay grazing fees. Stock limitations were not enforced. A woman who had tried to document some deviations from rules said that she had been squeezed out of the Meent Committee during the nominations in April 2002, and that her first replacement had too. Young leaders of the ward and municipality had conflicts over the Grazing Regulations with 'old ANC who are big farmers'. The Ward Councillor stressed the need for solutions that respected the interests and experience of farmers, who often saw regulations as a legacy of the past. 'Some of the farmers say that they are caught up in the laws of the former government. ... They say they

have been farming for years on the land why should they reduce the numbers now? They farm like commercial farmers' (Interview, Pella Ward Councillor, June 2002). Thus, there were needs for planning and coordination, for example to protect the interests of vulnerable community members. TC members, including influential farmers, appeared reluctant to address contentious issues in farming, such as access to new farms, the *meent*, women's rights and the rights of herders. During the Trancraa process in Pella the major event for doing so was a workshop on land and livestock management that, slightly paradoxically I found, was held six days after the delayed promulgation of the Grazing Regulations for Khâi-Ma Municipality. The SPP participant only casually mentioned the Grazing Regulations, so one may see the planning meeting as a gradual process of building consensus around promulgated rules. In an interview later in the year the Pella Ward Councillor referred to the consensus of the January meeting, not the official regulations themselves.

### 12.3.2 Land management planning and carrying capacity

#### *Background*

Land reform actors in Namaqualand emphasised consultation through *werkswinkels* (workshops), group work and community resolutions. The January 2002 land management workshop was long anticipated. At the October 2001 TC Meeting, the Chair (farmer) expressed concern about the Department of Agriculture (DoA): 'I hope Agriculture does not come and work out a killing framework (*moordende ruglyne*), for we sit with a very serious problem. I do not want one more framework that cuts away more from us than it benefits us'. This related to disagreement between the DoA and many farmers about stocking levels (see Section 10.3.3). The SPP representative suggested that the approach of the DoA had changed and that recent meetings at Concordia and Steinkopf had been 'very successful'. SPP urged that it was 'extremely important' the TC, Meent Committee, Farmers Association and IDP planners all participated in order to make one management plan, since the IDP had to be finished at the end of February (SPP, TC Meeting, 28 January, 2002).

#### *'The plan really lies with the community'*

The planning workshop took place on a hot summer day at *Pella Progress Hall*. Around 80 residents made it the biggest Trancraa event in Pella before the referendum. There was lively chatting, discussion and challenging interventions. While the IDP planners did not show up, the DoA representative was the main speaker. The workshop was in my view characterised by a certain distance between official DoA concerns about carrying capacity, *drakrag*, and overgrazing and residents' emphasis on practical problems, social issues and community decision-making. However, the DoA representative importantly asked what good planning meant. A resident stressed attention to practical problems and farmer views:

I think the manager must go to the farms every month and inspect the water and the grazing and then compile a report. He must have a record of all the tasks and respect the

desire of the community that people may manage on their own (*op hulle eie aangaan*). A management organisation or plan must reflect what is happening in this community and on all of its land. He should not only sit here and do things but must go out to the farms. He must consider each person's point of view, also their shortcomings, and he must put these things before the whole community. (Resident, planning meeting, January 2002)

The next speaker elaborated these concerns, drawing attention to farmer's knowledge and their power to choose to cooperate or not:

I think the management plan that we are discussing really lies with the community. It is up to the people to come up with a plan, and the farmer who is farming on the land today is actually the most important man. He alone knows how farming should be done and can foresee and give direction.

But the most difficult part is for us to get there. Each person believes that since he is a farmer, he alone knows what is best. Only if we come together and stand together, and listen to each other and help each other, for example to repair the fences and install troughs, then only the plan will work. We must come together and make a plan to make that windmill work – that is the management plan, but we have to work together.<sup>251</sup>

Then we must not say that one is the *baas*, or that one may not do this or that, or that one should be *baas* and exploit others ... If you choose that thing, he will not be afraid, for he is a farmer, he feels it and just watches until he is fed up. Now he has the chance to say which plan he thinks should be put on the table. Let us see this, let him give his cooperation – if we give our cooperation we can carry out the plan. (Resident, Planning meeting 30 January 2002)

The two speakers clearly formulated their expectations about support and a form of participatory planning, noting the need for coordination among farmers.

### *Seeing the land*

In response, the DoA official conceded that 'at the end of the day' Pella will decide how to manage its land but stressed the need for cooperation, saying that one could not have a farm, as in Leliefontein, with 'eight hundred farmers and eight hundred plans.' However, he stressed the importance of carrying capacity (*drakrag*) planning, referring to figures on sustainable stocking density calculated by the DoA for all farms in Namaqualand. He outlined three principles of farming: The first principle was 'to protect the land (*grond te beskerm*). That is for me the very most important. It is important that we look after our veld for our descendants are also going to graze there'. The second principle was limitation of stock numbers. He was aware that recommended livestock numbers, 'always made people very upset' because they regarded them as far too low, but said: 'When I look at the livestock numbers, I get goose bumps, thinking about what is here compared to the what the

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<sup>251</sup> This echoed a comment by a farmer who said that a 'management plan should put in place infrastructure and nothing else' (Interview, July 2002).

department says ought to be here'.<sup>252</sup> The third principle was correct farming based on knowledge of the land:

The management plan or the management planning committee should teach the farmers on the land a little. Many of the farmers sitting here know much more about farming than I do, but I know what I have learnt from the land (*maar ek weet wat ek van die land geleer het*). A big part of the management plan is training to make our farmers aware of certain things: It will help to see the finer details; it is easy to run on the path and just overlook them. But if you bend your head down to look at the land you will often see many more things that enable you to tell the condition of the veld: things that tell you to move your livestock for a while or that you may bring back the livestock, because the veld has improved on a certain piece of land. It is those things that we really want to have in our management plan. We have to provide a bit of training to our brothers, our people, who are farming on the land. (DoA official, Planning meeting, 30 January 2002)

This may be the kind of paternalism and hubris that the first speakers tried to prevent. It implies that farmers in Pella walk the land without seeing it, removed from and unaware of the land, while the advisor has the scientific sources of knowledge, has 'learnt from the land'. I would argue that stockholders through *kraaling*<sup>253</sup> practices and movements do read the land and act on what they see. However, in a discourse informed by the ranching practice of privately owned farms these farmer practises appear to be based on ignorance. The official added an important awareness about herders:<sup>254</sup>

Then we have our herders. They are very important. We often do not count them for much. He must just take the livestock to the field and collect it the next morning and he has to keep the jackals and the wild cats away from the livestock. They play an immensely important role. He is the one running behind the livestock. He knows what they eat and what they don't eat. Our herders must join us in the writing of the management plan. He might be a stock herder today but tomorrow he could be a stock farmer ... he must walk this path together with us. (DoA official, Planning meeting 30 January 2002)

Although the viewpoint could underscore farmer estrangement from the land, since only the herder is in touch with the stock and the veld, such an emphasis on social inclusion was valuable and, in my view, rather rare in the Trancraa process.

The official next asked if planning is necessary, since past plans were seldom heeded. He said that farmers themselves stressed the need for planning, saying: 'there is no control, there is no plan. Everybody does as he pleases. I want to keep my livestock in a camp. When I get to the camp, then they are all out and the gate is open, or the fence has been cut.' The DoA official stressed that plans should not 'limit and constrict people', should not 'tie

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<sup>252</sup> The DoA considers the overall sustainable stocking limit for the 95 000 hectares of Pella land to be around 5 000 SSU (19 ha per SSU), as indicated on hand-outs to residents. Stock farmers had just counted their animals and found that it exceeded 12 000 heads. The April 2002 dipping made the gap between official guidelines and stock numbers even starker. It found 21 750 SSU on the land or 4.4 ha per small stock unit (SSU), four times the stocking density that the DoA recommends. Livestock numbers and percent of total SSU: 1 260 cattle (24%), 4 730 sheep (22%), 7 420 goats (34%) and 350 donkeys (10%) (Chief Animal Health Inspector, DoA, Steinkopf).

<sup>253</sup> Keeping stock in a *kraal* (fenced area) at night, letting them out at day, possibly with a herder.

their hands', or tell them to not do this or that: 'The purpose of the management plan is that everyone must agree that there should be order. We must not try and cut each other's throats. We all have a right to the land and to benefit from it' (DoA official, Planning meeting 30 January 2002).

A planned farming practice was implicitly taken to involve a ranching model with the land divided into camps and on carrying capacity models. The DoA argued that carrying capacity planning was based on a neutral scientific data applicable to any category of farm. Carrying capacity was 'not something a clever man conjured up in his office but had really been derived from the land, such as the state of the veld, the rainfall and type of land' and was based on vast scientific data collected in the 1980s. The concept of carrying capacity was explained as the amount of land required to keep a stock unit for a year without additional fodder. For example, a certain amount of livestock could graze on Pella land for a year without fear that fodder will get scarce, for example 4 000 small stock on Pella *meent* suggested: 'Of course, if it does not rain then our hands will be cut off. Then the carrying capacity, everything, will be in a mess: But if we have a good year's rain, then that is the carrying capacity' (DoA official, Planning meeting 30 January 2002). The DoA considers the overall sustainable stocking limit for the 95 000 hectares of Pella land to be around 5 000 small stock units (SSU) or nineteen hectares per SSU.<sup>255</sup> Farmers did not ask why one should use a model based on good rainfall when in most years they did not get good rain (as indicated by an elderly farmer in an interview; Section 10.1.2).

*Discussion: Livestock marketing and infrastructure maintenance*

The plenary discussion stressed economic participation. A farmer asked about marketing of livestock products. In a thorough response, the DoA official said that 'marketing is one of the most important problems in the Rural Areas for often people sit with livestock that they want to sell, but do not get it sold: that is also why the livestock numbers do not decrease'. He described a lack of infrastructure and transport and how farmers were generally at the mercy of the *spekulant* (travelling livestock merchant) who passed through offering R150 for a lamb while the abattoir would give R250 to R300: 'We don't want to give it away for nothing. We want money for it, but our only market is the guy who passes through here, ... I really want to get rid of the thing and therefore take the money offered' (DoA official, Planning Meeting, January 2002). Thus, he recognised and identified with farmers' interest in marketing their products (an interest also confirmed in my individual interviews) and argued that marketing should be part of the management plan.

The official also stressed that Pella farmers could no longer expect the public to carry

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<sup>254</sup> Herders work for the bigger livestock owners. They may be poor community members or rightless outsiders who experience severe work conditions, insecure tenure and low pay (R200 per month was quoted by a herder in Pella).

the costs of infrastructure maintenance: 'Everything you need in order to be able to farm is very expensive. People expect the municipality to carry it, but those people do not get money from national government any longer. All the money that they have ... is what they collect from people through fees'. However, he also noted that 'even if the whole Pella community pay their fees we don't even have enough to buy a head for a windmill [estimated at R30 000]: the bottom line is that the people using these things will have to pay to get them repaired' (DoA official, Planning Meeting, January 2002). The official explained the costs of farmers with private ownership, for maintaining inner camp fences and jackal proof outer fences, as a guide. 'I am suggesting that each man must pay R4 per head, and if you are unable to pay R4 ahead then you will never make it as a farmer'. He agreed that owing to their poor market access and infrastructure, Pella farmers could not currently pay such fees. However, he said, in light of governments policies, land use planning should be seen as business planning. 'We can only get it right if we get the money right and we respect each other ... we are all involved in one business and therefore we need that single plan' (DoA official, Planning Meeting, January 2002). Thus one context of Trancraa was reduced government support for land maintenance. The SPP facilitator also placed it within a changing policy regarding redistribution and community management:

I think, to be realistic, we must realise that the Department of Land Affairs has changed their policy somewhat. In the past they bought commonage land for the Rural Areas. Now we have a new Minister of Land Affairs, and she has said she is not interested in so much common land. The people must make it on their own and farm commercially: that is where she wants to spend the money. I am not saying we cannot try, but I am concerned that each time we go and ask, that is the answer we get: "People must go and farm alone on their own farms. Why do you always want to farm together, it does not work." That is *her* opinion. I think you must put pressure on her if you do not agree, but anyway that is her policy (SPP, Planning Meeting, January 2002).

The emphasis on a commercial ranching model was reinforced by recent policy signals: Farmers pointed out that it was difficult to implement at Pella given the amount of land and number of farmers: they resolved to discuss the need for more land and the new the Minister's unfavourable policy with the DLA and other state departments.

#### *Group work and reporting*

SPP introduced group work by stressing a recent stock count of 12 000 stock: 'I think we were all shocked when we saw the livestock numbers and discovered that there are people who do not know that we decided long ago that no one may own more than 500 stock. There are people who have far more than that. What do we do? Do we leave it at that or increase the [permitted] number?' Groups were asked to discuss and make recommendations about (a) who hold the rights to keep livestock, (b) livestock numbers and carrying capacity and (c) user fees (see Table). Defined in advance by the SPP, the agenda did not include the issues

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<sup>255</sup> However, a registration just carried out had indicated 12 000 livestock and in April 2002 farmers



brought up by residents such as marketing. The pertinent information presented in a handout to participants was the estimated carrying capacity for Pella and the costs of maintaining infrastructure.

Groups submitted reports to SPP and the DoA official read out major findings and recommendations. All groups supported that stockowners must be registered, and four of five that an individual should enter a grazing contract as a condition of accessing the old commonage. Groups supported the 'resting' of land, if more land could be granted for the purpose. Groups were divided over whether rules about livestock numbers should discriminate between full and part time farmers (3 for, 2 against). Regarding the stock limitations only one of five groups agreed to a fixed stock limit applied to individuals,<sup>256</sup> nor did any mention a level for limit for Pella as a whole. The DoA official noted that the reports reflected a 'common feeling that co-operation among the farmers is more important than legal enforcement of carrying capacity norms'. He further noted proposals about strengthened marketing and again embraced it as an alternative to controversial enforced stock reductions: 'I would rather suggest we pursue marketing and then a person will be surprised to see what a difference it will make to the livestock numbers at the end of the day: I should get rid of that old ewe I have been hanging onto for ten years just because it is hard to get rid of her – then we will reduce our livestock and farmers will make more money' (DoA Official, Planning Meeting, Summary, January 2002). Here I would argue that farmer contributions through the questions and the group work affected the outcome of the workshop. However, the workshop did not address the rights of men and women farmers although in the discussion a woman farmer twice raised questions of women's right to farm (briefly discussed in Section 10.4.3).

#### *Reflections on carrying capacity in the planning workshop*

Outside the January meeting I asked the official whether people could set their own stocking levels. He suggested that 'one could adjust department figures a little, by taking the condition of the veld into account' but one should not deviate much. He was 'very concerned about the high stock figures. The veld is quite degraded even if it looks OK this year', and stressed that it is 'better to be a little on the lower side, we see that when the drought hits. Then the grass lasts longer, the livestock survive much longer and the farmers can wait longer before they must buy additional fodder'. In the official's view the current limitation of 500 sheep per farmer was not being respected, yet he believed that the main problem was 'the farmers with very small herds ... because they are not able to manage the herd professionally and get a

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and the Animal Health Inspector found almost 22 000 SSU on the land (about 4.4ha per SSU).

<sup>256</sup> Group 1: Reduce number of draught animals. Group 2: Through marketing. Group 3: 1 to 50 stock should be protected, above that a certain percentage reduction according to agreement with farmers. Group 4: A man who lives only from livestock may have 500 small stock or 80 large stock. A man who has a salary may have between 150 and 300 small stock or 40 large stock. Group 5: Devise strategy for marketing of animals and employ a marketing officer (SPP 2002c).

real income'. He rejected the common view that additional land could solve the problem as unrealistic: 'the land is not there ... if all the private farms in Namaqualand were bought up and added to the six communal areas and communal farmers spread their livestock on all these farms, the lands would still be overstocked' (Personal communication, DoA official, January 2002). The DoA official stressed that the experience with commercial ranching is the appropriate reference:

We have years of experience with the commercial farmers that we share with the communal farmers to help them to manage the land more productively and to ensure that there will be something left for future generations ... I know it is very difficult to persuade someone that he/she can't keep animals or that he/she must reduce their numbers when it's their only livelihood, but how else can you manage a farm if there is nothing left? Must we leave the people to suffer 60–80% losses during drier periods and start all over again or must we help them to become part of a more sustainable business that will give them a better life? (DoA official, personal communication March 2002)

The DoA official emphasised that it is by law required to secure environmental protection on all land and that the commercial farming sector had been through a transformation in the 20<sup>th</sup> century with stock reductions and many farmers leaving for the cities. To exempt the Rural Areas from enforcement of environmental concern would be a neglect of public duty: 'It is government policy to ensure a better life for all. If things like stock numbers are just ignored, nothing will change and the majority of people will not experience a better life ... the pressure on the land mounts each day due to various factors such as retrenchment at mines, etc., and I am not sure that I can just stand and look at how the natural resource is destroyed (Agricultural officer, personal communication, March 2002). This sense of public duty places the land at the centre. The carrying capacity theme is part of an environmental governance discourse and linked to the view that private ownership is more environmentally benign, which appears to be common in the region, a documented among commercial farmers in Namibia (Hongslo 2001). The Planning Workshop related tenure reform to the ecology of the land, but from a carrying capacity and equilibrium model that is contested for arid rangeland management (Oba, Stenseth, and Lusigi 2000). A narrow, technical application of carrying capacity models in land reform in livestock keeping areas tends to often neglect issues of social justice and locally and privilege one particular perception of farming practice and the landscape (Benjaminsen et al. 2006). In my view, the private ranching approach to Pella land tends to extend the policy of creating a small number of farmers, as in the controversial enforced planning of the 1970s (Klinghardt 1982, see Section 10.2.4).

The land planning workshop significantly showed (1) how carrying capacity planning framed ownership and rights in the tenure reform in a certain way; (2) how consultation did enable some farmer contributions; (3) reintroduced some social and ecological challenges in the debate; and (4) brought out the policy of making farming in the Rural Areas financially self-sustained. Ultimately several social and economic issues were not brought up and the workshop only partially responded to the opening thrust of two farmers to emphasise

participation and public support. SPP synthesised 'findings' in an informative report, which was also communicated in the February 2002 *Transformation News*, which stressed the themes of carrying capacity and maintenance but not marketing and economic constraints (SPP/Pella TC 2002a). The TC members had made an effort to land use planning. I see the planning workshop as the closest farmers got to negotiating rules concerning farming. It was not as top-down as the plans enforced by government in the 1970s but to some extent relied on pre-defined problem understanding, particularly in the focus on carrying capacity concept and tool and in the set format for group work. However, participants still did not demand a private ranching model and fixed stocking levels were widely rejected. The January 2002 meeting concluded that farmer cooperation is more important than the legal enforcement of carrying capacity measures.

### 12.3.3 The Meent Committee becomes a Municipal Entity

An administrative and political change of the Meent Committee to a Municipal Entity<sup>257</sup> illustrates a political role of the SPP and showed that residents were uncertain about the different changes regarding land governance. At the January 2002 TC Meeting, the SPP mentioned that the Mayor wanted to use the Planning Workshop to get a mandate to establish the Municipal Entity. The TC Chair said that he was 'very worried that we are in such a haste to use that particular day to get a mandate ... the people are still very uninformed about these things.' He was afraid of later being accused that 'we are only looking in one direction', namely municipal governance of land. 'We may get severely beaten if people perceive that we are busy with dangerous story', *vaarlike storie* (TC Meeting, Chair, January 2002).

The Municipal Entity was a somewhat dangerous story but the SPP facilitator pointed out that it was only for the interim period and would not bar residents from choosing differently later. At the January Planning Workshop, the SPP facilitator introduced the question by mentioning that 'in December of this year you will vote and will decide to whom the land must go, but in the meantime the municipality must manage the land.' She stressed that the Minister's decision, based on the voting, could take time: 'things always take very long if it has to go via government. There is at least 18 months left [that is, to mid-2003] for you under the management of the municipality' (SPP, Planning Meeting, January 2002). She explained a municipal entity as a 'legal entity that can stand on its own, and enter agreements with the municipality about a transfer of the management rights', and that the community would elect its members, whereas the municipality would appoint the chair. It would operate according to a constitution, the 'grazing regulations' and the management plan

that had been discussed on the same day. Residents would exercise power through the election of members or, if unhappy, by complaining to the municipality. The SPP representative added that, 'they are an official body and they can do the job – they are near the people and are of the people', but asked for feedback: 'We want to know if you think this is a good or bad idea.' The Pella Ward Councillor, representing municipal leadership, said that 'the authorities had proposed this entity', SPP had explained it well and it was up to people to choose.

A resident found it hard to keep different processes apart and asked if the Municipal Entity would be in power for five years (an election period). SPP again stressed that it was an interim arrangement and that the community could still choose to 'break away from the municipality ... but we can't be without management on the meent for the next 18 months. There is chaos on the *meent*. One must have someone to manage the land'. A sceptical resident commented that 'the municipal law should not be extended to goats and sheep'. The SPP staff member made a final appeal, saying that 'Khâi-Ma has given you the opportunity to get back the powers to manage your own *meent*' and that 'it gives ordinary burgers of Pella' an opportunity to control a new more powerful entity: 'So what you are saying is that we don't want this weak system of the Meent Committee that has no powers. We want a powerful Meent Committee to manage the Meent' (SPP, Planning Meeting, January 2002). A resident seconded the proposal and none objected so SPP concluded that 'Okay, people, we have made an unanimous decision' (Planning Meeting 30 January 2002). The January 2002 workshop and the approval of the Municipal Entity may have been the most significant institutional change during the Trancraa process because it established the land management entity for several years ahead.

#### 12.3.4 Back to Trancraa

The long January Planning Workshop was almost over but a resident asked about the mentioned 'transformation process' and decision over land in December 2002. The SPP facilitator asked: 'How many know about the Transformation Committee and the transformation process concerning land? No one! That is terrible! (*Dit is verskriklik!*) Then I must keep you back, please!' One year into the Trancraa process, in a meeting of more than eighty farmers, this was an unpleasant discovery. The SPP facilitator made a 'Trancraa speech' that captures the promises of Trancraa and again reflects what is so characteristic of communal tenure reform in South Africa: that the state is the starting point, for the Minister holds the power and 'she can do what ever she wants with the land':

As you know the Minister is keeping your land in trust. She has the title deed. You are not

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<sup>257</sup> The Meent Committee had been widely criticised as ineffective, having a merely advisory role toward the municipality. During 2001, SPP and LRC suggested that it could be changed into a 'municipal entity' with legal power under municipal legislation. Pella Meent Committee recommended this change to the Municipality in January 2001 (SPP 2001b) and it was debated and approved by Khâi-Ma Municipality and other actors at a meeting in August 2001.

the owners of your own land. The new government that has taken over has decided that people must become the owners of their own land. We cannot have all the land in the government's hands, people must be given the opportunity to be *baas* of their own place ... So, what the Minister said is that she will give the people eighteen months to decide to whom the land should be transferred. He does not want the land any longer, the land should go – but to whom? Should we cut Pella up and give each a small piece, should we leave it to the municipality and say we don't want to be the owners of the land? Should we establish a new local organisation that is in charge of the land? (Main SPP facilitator, Planning Workshop, January 2002)

The SPP further stressed that this was about the future management of land, such as irrigation land that the community currently could not develop it 'because it is in the name of the state; they have no security and therefore cannot get loans'. Yet the TC was 'struggling to get people's cooperation'. She described TC tasks of identifying Pella residents and their rights and planning land use, as just done: 'but there are many things here in Pella that we need to resolve and therefore we must hold hundreds of meetings during this year'. She regretted that people had stayed away from past meetings and that few had read the *Transformation News* from August 2001. SPP promised that residents' views would count and challenged them to get involved in the process:

When we get to the end of the year we must vote and then you will not know what you are voting over, and as a result may choose the wrong option. Your children will suffer the consequences for so many years, if you don't make the right choice. This is your future and the future of you children. ... I get very worried when in a big hall like this only one person knows about the process: The law that caused the whole thing says that if the people don't make a decision then the Minister alone will. She can wait no longer. If you don't want to take part and make a decision, then she alone will decide what will happen to your land. She can do whatever she wants with the land – it is state land at the moment. For years people have been asking to get their own land – you must get involved in the struggle and say what you want. (Main SPP facilitator, Planning Workshop, January 2002)

## 12.4 Preparing for a referendum

### 12.4.1 Intensifying the consultation and information campaign

Trancraa had two major thrusts: the study and planning effort, discussed so far, and the referendum. The Minister, representing the state as landowner, 'may decide to which entity the land referred to in subsection (1) must be transferred and must take steps to transfer the land to such entity' (Subsection 3.12). She *may* decide and *must* transfer. About timing, the Act says that any trust land which is not transferred at the end of the 18-month<sup>258</sup> transitional period vests in the Minister, who may continue to hold such land in trust and may at any time thereafter dispose of that land in accordance with the principles of this Act (Subsection 3.13). An indefinite trusteeship may not be consistent with the principles.

Although Trancraa was carried out as a consultation, the Act does not state that

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<sup>258</sup> On 5 May 2002 the Minister approved the extension of the 18-month transition period (applied for in August 2001) The closing date moved from 19 July 2002 to 19 January 2003 (SPP 2002b: Point 1).

residents *must* be consulted nor prescribe a referendum. A municipality or an elected community committee must inform the Minister how it intends to determine to which entity the land should be transferred and may suggest methods such as meetings and a survey of residents etc. (Article 3.4 a and c). SPP and the TCs decided to hold a referendum to document residents' preferences.<sup>259</sup> The June 2002 Newsletter states that the goal of the referendum is to 'get to know the community's opinion about who should be the future owner of land and how it should be managed' (SPP/Pella TC 2002b). A referendum could add objectivity and legitimacy to the advice given by the TC and SPP (personal communication, SPP staff, December 2002). It would also test the process: Would people care? Would they know? Would options make sense? Would it be fairly executed? In many different ways the referendum intensified the consultation and turned out to be a demanding task of the tenure reform during 2002.

During the first half of 2002 the SPP and TC started preparing for the referendum. The information campaign would have been easier if there had been a local newspaper with a widespread readership and if local government had had a database of residents to identify voters. SPP and the TC had to fill those functions. The January Planning Workshop meeting confirmed the need for information. The TC Chair said in January 2002 that every single household must be visited and SPP's new staff member suggested that if one visited half the households, the other half would surely ask what it was about. During February and March, TC members and the SPP carried out an information campaign (*inligtings-veldtog*), visiting homes in the town and at stock posts, having reached 160 households by the end of February. The front page of the February 2002 *Transformation News* asked 'what do you and your family know about the transformation process' and 'why are we so worried about the fact that people have not involved in the process?' (SPP/Pella TC 2002a). It regretted that it was 'always the same handful of people who turned up for meetings while the other members of the community remain in the dark'. The door-to-door campaign showed the same as the January meeting, that 'most people have not even heard of the Transformation process!' The enlightenment ambition was threatened: residents *should* not be in the dark. The Newsletter encouraged everyone to 'get involved ... to protect the interests of future generations'. The February *Transformation News* gives an overview of Pella land with a political and bold statement that after the December referendum 'all these lands shall be transferred to the entity of people's choice', indicating that 'old land', 'new farms' and 'state farms' are included in the Trancraa process and that the community has decision-making power (Table 17, page 197).

Information was politically sensitive. In the February 2002 TC Meeting the Mayor complained that TC members had campaigned against municipal ownership during

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<sup>259</sup> From TC mandate: 'To arrange a Day of Referendum whereby all residents will vote on a choice of an entity(ies) to which the land should be transferred' (DLA 2001c).

household visits. The Ward Councillor had received complaints and said that 'it is not good to campaign, or to intimidate people just before the referendum, or tell them they should not allow the land to be managed by the municipality, that the land should go back to the people. ... It may disrupt the whole door-to-door process since that kind of intimidation can look like propaganda' (Ward Councillor, TC Meeting, February 2002). SPP stressed that TC should distribute and gather information but 'not have a point of view' (and confirmed that the Mayor had been right, personal communication, SPP staff). In June 2002, SPP reported that surveys had found town residents poorly informed, whereas farmers had been more aware, although they could often not attend meetings. Farmers appreciated 'one-to-one' discussion, some saying they were reluctant to speak in meetings (SPP 2002b: Point 4.4). My household interviews (spread over time) also indicated a shift towards greater awareness of Trancraa. The June 2002 Transformation Newsletter devoted all its attention to the coming referendum and declared with some confidence that 'everyone is now probably aware of the Transformation process!' It had taken hard work to dispel the disappointment about poor awareness (*dit is verskriklik*) from the January 2002 Planning Workshop.

#### 12.4.2 Voter identification

##### *Trancraa and the status as resident (inwoner)*

Membership in Pella is socially, economically and emotionally very important and linked with various rights. Keywords for right-giving status are *boorling* (born member), *inwoner* or *burger* (resident). Under the new national Constitution it is a now citizen right to move to Pella. One needed to define the right-holding status under tenure reform. Trancraa (Definition vii) defines resident (*inwoner*) as 'a person who, at the date of commencement of this Act – (a) ordinarily resides in a board area or (b) under law is liable for the payment of assessment rates, rent, service charges or levies to the municipality concerned in respect of land situated in a board area.' The Act says various things about 'residents': (i) they must elect the Transformation Committee; (ii) their tenure and use rights must be protected in a balanced way; (iii) a future municipal landowner must be accountable to residents; and (iv) they may get preferential access to benefits from mineral resources. Thus, the term 'resident' is linked to rights to democratic participation, non-discrimination, land tenure and benefit. While disregarding the important community criteria of membership – birth and long residence – it maintained the idea of links between these different rights. More than four years passed from Trancraa's date of commencement (2 November 1998) to the land referendum was held. Trancraa's definition of resident was impractical, because one had to consider where candidates were in November 1998, and problematic because it could exclude old right-holders as well as newcomers. Trancraa abandoned a racial definition of residents but nevertheless extends a legal tradition of disregarding social meanings and practices of membership – I review a few aspects of the debate in the following.

*Inwoner* (resident) status was work-shopped twice. In April 2002, the SPP and the TC briefed and discussed imaginary individual cases with representatives of different organisations, who would in turn consult with their members before a second meeting in May 2002 to finalise the rules to follow (it is an example of the hidden, and here meticulously executed, work of a democratic tenure reform). The SPP opened a meeting by noting that the Act 'is a bit unclear. We need to define for ourselves what it means'. The phrase 'ordinarily reside in' needed to be defined, since many Pellanaars work away from Pella. SPP reported from other Rural Areas where one had experienced confusion and long discussions but agreed that 'a resident means a person who has voting rights and it has nothing to do with the awarding of [land] rights' (SPP, Inwoner Workshop, May 2002). A resident pointed out that this introduced a gap between an interest in land and democratic rights, for example for newcomers: 'When he casts his vote, does he not vote over the rights that he may exercise in the future? Why should he not be allowed to cast his vote on that day which will impact on his future?' A resident had moved away from another Act 9 Area: 'I was a taxpayer at that time but I don't have any more interests there so what right do I have to go and vote about some other place's future?' A woman who moved to Pella in 2000 and had been a taxpayer since then could not vote. She said that 'a person is allowed to move anywhere at any stage of your life ... it does not seem fair for you are a tax payer and yet do not have the right to vote just because you were not present on the stipulated date' (Resident, Inwoner Workshop, May 2002). So, there was tension with the new right to freedom of movement and equal citizenship. SPP pointed out that *Trancraa*, under which voting was implemented, was not national legislation, but about a category of rural areas: 'We understand the frustration, but this is unfortunately what the Act says. ... We have to draw a line somewhere and this is how they did it in the Act' (SPP, Inwoner Workshop, May 2002). A resident inquired about the recently (2000) immigrated owner of the shop in Pella: he thought that since this resourceful resident could not vote, he would not be able to participate in future management either. However, the SPP representative stressed that with a new owner the situation would change for then the members of the community would discuss and decide 'what should be in the constitution and who will be members of that entity – 'so that is where the problem comes in: we are confusing [land] rights with the entitlement to vote [stemgeregtigheid] and they are not the same thing' (SPP, Inwoner Workshop, May 2002). While ideal was that democratic rights and economic participation should reinforce each other, the Act temporarily divided distinction political and the economic rights, and residents pointed this out.

### *Birth rights*

Many Pellanaars see membership including rights to land as a right of birth or long residence and putting this aside was problematic. An SPP facilitator opened the debate by firmly rejecting birth right as 'something that we cannot really argue about. The Act does not mention birthright. It is not part of the description of a resident in the Act.' Therefore someone



born in Pella, but who was away in 1998, would not have a right to vote: 'We cannot do it in terms of the Act – so we exclude him' (SPP Inwoner Workshop, May 2002). A resident shrewdly asked if 'the Act should not be interpreted to say exactly that it is not necessary to mention birth right, because the notion is already there, you have it automatically?' Another added that 'the Constitution speaks a lot about birthright', and one argued that birthright was more practical since this was common knowledge, while otherwise the exact date on which some community member returned to Pella would determine his right to vote: 'That is where the birthright has more power ... how can we determine if he did indeed arrive here before that date? We did not watch each other so closely'. The SPP facilitator supported the idea of birth right but again focused on the opportunity to sort things out in future: 'I feel strongly that people cannot take your birthright away from you and that is why we must protect that right in any constitution [of a new ownership organisation] written in the future, so that people do not feel that they are excluded just because they were not here that day.'

Participants gave in: 'we cannot do anything about it, the Act must prevail' (*die wet moet bepaal*). The Mayor said that one could not 'get around the 2<sup>nd</sup> November 1998'. She also expressed loyalty to the intentions of the lawmakers and pointed out that a birth right could have caused conflict and difficult interpretations: 'How many of us sitting here were born in Pella, or even in a Rural Area, but we have interests here now', and she mentioned *Oom* (Uncle) John, an influential farmer and TC member born in Namibia. So we shouldn't just criticise the Act or see loopholes ... if we were honest, most of us would say that we were not born here, so then we would have had a problem with birthright.' *Oom* John acknowledged being born in Namibia but protested that 'I have children and of my eight children seven were born here. Not one of them is here to argue their case or cast their vote. It is not right. They also have a right here'. SPP<sup>2</sup> retorted quickly: 'That means *Oom* John would not have had a right under birthright. And *Oom* John cannot come here and lay claim to the rights of his children!' She further stressed the discrimination experienced after moving to Namaqualand as an adult:

That is probably why the Act makes provision that birthright is not taken into account, to accommodate everyone regardless of where you come from: it would not have mattered if you moved here from Israel or wherever. You would not have been able to tell me, as you did when I moved here, that 'You are a foreigner. You are an incomer'. You would have accepted me because we now live in a free South Africa. However, since this is a Rural Area, for various reasons the 2 November 1998 is the closing date and there is nothing we can do about it. (SPP<sup>2</sup>, *Inwoner Workshop*, May 2002)

It was not pleasant to workshop the idea of *inwoner* under the prescriptions of the Act but participants resolved specific issues through discussion and accepted others. SPP ended the meeting by requesting further inputs and promising that the TC would finalise and publish guidelines so residents would understand this. The June 2002 *Transformation Newsletter* explains *inwoner* as defined by the Act and set out agreed criteria regarding time, residence,

children and tax payment (SPP/Pella TC 2002b).<sup>260</sup> It described how to register on the voter's list, showing a registration form that was available in the Pella Ward Office from July 2002, and the information required.<sup>261</sup> The TC would evaluate applications, make lists of qualified and non-qualified individuals, and reply in writing to those rejected, who would have a right to appeal to the *Trancraa Loods* Committee. The idea of 'applying' to become registered as *inwoner* was sensitive in the context of the apartheid past and involved an assertion of power by the state and implementers: *It is your land*, but the Act defines who may vote over it. However, the tension and the many questions that the issue of resident status and voter rights raised were apparently resolved through work and discussion.

This chapter has shown examples of democratic practices that were central in the tenure reform process in Pella: TC meetings and debates, the January Planning Workshop, consultations and preparations for a referendum. I record detailed attention to formalised participatory practice. Some of the provisions for consultation were in *Trancraa* but I think many dimensions of the historical and social context are relevant to understand it: past democratic practices in the Namaqualand rural communities; the immediate background of the anti-apartheid struggle; the democratisation effort in local governance; and the skill of the civil society organiser and consultant, the SPP. As mentioned, an infrastructure of democratic practice was not always available, such as newspapers or an applicable voters' list. An extensive information campaign was required to reach households, some of which lived scattered in a vast landscape. Because the tenure reform involved efforts to promote resource development (such as with regard to tourism, minerals and irrigation) it showed potential for practically linking the democratic process with economic rights associated with land tenure. However, there were reasons to worry about how deep and how materially relevant the democratic consultation would ultimately prove.

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<sup>260</sup> (a) Children above 18 who live with their parents qualify to vote, even if they do not pay tax and/or have interests in the *meent*; (b) Anyone working or studying outside Pella, but who returns for weekends, holidays and/or annual leave qualify; (c) Anyone who settled after 2 November 1998 do not qualify; (d) Someone who is settled permanently somewhere else, and only occasionally visits Pella and pays no taxes or fees does not qualify. '*Inwoner*' defines who may vote, not land rights; non-users and users of the land are equally qualified to vote. People may vote in several areas if they qualify. 'Birth right: The Act does not take birth right into consideration' (SPP/Pella TC 2002b).

<sup>261</sup> '*Application form for registration as resident of the Pella Rural Area under Act 94 of 1998*', requesting name, ID number, birth date, address and signature. Information required for official use was: (1) Resident at the relevant date? (2) Paid taxes at the relevant date? (3) Recommendation and reasons. The forms was to be signed by the TC Chair.

### 13. OPTIONS FOR THE OWNERSHIP AND MANAGEMENT OF LAND

To introduce the intensifying debates about different ownership options I first deviate from the chronological order by reviewing some earlier debates discussing the 'Options Workshops' in May and July 2002, continued in the TC and *Loods* (Steering) Committee meetings in September 2002. Through long sessions residents and facilitators worked to understand, evaluate and give meaning to the options suggested by Trancraa's Article 1 (iii): municipality, Communal property Association or other option.

#### 13.1 Political debate about ownership options

*The ANC: 'If we do it, it will be for the poor'*

Interviews in 2001 showed that some political and administrative leaders favoured municipal control. By the beginning of 2002 the choice of ownership had become more openly politicised. Therefore the Mayor had criticised the TC members involved in the information campaign for being biased. In February 2002 the young Ward Councillor (ANC)<sup>262</sup> again mentioned campaigning for a Communal Property Association (CPA) by TC members, and thought a *lobby of veeboere* (stock farmers) was behind this. Having visited a redistribution farm recently, he was aware of farmers' desire to manage things themselves. He said community ownership could relieve the municipality of management tasks for which it had little resources and avoid conflict with farmers over payment of fees. However, the community as owner would lack manpower and finances and he believed that the municipality would be better positioned to generate employment and protect future rights. He asked what farmers would do if things went wrong – 'go into the mountains?' He also suggested that the municipality would be better at preventing conflict between stock farmers and irrigation development, although it could create 'two camps', a divided community due to different attitudes to the ANC and the municipality. He believed a CPA would be more susceptible to dominance by narrow economic interests. More generally he worried that the referendum would simplify matters too much and suggested that people could be given a chance to adopt various more specific recommendations by the TC sub-committees along with the referendum, a suggestion that was not realised (Pella Ward Councillor, ANC, February 2002).

The Mayor of Khâi-Ma (ANC) raised concerns about a CPA, particularly in relation to irrigation development. She argued that 'the people will go where the money is ... certain people will grab the thing. It is important to think of the common good.' She said that privatisation was a 'very emotional issue': it had been mentioned in the recent Transformation News, but she asked whether it was really an option (Mayor, TC Meeting,

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<sup>262</sup> An elected political and administrative leader of the Pella ward (*wyk*), a section of the municipality, and considered by residents a powerful position.

February 2002). The Mayor regarded the management costs and conflicts over payments arguments against municipal ownership of land: 'If we do it, it will be for the poor, for the small farmers' (Interview, April 2002). Another ANC leader expressed the same view that community rights and the interests of the poorest were the major concerns for ANC, particularly securing broad participation and benefit sharing in an irrigation development project (Deputy Chair of Pella AN, interview, March 2002). Against the municipal options, the Mayor considered that there could be new mayors in future, 'even a farmer' and that a municipality could sell land without consulting residents. She mentioned the strong 'feelings for the land' and said that the whole issue was stressful to deal with – stress that would increase over the coming nine months. In June 2002, financial constraints remained for her a serious argument against municipal ownership. 'But at the end of the day, the people must decide what is best for them. If the people decide that the municipality must administer, then that is how it should be. The municipality is more established and it is an organisation that has free and fair elections' (Mayor of Khâi-Ma, June 2002). The Mayor expected that if land was transferred to a CPA, government support would cease and the CPA would have to rely on user fees. She argued that while the government funds the municipality, 'CPA's are more dependent on NGO's for funding. ... I think they [the government] are willing to fund the municipalities because they are more stable.' She referred to the case of a failed trust in nearby Witbank where one could 'see how much money the government invested in the CPA and see what came of it. Now, the way I see it, government will not be prepared to invest in a CPA again' (Mayor of Khâi-Ma, Interview, April 2002).

A TC member (April 2002), not member of the ANC, recalled that recent discussions of options had been heated. She believed that 'many did not understand before, but are now starting to realise that there could be changes, they are starting to get mobilised. The Mayor feels she could lose, and thus lose the guesthouse [Swartkoppies], and she wants to fight against that'.

The Manager of the Pella Ward Office (an administrator) held that poverty, unemployment and dependency were the main problems in the community (Interview, April 2002). He advocated municipal ownership to access funding, as in the case of the Swartkoppies *Oasis in the Wilderness*, a project he managed. He envisaged an airstrip, golf course, more visitors and job creation. The municipality had to fight for recognition, for example get the control of the 4X4 from the District Municipality. About the municipality he said, 'when will they ever learn if they do not get responsibility?' whereas he was 'afraid that the land would go to the people.' People would have to make community-based companies but they lacked experience: 'If it goes back to the community, then we have got a problem ... it would be difficult because of apartheid. Government always thought for us' (Ward Office Manager, April 2002). In my view, it was a common view among local leaders that the municipality was best positioned to lead economic development and that some form of

continued trusteeship (protection and guidance) was needed to mitigate the impact of apartheid on individual and community skills. Another public official, the Department of Agriculture extension officer responsible for Pella<sup>263</sup> said that 'it does not really matter who owns the land', while people must be trained, take responsibility and accept a 'culture of payment'. He believed the main job was skills development, marketing and helping farmers to commercialise production within the communal system (Interview, March 2002).

*The DA: 'get ownership for the first time'*

The Democratic Alliance (DA) Councillor said that she 'hoped that people would get ownership to their land for the first time ('Dit sal nou vir die eerste keer wees dat die mense eiendomsreg het op hulle grond'). I hope that at the end of the Transformation process farmers will have the right to manage their own land'. However, the DA as party left the TC, apparently regarding it as an arena won by the ANC. Although leaning towards community ownership, the DA Chair had also said that he had concerns about 'selfish farmers' who were pursuing narrow interests (Interview November 2001).

*The SPP: 'We are clubbed from all sides'*

The SPP was carrying out a balancing act. The ANC Vice-Chair (Interview March 2002) stressed that SPP was working for government. He saw it as a problem that SPP had criticised the amalgamation of Act 9 Areas into new municipalities. He said that if there were problems of deviating views today he and others would contact ANC members of the SPP Board. This was part of the somewhat intricate power relations between party and civil society organisation.

At the first Options Workshop in May 2002 the SPP facilitator warned against going into the trenches and usefully rooted the debate over options in land uses and stressed the problems of funding and cooperation which were likely to prevail under all options. In a break one SPP staff member said that she felt her information had been 'sort of unbalanced' towards municipal ownership, since she had stressed the problems of raising funds and solving conflicts: 'But people must be aware of the problems'. She said that others accused SPP of being 'anti-municipality', for example when protecting community rights at Swartkoppies: 'That's why we get clubbed from all sides'. In the Mayor's view, SPP emphasised one option over the others and 'each person has more trust in their own leader'<sup>263</sup> (Interview, June 2002). The minutes of the June TC Meeting note that Pella ANC intended to seek advice about the options from higher levels:

The mayor said that she is worried about the decisions that shall have to be made about the future ownership of the land. She does not have a problem with the SPP or the process, but is aware that she and her colleagues from SPP may at a later stage get the blame in case things go wrong. They have asked for a meeting with the Minister, with Boeboe van

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<sup>263</sup> 'SPP sal byvoorbeeld meer klem lê op die opsie wat hulle dink die beste is. En elke mens vertrou mos jou hoofd meer'.

Wyk [ANC member of Parliament, formerly SPP staff] and other leaders for direction and help with this important decision-making process and want to discuss the whole matter in their own forum [wil die hele geleentheid uitpraat op hul eie forum]. (Pella TC 2002)

The political heat around the question of who should own the land was picking up. The scene was set for clarifying the ANC view. The meeting mentioned involved the Provincial Minister of Agriculture and Environment, the Mayor of the District Municipality, mayors of the municipalities, ward councillors and TC Chairs. The Mayor said that the planned ANC meeting would be the first advice regarding Trancraa that the local ANC would get through the party hierarchy (personal communication, June 2002). And after it Pella ANC advocated municipal ownership of land.

### 13.2 The July 2002 Options Workshop

In July 2002 TC members again gathered to prepare themselves for advising residents on the choice of future land ownership. SPP gave thorough advice and TC members brought in a wealth of perspectives (as my 44 pages transcript testifies). I noticed that men were more guarded and women more willing and able to formulate difficult and emotional issue, thereby driving political reflection forward. For example, the secretary brought in viewpoints of relatives at Annakoppe and referred to claims in terms of Nama culture: she was also a secretary to invisible conversations and aspirations in her social network. The TC commented on issues such as the new legislation about mineral resources (Section 14.1.1), the Communal Land Rights Bill, family claims and informal privatisation of water. The SPP had the task of channelling conversations and insights into a report that would be true to the expectations and politics of Pella and convincing to the Minister.

#### 13.2.1 SPP: process, rules, rights and choice

SPP brought a plan and a matrix and the main facilitator outlined the key principles of Trancraa: information, impartiality and legality (SPP Options Workshop, July 2002). She stressed that TC members provide balanced information and avoid campaigning: 'this committee cannot take a position. We must place all the options on the table for people. We must not campaign for this side or that side. We must just tell people that these are the possibilities.' Residents will reject an unfair process ['dan gaan mense sê dit is onregverdig']. She asked them to bring the Act when speaking with people and respect it: 'We cannot just do whatever we want to do. We must work according to the Transformation Act' (SPP, Options Workshop, July 2002).

The main facilitator (SPP<sup>1</sup>) gave an introduction to put the 'options' and referendum in context. The January 2002 improvised talk (page 230) was a community oriented manifesto for Trancraa and this speech sums up, I think, a learning and thinking about Trancraa in the Namaqualand land reform network and sets a frame for the deliberation of options. The presentation emphasizes that rules to protect and balance the right of residents, users and

the public interest (Trancraa Article 3.2) should be the Minister's criterion to decide about the transfer of land. The referendum is advisory, though the Minister may not reject it on just any ground, as clarified through an exchange between the two SPP facilitators. The younger staff member, SPP<sup>2</sup>, said that she was worried that 'the majority of the committee decide on the entity of their choice – and this is what we are trying to tell them to do – and the Minister is not pleased with their choice, then she may still reject it (*dan kan sy dit nog fire*).' SPP<sup>1</sup> responded that the Minister could not say 'I do not like a trust, I want a CPA' but only reject a choice if implementers had not followed the correct processor if an option chosen was not properly investigated with regard to the advantages and disadvantages. 'The Act says that you can choose' (Exchange between SPP staff, Options Workshop, 2002). SPP<sup>1</sup> therefore outlined the need for a clear report and rules to convince the Minister that a sustainable system for protecting rights and managing land had been proposed. She reminded that 'we are entering a new phase and there is no longer a separate Rural Area with its own legislation, as under Act 9. ... In the past the Minister was based in Pretoria and if you wanted to do anything you had to write to Pretoria and wait about six years for a reply ... [but now] it is the same deal for the whole of South Africa'. Trancraa must 'promote the goals of land reform related to fair opportunity, access, protection of rights, prevention of illegal dispossession ... We must see that justice has been done' (SPP, July 2002).

Rules should be designed to protect individual rights and interests, and the SPP facilitator argued that the DLA wanted details: '...if some land is privatised, are we going to terminate someone's right to cross it, or make a servitude to ensure that they do not lose that right. That is the kind of detail that they want, to ensure that no one loses their right'. Rules should also protect community interests as in the irrigation scheme, which in the view of SPP involved risks of misappropriation (a sound reading, it turned out). The Minister wanted to be convinced that rules could be sustained through proper administration: 'if there is no administration, there is chaos'. While the Grazing Regulations (see Section 12.3.1) provided rules for live stock management, but similar regulations should be worked out for other land uses otherwise the Minister would possibly write the requirements she saw fit into the conditions of transfer. SPP ended with the 'most important' point, how to cover costs of land management given that many users did not pay fees and the Municipality was poor: 'at the moment there is no money to really manage the land ... if we were to break away, who will carry the costs, ... the Minister wants to check that we can implement what we are applying for' (SPP, Options Workshop, July 2002). While concerned about individual rights and interests, in my view this presentation inscribes the consultation in a state-centric discourse in which the most common phrase is 'the Minister wants'. The Minister is portrayed as intensely concerned with the protection of rights of residents but the presentation left out state responsibility for institutional support for those rights.

### 13.2.2 Debating the options

After the speech the SPP facilitators presented different options (Table 18).

**Table 18: SPP presentation: options for ownership and management of Pella land**

Option	Comments
Land remains in Trust with the Minister	Land will be managed in terms of the proposed Communal Land Rights Bill, and we do not know the final draft.
Private ownership	Land is transferred to individuals or groups who shall alone hold authority over the land and shall alone be responsible for all obligations related to land, such as taxes, administration etc.
CPA – ( <i>Gemeenskaps eiendomsvereniging</i> )	A legal structure for a group of people who want to hold and use land in common and which is established under the Communal Property Associations Act (Act 28 of 1996) What may a CPA do? Hold property [eiendom], such as land, tractors and buildings; Buy and sell property; Take up loans from a bank using land as security, Take someone to court or be taken to court; Have a system of rules that all members must follow; Enter agreements over land with developers
Municipality ( <i>munisipaliteit</i> )	[Quotes Trancraa Article 4 about municipal accountability]
Combination	Land is transferred to the Municipality but is managed through community committees in terms of a service delivery agreement/regulations Land is transferred to a community organisation and is managed by the municipality through a service delivery agreement Land is transferred to a Municipality, and a community organisation is established in order to ensure that: <ul style="list-style-type: none"> <li>- the land rights of members of the organisation are protected</li> <li>- that members of the organisation are informed about possible land projects or changes inland use</li> <li>- monitoring and application of Article 4 in Trancraa and conditions in the tile deed</li> <li>- Represent the community in negotiations etc.</li> </ul>

Source: SPP Overheads from presentation at the Options Workshop 25 July 2002

In Pella (and the other Namaqualand Rural Areas) the main choice was between ownership and management of land by the municipality (*munisipaliteit*) or ownership and management by the community (*gemeenskap*) through a CPA (*Gemeenskapseiendomsvereniging*). However, considerable complexity was attached to these options for they were linked to individual and organisational strategies to control land and resources and to political tensions. The LRC lawyers were skilled in the use of metaphors and wrote a note used for the Options Workshops in Namaqualand titled *Six of the one, and half a dozen of the other* (LRC 2002c), a document that responded to community queries and was used at meetings and workshops in the different Rural Areas including Pella. It alludes to the possibility that the differences between the two major options, municipal ownership or a CPA, were more about words than substance. The document advocates a transition from a situation where land use is permit-based to one where rights are protected against majority decisions. LRC lawyers state that ‘the community is the owner, but it cannot really work like that. There must be an



entity in whose name the land is registered' (LRC 2002c: 1). Members of an entity may get land rights that already vest in them or are allocated to them by force of new rules and regulations, rights that would then be protected by law and not alienated by majority decision. The document established that ownership had to be vested in one entity, whereas different entities could be involved in managing land (LRC 2002c: 5-6).

#### *Trusteeship, Communal Land Rights Bill and Nama claims*

One assumed that if land remained in trust with Minister the current draft Communal Land Rights Bill (CLRB) 'will probably be applicable to you. ... It is applicable to all the areas, Kwa-Zulu Natal, Eastern Cape etc. It is a very complicated thing; it will take time before it is approved, so one problem with that option is that we do not know what the system will be in the end'. The SPP said that the CLRB, when passed, might also be applied to CPAs, one of the options the community was to vote over (SPP, Options Workshop, July 2002). A member pointed out that they were afraid of missing advantages under the new proposed Communal Land Rights Act: 'Say, January 2003, the Act is not finalized but we want our interests to be protected through that Act. After it is completed, we may discover that it holds much more advantages' (TC Member, July 2002). Another member asked if, given uncertainty, the community would have the chance to correct a wrong choice. SPP reminded: 'You already fall under the Transformation Act, which was written for these old Coloured Rural Areas [hierdie ou kleurling landelike gebiede]. It is a bit difficult'. As I interpreted it, the 'difficulty' lay both in the uncertainty and the apparent extension of past legal discrimination into the tenure reforms of the democratic era. A member was indeed critical of this partitioning of the lands under tenure reform:

Listen, these things have just been carried over from the old apartheid system. ... I feel that throughout the country there should not be special privileges for you and for me. We have said that we are against that system and if we revise something, then it should be straight, it must be just for everyone and should apply to everyone. The moment he comes back to me and says, 'this is only for the one: In the Northern Cape we have one system, and in the Western Cape there is another system', then for me it will once again be like the old apartheid system (TC Member, Options Workshop, July 2002).

In this context members also discussed ethnically based claims to land, and which was part of the theme *it is our land*, as witnessed in this debate. A member had earlier told me that they had considered a 'Nama claim' but decided not to pursue that option. It was part of a compromise about pursuing a programme of land redistribution instead of an uncertain restitution claim. Now the Communal Land Rights Bill triggered renewed discussion of traditional leadership as a latent possibility:

I just want to know about this Communal Land Rights Act and the land of Pella. It is still so that most black people have their traditional leaders, whereas the coloured people ... back in the 1800s had the *kapteinskap* of the coloured people and the Namas. Won't they just automatically go back to the system of 1913? Is it not likely that something like that may be used again? (TC Member, Options Workshop, July 2002)

The TC Secretary reported that ‘some of the Nama people in Pella came to talk to me and told me that they feel that they have part of the say in Pella [het ‘n deel seggenskap in Pella]. They want their land back. They also want a governance right, something like that captaincy’. She asked ‘how do you respond to people like that?’ A man and TC member criticised the ethnic perspective, saying:

I just want to ask how everyone feels about this matter. After the last hundred or to hundred years ... who can still say you are a Nama or something? Whom do we omit from that? Many of us in this hall have white ancestors, Nama ancestors, now how do we divide each other up? In my opinion we should have a look and realise that this country is a country of mixed races. That is the road that our ancestors did not have [non-racialism]. We cannot separate. This man has a white grandmother and I have a Nama grandmother. Now why do we want to go back? We should only go forward. (TC member, Options Workshop, July 2002)

SPP<sup>1</sup> encouraged debate to reach consensus: ‘If there are groups who speak like this then we should get them together and you should ... discuss it with them. They have the right to say this ... they should be invited, but we should not attack them’, but to my knowledge the issue was not addressed again in the formal Trancraa process. I note a quite firm rejection of an ethnically based rights discourse from leading TC members, which was not challenged in the meeting. The Mayor of Khâi-Ma gave a personal account through which she also defended the government against critique of the CLRB, though criticising the emphasis on privatisation of land and arguing that there must be space for traditional institutions, which she interestingly compared with her own effort to accommodate the Transitional Local Council (functional during 1994–2000 but rooted in the old *raad*) within the new municipality:

We expect that everyone should be equal ... [but] as just pointed out we are a country with mixed nations [gemengde volke] or different people [verskillende mense]. Just as we are now struggling to explain to Pella people that a municipality does not function like a transitional council, in the same way you need to leave space for someone who was a *kaptein* or a traditional leader to be part of a transitional process, so that he can understand that he cannot have land of his own anymore. ...

We know that we are all afraid. The thing that scares us is what Oom John just asked about: if we make our choice to have the land in trust with the Minister and after a year discover that it was not the right one. That is a question that troubles all of us. That is why we must look at another option that is flexible and that will cover us in the future, so that we can say no. But we know that the Minister is leaning towards ownership [neig na eienaarskap toe]. But ownership is equivalent to alienation [eienaarskap is gelykstandig aan vervreemding] and since we are so easy to exploit, we will face hardship. We are not so empowered yet that we can make it through any trouble. If we are experiencing hardship, and someone comes along and says. ‘Hey, I can help you’: that is the moment we fall. We must think very carefully through the option we choose. We should also come up with clauses that we may ask them to build in to cover us.

About this Nama business and people who claim certain labels or something for themselves, we recently had an interesting discussion: A farmer said that he is so tired of being told that he must speak English that he gets a pain in his backside. So I told him that I am pained just as much because I cannot speak Nama anymore and my forefathers were Nama. I cannot just suddenly decide that I am a Nama. And that is why we should insist that people should come here, and visit [the Secretary] less at home to discuss their issues with her there while we don’t know what she is telling them. Let them come here and explain their family tree to us, where they come from and why he is a Nama. We will attend to them.

Everyone will come and say, 'no but Mik belonged to my great grandfather' or 'Dabenoris belonged to so and so' and then we have the Johnsons case who said that they were dropped here with bicycles on this piece of land and therefore it belongs to them. Just let the people come to the meeting. Not in Nama, they should not come here and talk in Nama. Take AP for example. Say she is a Nama, we can send a delegation to AP, or tell her to come in to the office and explain to us, for that is where the problem comes in. (Mayor, Khâi-Ma, Options Workshop, July 2002)

This long quote shows the situation faced by the local government leader between policy and diverse local claims. She places the issue in the context of legal uncertainty and the fact that privatisation does not appear to her a viable option ('ownership is equivalent to alienation', is a powerful statement). The Nama claims are not dismissed but must be brought into the official process of committee and community meetings while the talks with only the TC Secretary should be avoided, this whispered discourse inclined against government. Despite her personal grief at the loss of the language of her ancestors, the individuals should not 'come here and talk in Nama'.

SPP<sup>2</sup> explained that the 'Nama story' has come up more and more in Concordia and Steinkopf and that the same was the case at the World Summit on Sustainable Development. In her view, the claim to Nama status contradicted living 'like westerners' (with modern amenities): 'If you want to be Nama then you should go back to the veld and the culture. You must embrace everything about being Nama if you identify yourself as one'. Secondly, as pointed out by the Mayor, support for a Nama claim would engender claims from many more groups: 'Naturally we have to hear the stories of each and every one for we have Namas, we have Basters, we have Damaras, we have everything that they may claim. And we have the so-called "coloured", which we are not! We are not "coloured". There is nothing like a "coloured"!' (SPP<sup>2</sup>, July 2002). SPP<sup>1</sup> wound up by saying that 'everyone here in Pella has a right to the land in terms of the Act' and that no one could be excluded on the basis of ethnic status.

The participants in the meeting rejected indigenous land claims or land governance, but such claims were part of community discourses that were critical of the Trancraa process. Ironically, SPP had just explained Trancraa and the referendum with emphatic emphasis on the Minister's requirements about democratic rules in support of municipal, CPA or individual ownership options, while the same Minister was currently leading the drafting the CLRB that emphasized 'traditional African communities'.

#### *What is a CPA?*

Another option was a Communal Property Association (CPA), a legal institution for a community to acquire, hold and manage property in common. SPP explained that a CPA could hold property and take up loans using land as security, to develop land and enterprises and may get 'a certain amount of administrative support and help from the Department of Land Affairs, but to tell the truth it is not very strong and many of them have problems' (SPP,

Options Workshop, July 2002). Members raised many questions about the CPA, including the difference between a CPA and a private trust (a local one had failed at Witbank). SPP explained that a trust could be registered as a CPA, but the Witbank trust had not been, since it came into being before the CPA Act. The Mayor asked if a CPA could be disbanded and the Ward Councillor whether a part of the community such as Annakoppe could form one (confirmed by SPP). The Ward Councillor asked about the case of financial bankruptcy or inability to repay loans and SPP confirmed that it could lead to the loss of land. Some members asked repeatedly about the options for a few residents to hold or own land through a company or a smaller CPA: 'We are spending a lot of time on the property of a community that is financially very weak. Now, here is a vision that needs to be looked at and investigated: If 10 or 15 people could get together and agree to buy a farm, agriculture or a piece of land ... can they form a CPA with the community?' (TC member, Options Workshop, July 2002); this related an irrigation development initiative discussed later (Sub-chapter 14.2). One of the SPP facilitators confirmed that either the municipality or a CPA could lease land to a company formed to enter contracts and run business operations, which could protect the community against losing land, but would bar the company from using land as security for a loan – 'So that is always the story'. It was a complicated topic and members agreed to discuss CPAs on a new workshop in August. In later information the LRC suggested that a CPA was not a tempting way for residents to give shape to further their claim that *it is our land*,<sup>264</sup> though it also had critical comments on government ownership (below).

### *Municipality*

The SPP facilitators addressed municipal option by referring to fears expressed by residents but stressing the guarantees of democratic accountability given in Trancraa Section 4: 'You will always have a say over your land, a bit of say over your land'. However, some members had limited confidence in the power of the community to negotiate and have oversight of transactions, even under municipal ownership. A TC member said:

Let us say the municipality has the land. We are talking about giving residents a fair opportunity. But how do you give a man a fair chance when he does not have any financial resources? ... Say the municipality took over and they decide to lease the whole land to Karsten Boerdery. Then Pella residents no longer have a say about those areas. (TC Member, Options Workshop, 27 July)

A fear of the municipality could be a fear of alienation. SPP<sup>2</sup> responded that 'they cannot do that. You must take part in that decision. Community consultation, Oupa!' and SPP<sup>1</sup> stressed that regulations should stipulate that the municipality could not lease the land without

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<sup>264</sup> LRC states that 500 land redistribution programmes (75% of all) had led to the formation of CPAs. The CPA Act requires public support to CPAs but: 'there is no support, rights are not allocated and there are no registers; each one grabs for himself; where CPAs do business things get even worse; and CPAs struggle to enforce land use rules' (LRC 2002c: 6).

consulting the community. One agreed that only a majority of participants in a properly announced meeting would have the power to approve the alienation of land, whether under municipal or CPA ownership.<sup>265</sup>

Another problematic issue was that Trancraa only gave Pella residents' 'reasonable preference' (*redelike voorkeur*) in access to land, which indirectly signalled the end of a protection under Rural Areas Act 9 of 1987. SPP<sup>1</sup> noted that 'I know it is one of the sore points because you have just amalgamated and people from Pofadder come and steal the wood, and whatever is happening here'. She explained that the Act only required 'reasonable preference' and not that others should be excluded. A TC member said: 'that one is a bit vague (*Hy is 'n bietjie dof, daai*). ...It is unclear. Listen, it says "reasonable"... but if I say "reasonable", it does not protect me. It gives the man from outside access, it gives him a call'. The younger SPP<sup>2</sup> staff member argued that 'it is as it should be. We want a South Africa that is open to all!' However, Pella residents would insist on exclusive property rights and in this respect find the freedom of movement in the new South Africa a different matter. SPP<sup>1</sup> again stressed that residents could change the rules under a future constitution (Exchange, Options Workshop, July 2002).

A member asked whether municipality or CPA had the strongest legal backing, and the SPP cautiously assessed that local government did for 'if the municipality falls flat then the province may step in, but if the CPA falls flat then there is one man in Pretoria, and it is not easy to get support'. A farmer leader expressed lack of trust, saying that:

Our fears have always been about what happened in earlier times. We have just come out of the old dispensation but the things that you grew up with, you cannot cut off in a day's time. And we have always feared many of these things. Our fears were always focused on the town. Now we sit with fears focused on the outer lands. Our people fear, or the farmers fear, that in a year or two, the land will go back to the municipality, and then the municipality increases the fees for the large stock to R5, just as an example ... Now we are saying that our people must have the right to have a say, we must negotiate with the municipality to make sure that it is affordable to people ... but then someone else may come along and do another thing. (TC Member and farmer leader, Options Workshop, July 2002)

Fear (*vrees*, plural *vrese*) was a recurrent theme: fear of losing land, fear of losing power and fear of payment. The shift from fears related to town and residence under apartheid to fears related to land and farming today is interesting. Farmers succeeded in fighting off the attempt to introduce Economic Units (ranching model) in the 1970s but here the farmer leader expects that the municipal option may involve increased fees and limited power to negotiate reliable agreements with changing leaders. Thus, the farmer was not convinced that the municipality could provide the assurance that the Mayor had hinted at earlier. The SPP responded that the Grazing Regulations provided that fees should be based on real

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<sup>265</sup> The LRC states in a forthright manner that state entities are 'usually distant, difficult to reach and sometimes arrogant': they some times 'treat the land of the community as if it is their own and are slow in responding to the requests of land users' (LRC 2002c: 5-6).

maintenance costs and regulated ‘and that is how you get protection.’ The farmer noted that ‘real cost of maintenance’ may be subject to interpretation and great variation despite any written rules.

The Ward Councillor said that he had received only R5 000 for the Pella *meent* in 2002 and was unable to recover the gap between the allocation and actual costs from farmers. The ANC Vice-Chair advocated a transition to a non-subsidised agriculture:

The money will not fall from the sky to maintain the fences and put in windmills. So there are financial responsibilities and we will just have to come up with the money. If your stock costs R10 per head [to maintain], then you will just have to pay it because you want that land to be commercially viable, you want that land to be in good condition and you want water. Now, whether the responsibility lies with people, the municipality or the Meent Committee, you cannot sit back and allow everything to go down hill. That responsibility will just have to be carried. If a thing is amiss it should be provided for, it must be brought to attention. We cannot ask 20 cent or R1.50 per head. There is no set amount for every year. So the people must be made aware that we must get in those funds and they will just have to understand it. (Pella ANC Vice-Chair and TC Vice-Chair, Options Workshop, July 2002)

The ANC leader’s position reflected the situation of public poverty and he requested financial self-sufficiency based on user payment, within a discourse of market-based development, which was an important context of the tenure reform. Farmers had reason to fear municipal ownership as an instrument of commercialisation of farming activities with little or no public funding to make the transition a success. A farmer leader said that he was happy that the ANC leader had started to talk about ‘commercial’ but stressed that the public had an interest in ‘our people learning about the commercial farming business, which is meant to provide the nation’s citizens with food.’ He linked this to how ‘the former regime provided the farmers with fences and pipes’, cheekily claiming that therefore farmers in that time had no financial problems and one should take care not to oppress the farmers.<sup>266</sup> He thus established a justification for public support that was both related to the market discourse and the old trusteeship. The younger SPP<sup>2</sup> facilitator said that she did not want to enter into a debate with the farmer whom she called *Oupa*, Grandfather: ‘But we have inherited a poor country that must now be rebuilt. We cannot just give handouts. *Oupa* wants this government to govern as the previous one did. Our government had to start from scratch in 1994 and faced a lot of problems: it cannot just give you fences and things’ (SPP<sup>2</sup>, Options Workshop, July 2002). The Mayor encouraged residents to engage in the annual municipal budgeting but the bottom line was that ‘as you budget, you must also pay’ (‘Net soos jy begroot, moet jy betal ook’). SPP<sup>1</sup> added that ‘that message must be repeated again and again’. Which it was, throughout the Trancraa process, suggesting that the land belonged to those who could make financially viable use of it.

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<sup>266</sup> ‘Die vorige regering het die boere voorsien van drade, pype. Daai man het finansiël nie ‘n probleem gehad nie. So ons moet ook kyk daarna, dat ons nie die boere wil plat druk nie’.

### *Combination options*

The State Lawyer had recently suggested that land could be transferred to the municipality under a set of regulations according to which community-based entity controlled management while residents were empowered to determine rules of access (SPP, Meeting, May 2002). The SPP reported to the *Loods* (Steering) Committee in June 2002 that the combined options (*mengsel opsies*) 'seemed to offer many advantages' and envisaged that five different sets of regulations could be developed to define and protect the rights of residents: concerning grazing, cultivation, new land uses, membership and servitudes on parts of the land (SPP 2002b). Now the SPP explained these combinations (see Table 18, page 242): In two of them, the municipality would own the land while community organisations would either have responsibility for management or a watchdog role, advocating community interests. In a third combined option the community would hold the land while the municipality would provide administrative services, charging the community. All three arrangements would be based on service delivery contracts between community and municipality, and they were difficult to keep apart and were not debated in the main session.

The TC Chair and farmer had arrived late and missed most of the previous discussion) argued that one never knows what municipal legislation and leaders will be like, nor even if the institution would exist, while the community would always be there (*'die gemeenskap sal altyd daar wees'*). He said that the municipality was 'a disadvantage. We know what we currently have but cannot say what we will have in ten to fifteen years. ... If we take the community element out of the municipality, then they can do with our land as they please. There may be a relationship for the purpose of management, but it must be governed by the community and not the municipality.' That, in his view, was what 'combined' should mean. The TC Chair further argued that he favoured a private trust (criticised in the debate he missed) rather than a CPA: 'The trust allows the land to stay yours. That means you will be the owner of the land. That also gives you human dignity. But unfortunately ... you must put the land in the hands of a few people, twelve jackals and three sheep' (Farmer and TC Chair, Options Workshop, Group Work, July 2002).<sup>267</sup> This is one of the statements that link ownership with dignity. The 'unfortunate thing' was that a few nominated or elected individuals had to manage the trust in the name of the community. As I see it, this attitude of distrust was characteristic of member attitudes with regard to any of the options debated, and one that no set of rules could readily remove. The TC Chair and advocate of community ownership made no pretence that elected jackals would necessarily behave differently than the government appointed ones had done. Soon after this the TC leader withdrew from his

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<sup>267</sup> 'Vir my die trust laat die grond joune bly. Dit wil nou sê jy is nou darem die eenaar van die grond. Dit gee jou ook mensewaardigheid. Maar die ongelukkige ding ... Hier moet jy die grond aan 'n paar mense toe vertrou, twaalf jakkalse en drie skape' (TC Chair, Options Workshop, July 2002).

work as TC Chair, to take care of his sheep, he said.

*Privatisation, water and subsistence*

The SPP had introduced the possibility of subdivision of land for individual ownership early in the debate but members jumped to the 'traditional', the CPA and municipal options. In Pella, subdivision of land was generally rejected as impractical and as violating the right of most members to use the land (refer the Mayor's view that 'ownership is equivalent to alienation', quoted above). The fear of losing land was so strong that the collective ownership options were also debated in terms of how much risk of alienation they carried with them. Could a municipality just sell land without consulting the community? Would a CPA lose land in financial transactions?

Nevertheless, committee members were concerned about various forms of individual or family tenure to specific resources, such as water sources, leased garden and stock posts, though they generally wanted such rights to function within a form of collective ownership that would ensure that land always 'returned to the community' (a view supported in household interviews). Some cases of semi-privatisation of resources had been discussed as problematic. On the previous TC meeting a few residents had applied for private ownership to their houses, wells and associated plots of land. The TC decided that it could not process applications in the transition phase, while a future owner and the community could decide to allocate land in private ownership (Minutes, TC Meeting 24 August 2002). Now the Mayor told that residents had come to her asking the Council to buy a borehole: 'I don't understand that for the borehole is not even on their land'. People also told her about an individual who demanded payment for water from a borehole he had drilled (Mayor, Options Workshop, July 2002).<sup>268</sup> Thus, land tenure in Pella is dynamic: One person tried to sell a well to the new leader; another sold water from a well he had dug; residents had been selling garden plots by the river. TC members stressed the need for a clarification of rights: A participant said that 'we have told each other that we need to look at people's rights (*mense se regte*),<sup>269</sup> so that no one harms the rights of someone else'. The TC Chair argued that land belongs to the community although an individual may have a right to the well itself,<sup>270</sup> and that this was in line with the common understanding. He feared that claimants might use the coming tenure investigation to expand their rights beyond the established and accepted practice. He said

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<sup>268</sup> At Annakoppe some residents had dug their own wells and a few claimed family or individual rights to those. Five of six water sources reportedly belonged to members of the same kin group. A respondent said that 'you cannot deny someone who needs drinking water', but a farmer had charged a widow R30 per month for drinking water collected from his well (a practice that upset a white farmer neighbour). Another resident confirmed that she could not take water from the nearest well because the holder demanded payment, so that she now had to carry water on a donkey cart from a well belonging to a relative further away. In this hamlet residents with inferior rights to water were vulnerable (Interviews at Annakoppe, January and November 2002).

<sup>269</sup> One must distinguish between the rights people have (*mense se regte*) and human rights (*menseregte*).



that he was not talking about private ownership (*privaat eienarskaap*) but about 'people who have had a lifelong subsistence right (*mense wat vir sy lewe lank bestaansreg gehad het*). He expressed concern that residents, for example at Annakoppe, could lose such rights to land, residence and water. In my interpretation he asserted fundamental rights to resource security akin to human rights.

The Ward Councillor pointed out that the underground water and springs belong to everyone, to the community, and the well-informed ANC Vice-Chair referred to the new policy on water rights and stressed the duty to apply for and pay for water rights: 'We must show people that we cannot just claim boreholes. There are certain conditions, there are certain regulations regarding a borehole, it must be registered. It must be made known' (ANC Vice-Chair/TC Vice-Chair). However, this regulative approach appealed more to the ANC leaders. The Farmers Association and Meent Committee leader, undoubtedly the most historically informed of the central players, reacted against this perspective suggested by the young ANC leader, and stressed the basic needs for certain things for life and that rights are rooted in a history meeting those needs:

We want to be very technical about this thing, but it is not necessary for us to be so technical. What you are talking about is not something that just arose in this period. We must remember that our people have come here, and he went to settle by a water source and no one told him to do this and not do that. You had to have water, so automatically it was not a question of this and that. If you saw that there is no water then you went looking for some, and that is how people survived. It was a matter of survival. My personal view is that no one can sell a borehole here. No one can sell a well. No one can sell a hole that they dug. But people have lived from them and we cannot deny that. Those people have been there since the time of their forefathers. ... People did not get water [from anyone], not from the mission, and I don't want to get technical. There may have been new laws, but those laws were not brought here by our people. Those people had to use water to survive. (TC member/Farmer leader, Options Workshop, July 2002)

The sense of water rights is not granted from anyone, is older than any law, and is rooted in the pastoral lifestyle. He was concerned to point out that the right to water was not granted by any institution, and that the laws, also the recent water legislation, were not brought by 'our people'. The Mayor sought a compromise between the emphasis on policy, national ownership, and regulations mentioned by her younger ANC party fellow and the experience of the older, historically aware farmer. She pointed out that the problem was not merely a legal infringement on people's traditional lifestyles, but recent conflicts between residents. As I interpret her, one could not rely on the freedom of pastoralists and age-old rights when one resident was excluding another from water today: 'We will have to get technical because you may for example think back to last year when we had the problems at Annakoppe where someone refused to give water because he had put up the pump. Most of the problems are about water ownership here in Pella, as in most of the Act 9 areas ... We have come close to

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<sup>270</sup> 'Die grond is die gemeenskap se grond maar in werklikheid het die ou die regte op daai put want hy het daai put loop grawe.'

hitting each other with *knobkieries* [clubs] over water and dams.’ (Mayor of Khâi-Ma, Options Workshop, July 2002). She expected that water would cause major problems in the future and had contacted government officials to examine issues and be aware of relevant policy.

A member concluded the discussion by suggesting a definition of the difference between private ownership and individual tenure or subsistence rights:

May I just suggest that we need to distinguish between private [privaat] and tenure [verblyf]. ... It is not your private property but ... you cannot chase away the guy who dug the well. You cannot understand it as private property, as his alone [as 'n privaateigendom, as joune alleenlik]. We must point out that that privacy does not mean that the man has private property [Kyk, daai privaatskap moet ons uitwys dat dit nie die man se private eigendom is nie] (TC member, Options Workshop, July 2002).

As I understand it, and supported by some other comments, within the frames of community ownership of land an individual may have a right to use the water source he or she has invested labour and perhaps money in. However, he or she cannot transact with it as private property, since the land is community owned. The basic right to life also provide strong grounds for saying that he or she may not deny another person access to water. The member suggests a resolution in the distinction between a limited individual tenure (*verblyf, privaatskap*) and an unrestricted private property (*privaateigendom*).

I made a note that Pella residents may try to sell a borehole on the *meent* or water from a well, so privatisation is not a strategy reserved for neo-liberal reforms. However, other Pella people set limits: The Mayor did not buy the well offered and committee members wanted to maintain limits on the rights of a Pella man who was selling water to a widow, and who even the Boer neighbour criticised. Thus, from the matrix of ownership options (Table 18, page 242) one had confronted practical tenure issues that had not really been addressed in the official Trancraa process so far.

### 13.2.3 Group work on the ownership options

#### *Presentations based on different land uses*

The options posed further uncertainties and questions, as explored in group work. Three groups discussed advantages and disadvantages of the main options with respect to (1) stock farming, (2) tourism and (3) irrigation farming (mining was no longer included – see Section 14.1.1).

The ‘stock farming group’ favoured community ownership. It reported that the current trusteeship, alienation of land was not a risk but there was high uncertainty about applicable laws and financial support. Farmers advocated the control that an private individual owners can obtain, but saw private ownership as impractical and risky in the Pella context. Their evaluation of the CPA option was mixed: Pella could gain ownership and negotiating power, but the CPA would be vulnerable to corruption and financial mismanagement and thereby to losing land. The farmer group saw the municipality a stable due to its legal backing, but

drawbacks were (i) risks of corruption, (ii) poor funding, (iii) and uncertainty, linked both to national policy and local political risk (Minutes of Options Workshop 25 July 2002). Thus, they interestingly saw the municipality as replicating the weaknesses of state trusteeship.

The 'tourism group' was dominated by young ANC leaders, who gave a highly favourable evaluation of municipal ownership which they described with the key-words: 'Contact. Local. Open. People participate. Quick decision-making. Services. Permanent organisation and elected leadership'. Their presenter said that 'the municipality is of and for the people. They are one, the people and the municipality. And there is an open line where quick decisions can be made.' A disadvantage the group saw was that the District Municipality controlled certain funds. Regarding the CPA, the group emphasized the risk of corruption and it said that 'we have no benefits from private ownership. Only groups of people get benefited, not the whole community who have the right to the land' (ANC Vice-Chair, Options Workshop, Group presentation, July 2002). The ANC leader particularly stressed risk of 'the alienation of our land, which will belong to a small party but will affect the whole community':

We don't want to move to dispossession again. A guy owns a piece of land. He runs into financial trouble. Now he has the land. He has ownership. He has the land; he has a possession. Now he sells the land. There the land goes. Or he uses it as a security for a bank loan. Then he fails to pay it back. The bank takes the land and he sells it. The land is gone. Thereby ownership, the fact that you have got property and land, has lead to the point where again you let go of it. (ANC Vice-Chair, Options Workshop, Group discussion, July 2002)<sup>271</sup>

The process of dispossession is described in precise sentences, leading to the inherent uncertainty of ownership. However, the Ward Councillor suggested benefits of private ownership through tourism enterprises and job creation and SPP<sup>1</sup> also suggested possible advantages of leasing or selling land to entrepreneurs: 'Say that there is a wonderful piece of land along the river but no one in the community has the money to develop it. We sell it to a man for a million rand to build something there. Then those people should provide work for people from the community'. She argued that the session was also training in giving a balanced presentation to residents, so 'we should not over-emphasize our point. I think we should put a few benefits down also. I think it is a fact that you will have job creation and that you will maybe get money in from the land. But the dispossessing is the disadvantage' (SPP, Options Workshop, Group work discussion, July 2002). Thus, the participants explored the contradiction inherent in their situation, having land and labour but no capital. SPP sought 'balance' in a politically sensitive debate, but in my view it was almost impossible to 'balance' benefits against the risk of dispossession stressed by the ANC Vice-Chair.

The 'irrigation group' praised irrigation farming as the key to progress: 'We are

convinced that the way forward must be agriculture ... It is one of the resources in the country that really can eradicate poverty and backwardness and create work. ... So, agriculture and irrigation are important and it should be part of us and our future.' The presenter said that state trusteeship was hampering investments but also excluded 'autocratic decisions' and prevented risks: 'It is not easy to gain ownership, so there is no easy ways for one guy to cheat, no shortcut for someone to get ownership of the community land'. The group noted that the municipality has administrative capacity but also that that it was disadvantaged by 'lack of capital, unilateral decision-making and poor participation'. The great disadvantage of all options was lack of resources: 'I may have fought for my grandfather's or father's piece of land, but I cannot actually manage and work it usefully because I don't have the facilities' (Farmer, Options Workshop, Group presentation, July 2002). Thus, despite commercial opportunities the scenario of legal options and support was not so promising.

*People don't really understand*

After the long July Options Workshop meeting the lead SPP facilitator commented that, 'I think the response is very worrying. It shows that people don't really understand'. In my view it showed that it was difficult for members to balance the pros and cons of the different options with which one had so little experience. It could also show that the discourse of legal options, regulations and contracts was distant from the lived tenure problems in Pella. The offer that *it is your land* had been given a specific form in Trancraa, with set options. The SPP facilitators were trying to translate residents' diverse claims and experiences that *it is our land* to fit these. However, there was actually little time to link concrete, problematic rights and practices regarding, for example, wells and drinking water to the ownership options. The interesting debates about Nama claims and local semi-privatisation of bore holes and wells were not included in the minutes, which summarised the meeting with emphasis on SPP's overheads and the group reports (Pella TC 2002a).<sup>272</sup> Furthermore, the debates were made difficult by uncertainty of the role of public support for either of the alternatives. As I will discuss further in Part IV, the central state was largely absent from the discussions, as was clear information on its commitments. The representatives of the local state were present but they also experienced uncertainty about public support and in addition they were an interested party that residents had many questions about. Thus, each of the ownership alternatives were inadequately presented in terms of the public capacity to respect, protect and fulfil rights of individuals. It was difficult for the TC members to link the

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<sup>271</sup> He had advocated a market-based approach and cost-recovery in livestock farming (page 246) and later in relation to irrigation development (page 262), so the acceptance a market discourse was related to the issue, but in none of the cases involved a transfer of land into individual ownership.

<sup>272</sup> The minutes announced a new Options Workshop in August 2002, this time for a wide group of leaders of community organisations. SPP reported that it had been more realistic and grounded but also more critical of the municipality; the Mayor found it unbalanced (TC meeting September, 2002).

legal options and abstract institutional arrangements in each (such as regulations, constitutions and service contracts) to the development projects they had been promoting over the past year.

*Trancraa is an act without a 'hereafter'*

In addition came the uncertainty around the Communal Land Rights Bill (CLRB), about which TC members had raised several questions. The CLRB was published for comments in August 2002, shortly after the meeting reported here, but this did not remove uncertainty about whether it would be applied to the Act 9 areas. In the September 2002 Loods Committee Meeting in Pella the Head of the SPP Namaqualand Office explained that the CLRB could, according to its Article 3C, be applied to other areas than the 'homelands' should the Minister so wish. What CLRB and Trancraa had in common was that 'the Minister wants to get rid of her trust obligations ... whether it is the 13% of the homelands or the coloured rural land, she wants to get rid of all that land'. A difference he saw between Trancraa and the CLRB was that the latter promised resources for technical and financial support, administration of rights and conflict resolution (SPP, Head of Namaqualand Office, September 2002). The provincial DLA official believed that the CLRB would 'not have any bearing on the Namaqualand Rural Areas because situation in the former homelands was completely different: 'Here you had a council that managed the land and there you had tribal chiefs.' He stressed the problem that 'Act 94 does not have a 'hereafter' (*namaals*). Those of you who know the Act much better, such as SPP and LRC, have always asked what about the "hereafter", and that question always remained unanswered concerning Act 94. The CLRB had 'hereafter', he said for it provided for structures and support. Therefore, regarding Trancraa one had to focus on how 'through regulations, we can realise that which you have decided regarding an entity, so that you can adapt it further: How we will do it must still be worked out and then we will return to you and inform you about it. This is how much, at this stage, I can convey to you' (Official, Provincial, DLA, Pella Loods Committee, September 2002). Thus, the transition phase was implemented in the context of increasing uncertainty about financial and institutional support after Trancraa. This was, as the DLA official pointed out, a longstanding insight of the SPP and the LRC, and it was again articulated in the recommendations to the Minister in 2003. And his statements confirmed that the uncertainty experienced by residents and committee members were strongly related to the policies, or lack of policies, to support the implementation of Trancraa.



## 14. RESOURCES, RESOLUTIONS AND RESIGNATION

During the last stage of the transition phase, Trancraa implementers tried to resolve the resource management issues they had addressed over the past year but regarding some of them, such as mineral resources and irrigation development, they had to register a measure of resignation owing to constraining legal or economic circumstances.

### 14.1 Mining and tourism: Disappointments and problem solving

#### 14.1.1 Mining

In a desert land full of minerals residents hoped that Trancraa could strengthen their rights to mineral resources, a major issue in the 1996 Act 9 consultations, but Trancraa only gave cautious reasons to think so (Section 8.3.5) although Section 6 did give some protection to Rural Area communities in terms of preferential access to minerals on their land. The Pella the TC Vice-Chair heading the TC Sub-Committee on Mining had actively promoted the organisation of small-scale miners and tried to facilitate and reduce the costs of applications through the municipality (see Section 11.3.2). During the first half of 2002 SPP and LRC mobilised Namaqualand community representatives to make inputs to the consultations over Mineral and Petroleum Resources Development Bill through letters and a meeting with the relevant parliamentary committee, but by July 2002 the new Act (Act 28 of 2002) had been passed through Parliament.

At the Options Workshop in July 2002, SPP's presenter initially treated the impact of the mineral legislation lightly ('in Pella it is not such a big problem because there are not many people who have mining rights') but was halted by the Ward Councillor who reminded her that 'people have shown a very great interest in mining rights ... many have already applied. So we will not be able to ignore it completely'. The SPP staff explained:

We need to understand that the Mining Act is a very strong act. If someone from outside has applied for mining rights, the Department of Minerals and Energy can award those rights even though it is Pella land. There is nothing that you can do about it ... the new Mining Act repeals Article 6 of the Transformation Act, and that was the protection that you had, but now we don't have it any longer. (SPP<sup>1</sup>, Options Workshop, July 2002)

Members expressed disappointment, a member noting 'that Act is actually unfair but we cannot change it.' SPP<sup>1</sup> agreed that 'it is terribly unfair. It particularly harms our people because they are not economically strong enough to go on their own, not able to say to NN [the Mining Commissioner], here is 10 000 rand for you'. A member remembered an earlier pamphlet on Trancraa and asked if it did not 'have something in it on mining',<sup>273</sup> but SPP

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<sup>273</sup> The pamphlet states that Trancraa should 'give the community opportunities to benefit from the exploitation of minerals on their land' but recognises that minerals will belong to the State and that the Minister for Minerals and Energy would give consent for applications for mining or prospecting after consulting with the new land owner, possibly under rules about preferential access and employment as per Section 6 in Trancraa (SPP/LRC/DLA 1999).

pointed out that it was made before the new Minerals Act. Mining was no longer addressed under the Trancraa process, for the community's advice was not likely to make a difference.<sup>274</sup> In TC Meeting (September 2002) a farmer brought the mining issue into debates about irrigation development, because he found that it illustrated a situation of marginalisation:

- SPP<sup>1</sup>: It is very important for us to understand that we have no control over minerals. They can put up a big mine just outside the town and you will be unable to do anything about it. In this process, no one, not even Department of Land Affairs, has any control over Minerals and Energy.
- Farmer: So they just do what ever they want on a person's land.
- SPP<sup>1</sup>: Yes, but only the state may.
- Chair: *Oom*, the mineral rights belong to the state. The state has sole ownership and rights to all the minerals throughout South Africa. The state can mine there or give its permission to mine. The municipality only makes a recommendation about mining ...
- SPP<sup>2</sup>: Let me give you another shock, *Oom*. If they find minerals at Rooipad, then you can forget about developing it [for irrigation], for then they are going to mine it.
- Farmer: That does not come as a shock to me, because you do as you please with our land anyway.
- SPP<sup>1</sup>: It is not *we* [who do as we please with the land].
- Farmer: *Minerals and Tourism*, they don't need permission from anyone: *they* just do as they please.
- Chair: That is why I have said several times in the Transformation Committee that mining is a completely different story. We cannot do research and make recommendations as we are currently doing regarding irrigation.
- Farmer: So mining should not be discussed at all here on the Transformation Committee.
- SPP<sup>1</sup>: Just for information, that is all.
- Farmer: They can just come and put up their pamphlets here and then you can get your information: It is as simple as that.
- Chair: No, *Oom*, we must discuss mining here also.
- Farmer: But you don't have a say anyway. (Exchange, TC Meeting, September 2002)

Sometimes it would be simpler just to put up pamphlets, with no further ado, if the consultation appeared empty. The SPP later reported to the government that the repeal of Trancraa Section 6 'had made the community very unhappy and the residents of the Rural Areas had in general felt that they lost their advantages with regard to minerals and that the new legislation does not protect their rights' (SPP 2003: 46), and thus continued to make the government aware of community views. Yet the result for the time being appeared to be that Pella small-scale miners would continue to find and sell minerals illegally and therefore at poorer prices and some risk. The police and other officials might continue to tolerate small-scale mining as a right of survival, as one representative had mentioned in a meeting in 2001. Thus, disregarding the law may protect fragile connections between land and well-being but miners deserved legal protection to be able to advocate their interests.

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<sup>274</sup> Members did not in all cases reject the state's claim to ownership of mineral but many expressed a that they felt marginalised in terms of decisions and procedures. A Pella small-scale miner said that he welcomed state ownership of mineral resources because it checked the power of certain influential families in Pella who may lay claim to certain areas, as they had done regarding farming in the past (Small-scale miner, Interview, 2001).



### 14.1.2 Exit 4X4 route

The 4X4s crossing Pella land symbolised residents' lack of ownership and rights to make contracts over access to land. An influential farmer said:

For the community and all of us the 4X4 routes do terrible damage and nothing is ploughed back. We who are using the land, the grazing, also carry the cost. They are all taking advantage on us. The municipality or whoever gets all that money does not plough anything back into our community. All they tell you is that tourism is a boost for the country: But what about the man on the lowest level, the community? (TC Member and Farmer, TC Meeting, September 2002)

From the community perspective tourism was constrained the control by the District Municipality and, reportedly, reduced consultation and benefit sharing after amalgamation in 2000 (SPP 2003: 44). SPP had facilitated a confrontation with the Namakwa District Council (NDC) in February 2002 (Section 12.2.1) but the 4X4 debates did not, during my brief involvement, appear to strengthen the rights of Pellanaars. In September 2002, Pella TC members noted with disappointment that it had not been possible to reach further commitments or agreements with the District Municipality (or Council, *Raad*). An ANC leader explained that the District Municipality had the management right and obligations but argued that the 'the money should go to the municipality instead of the District Council in order for the municipality to be financially independent' but found that 'the District Council takes the money. That is their reason, though they may present other reasons ... and that is why we don't get the benefit of the money although the thing passes over our land.' He argued that it was at bottom a legal problem and that 'the municipal system legislation must be amended to make it possible again. They are bound by law to act this way. It will be difficult for you to change the thing because then the laws and things must be amended. So it is that kind of process, and that is why it is so difficult' (ANC Leader, TC Meeting September 2002). It was as if he envisaged another *Trancraa* to get control over the 4X4 route. Here, the Khâi-Ma municipal Tourism Officer said, 'I hear it is being blamed on clauses now', but argued that the municipality could and should negotiate for a greater share of the income. She further suggested that some benefits were coming back in the form of government projects and suggested that farmers on the stock post 'need to think about what they can do to make the 4X4 route more interesting for those who are passing by'. A farmer was protesting.

To avoid more conflict, the TC Chair interrupted and concluded that benefits were not coming back and that it was larger issue than the TC could handle. As far as I am aware, this was the last time the issue of the 4X4 route was officially addressed in the interim phase of *Trancraa* in Pella. As I had noted from a previous meeting, officials of the District Municipality had justified the status quo with arguments that residents and the municipality did not have capacity to govern (Section 12.2.1). *Trancraa* could challenge such arguments and practices by empowering residents as landowners. However, in neighbouring Nama-Khoi, meetings with the District Municipality in September 2002 had addressed the 'confusion about the

responsibility and development of the 4X4 route ... but the lack of clarity could not be dispelled' (SPP 2003: 44). The SPP and the TCs made a useful effort to debate the issue, but in the short term the outcome was limited. Trancraa involved initiatives that got stranded and which draw attention to missing social, economic or legal entitlements.

#### 14.1.3 Swartkoppies Oasis in the Wilderness: Rights and resolution

An example of a more favourable result was found in the *Oasis in the Wilderness* at the abandoned Swartkoppies mine and residence, which was an important public investment in Pella during the period of land tenure reform. As discussed in Section 12.2.2, there were some tensions around the municipal leadership of the project and the use of community land. An SPP facilitator told me that the Swartkoppies case had become more sensitive during the year and that political leadership had tried to put a lid on the debate of the issue so that at the time not possible to pursue the legal solution proposed by LRC. However, by October 2002 Pella leaders had realised that they may have violated community land rights, and were now keen to find a solution (SPP, Personal communication, July and October 2002).

In the September 2002 TC Meeting, the main SPP organiser gave a very detailed and comprehensive outline of what one could do to protect land rights in this case. She argued that the Trancraa report, on Swartkoppies as well as other projects, should cover a description of that area, the history of the land use, rights and interests in the land for whom, where and for how long, access and use rights of others: The report should further clarify 'the rights of the community to decide about their land and to get the benefits, directly and indirectly'. This would include the proposed use of the land, the project management, names of the participants, proposed land ownership, business plan, funding, distribution of income and the empowerment of local communities through, for example, training. The TC needed to identify the size and borders of the land required by using the services of the land surveyor provided for under Trancraa. One would need a lease agreement between the manager and the future owner (SPP<sup>1</sup> facilitator, TC meeting, September 2002).

In a meeting shortly after, the DLA supported the SPP approach and expressed worry a similar risk as in the Goodhouse project on Steinkopf land, where commercial land development had taken place without due process (DLA, Loods Committee Meeting, September 2002). In this case the state was present to back a community interest and the civil society members of the land reform network. The SPP carried out a study by involving LRC lawyers and answered most of the questions raised above (SPP/Pella TC 2002c). It underscored the role of SPP and LRC in enhancing information and transparency and created a consulted project document that identified for example job creation for the Pella

community as a major goal.<sup>275</sup> A 'Resolution Meeting' was held on 2 December 2002 (five days ahead of the referendum) confirmed adopted the proposal. Fifty residents participated in the meeting, of whom forty women, partly reflecting their interest in tourism issues and the politics of the issue. SPP reported that the Mayor chose to be absent. One facilitator feared that she was angry but the other reasoned: 'We did the whole job for her. Why is she unhappy? Now she has the land and the guesthouse for two years on a legal basis' (SPP facilitator, Personal communication, December 2002).

The approach to the *Oasis in the Wilderness* project may be seen as an instruction in practical 'rights literacy' and how to ensure transparency and accountability of government and other actors. It brought together SPP advocacy and LRC legal expertise to prevent that a public investment was used to justify an illegal appropriation of community land rights. This translated rights-discourse into negotiated rules in a volatile situation and for my point of view such efforts to create new rules were necessary to realise the goals of land reform and other public investments. It required much work for a small but special place, perhaps, indeed, a future *Oasis in the Desert*, if sustainable without the vigilance of civil society actors that was part of the Trancraa process.

## 14.2 Irrigation development

### 14.2.1 Introduction

Commercial development of high value land, such as peri-urban or irrigation land, may put pressure on tenure systems and make community control and solidarity practices inadequate to protect the majority of right-holders from losing their share in community assets (Peters 2002b; Woodhouse 2003). The Pella TC had focused attention on the commercial potential of Pella land along the Gariep or Orange River, particularly at Rooipad in the eastern and Mik in the western end of the part of the river bordering Pella. The Klein-Pella farm owned and managed by Karsten Boerdery lay next door with its wine fields and date plantations as an illustration of unequal development. TC members had envisaged a development that combined community land rights with greater participation in the market economy but faced the constraints of trust, finance and information, in a sense exploring the limitations of tenure reform in bringing about social change (see Section 11.3.1). In this last stage of the transition phase, three farmers and TC members attempted to get privileged access to a valuable part

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<sup>275</sup> The Swartkoppies agreement provided for a development committee of municipal and community representatives. The main part of the land would be opened for grazing while only the house and garden would be used for tourism. It noted that no land or improvements could be alienated without the approval of the Minister, while the municipality was identified as the manager of the land. The demarcated plot could be leased to the Municipality for a period of two years at the (symbolic) sum of R100 per year, in order to establish the rights of the community, and future owner. The owner of the Pella *Meent* would decide about the long-term ownership of the land. All improvements should belong to the future owner and incomes should benefit the Pella community through projects or revenue sharing (SPP/Pella TC 2002c: Point 10).

of the land, thus suggesting another meaning of *it is our land*. They justified their bid by merging ideas of trusteeship, 'black economic empowerment' and private ownership, various influential alternatives to rights discourses. Yet other TC members, the ANC and SPP defended community rights and contained the initiative.

#### 14.2.2 The TC meeting September 2002: dependency and market development

Irrigation development was the major issue at the TC meeting in September 2002<sup>276</sup>. Members noted difficulties encountered so far: The Agricultural Sub-Committee said that it had faced problems getting information from the provincial department of agriculture, and suspected a hidden agenda. The or acting TC Chair stressed that 'the Committee is not just any man from the street who wants this kind of information', but was appointed by a Minister and 'busy with something that is being acknowledged, with a Transformation process.' He had written to the provincial leaders to demand information, putting pressure on a named official (Chair, TC Meeting, September 2002). A farmer believed that an official in the provincial department was unwilling to share information, while sharing it with commercial developers and the Land Bank: 'So it is almost like the people are just waiting around while you have already been sold out'. He argued that the TC should look elsewhere to obtain information and had himself contacted the shop-owner at Pella (white and immigrated in 2000) who had informed him about technical and economic investigations required and suggested a very high value of the land (TC member and farmer, TC Meeting, September 2002). Thus, based on past experience he suspected that power, agency and information were located outside the reach of the community. The SPP facilitator argued that the criticism of officials was partly misdirected and explained the roles of different government departments in providing technical assistance, financial advice or loans and so on. The young ANC leader and now TC Chair had so far advocated market-oriented production in mining and livestock farming and stressed the commercial potential of land:

You don't just get the land and then the land just lies there ready for people to make a living from it, for creating jobs. We can work with the land. It is a kind of goldmine that people are getting back. And land has value. Land is money. It does not help people to just have the land ... we must help people think of it in that way also. The land must be viewed from a business point of view, so that we do not just have ownership of the land while it is lying there unused.<sup>277</sup> (TC Chair, Vice-Chair, ANC, TC Meeting, September 2002)

The TC should help people think commercially, see the land through new eyes, new discourse. He explained that during the Trancraa process people should get business plans, a title deed (*kaart 'n transport*) to land, information and Land Bank loans to make infrastructure. Thus he articulated a development vision centred on individual tenure and

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<sup>276</sup> The former TC Vice-Chair (and Pella ANC Vice-Chair) now chaired the TC as he did for the rest of the process. The former Chair was said to be busy with his stock farming.

<sup>277</sup> 'Kyk, dit help tog nie dat die grond is daar, want ons moet die mense ook so laat dink ... in 'n besigheids lig moet die grond oorgedra word so dat ons nie net die grond het en die grond lê daar nie'.

public facilities, and in this respect somewhat akin to Amartya Sen (1999). However, the dominant discourse is that of commodification of land and market orientation of production. He was seeing like a business manager ('Land is money') and like a politician, who hoped to be able to offer something to the constituency and used the same optimistic rhetoric 'let us work together' as he had done about mineral resource development a year earlier. Apparently the views here differed from arguments he made earlier against privatisation of land for tourism development (footnote 271). Despite the idea here of 'title deeds' to individuals, this leader was advocating a commercial development within the frame of municipal leadership and with a community control of land. The Ward Councillor supported his colleague and outlined the need to coordinate and negotiate with various actors. 'At the end of the day, the community must decide who the partners are going to be...but those people (commercial farmer neighbours) already have the market, it will be easier if the partnerships are already in place' (Ward Councillor, TC Meeting, September 2002). The farmer who had worried about access to knowledge elaborated his fear of the power of outsiders:

We must be aware of our starting point. We, the community, want an evaluation, and remember we are the negotiators. We must go to the developer. But how does one negotiate with a developer who is ready and ahead of the community and you know that you do not have even the vaguest notion about what is going on behind your back? ... If we don't do our homework right then the other guys like the developers are going to rush over us. At the end of the day we sit with nothing ... We need to bring those issues to the table in order for us to advance our community. ... The land must belong to the people alone, they must have sole ownership. ... I feel strongly that we must empower our people. Our people should be able to go to Karsten and say: 'Look, I have three hectares of land, come and help me with it.' While we have been studying this, I have felt a couple of times that that man already has the project: He will get the land, it is his land now. (TC Member, Farmer, TC Meeting September 2002)

To the development optimism of the political leaders, he added realism concerning power relations and a sense of vulnerability. While he questioned the assumptions the SPP approach rested on (study, negotiation and resolution), he also returned to them: 'do our homework', 'bring those issues to the table'. He continued to stress that one must have financial and technical knowledge 'and then go to the partner. ... And then we will talk about it. Now we enter into negotiations. ... I don't want to get that knowledge or that information from him. I want to get that information myself' (Farmer and TC member TC Meeting, September 2002). SPP supported him and also stressed the constraints that 'at this moment the only thing that we have is a dry piece of land, which really is of no value. ... there are two issues: the water rights and the money that is needed to bring the water to the land, and then only may we start talking about the value of the land' (SPP, TC Meeting, September 2002). SPP reported first that Pella only held irrigation rights for thirty hectare of land, the smaller plots along the river, and secondly the infrastructure for lift irrigation would cost R8 million. A commercial developer would probably not carry such costs without full ownership land but if

the government would carry the investments, developers may accept leases or joint ventures. SPP staff stressed a stepwise process: first get water rights, then identify public funding and then negotiations with developers. LRC had made a proposal for a tender process to select the best developer but SPP stressed that the new landowner, not the TC, would negotiate the conditions. The most sceptical TC member said: 'Let us say we just give the land to a developer,' but both SPP staff protested that 'we give nothing, it is cooperation' and 'it is a partnership... You will negotiate and you will sit around a table and you will talk about it'. The farmer accepted: 'OK, we go into a partnership'.

SPP stressed that one should get information regarding water rights, hear from the state 'if they are prepared to do the thing' and then we compile development proposal: 'That is as far as we can go before the referendum.' Thus, the TC was still a forum for development debate but its time was almost over, and there were complicated connections between useful tenure options and the requirements of a commercial venture. The reconstruction of land through irrigation development, the option denied in the past, involves rights, funding, technology and information. The sceptical farmer was correct that public support and other entitlements were important determinants of the deals possible and thereby the form and security of tenure to this valuable land.

A proposal from 1998 to allocate 4 000 hectares to formerly disadvantaged communities had recently been revived under the Provincial Department of Agriculture. In a September meeting, the DLA advised Pella to make an early and well-prepared application and SPP pointed out that they had already done so, although with limited information on the requirements. The DLA official elaborated various technical investigations, including a 'ploughing certificate', and listed a number of offices and individuals that they must go through (Provincial DLA official, Loods Committee Meeting, September 2002). Whether residents chose municipal ownership, a CPA or lease arrangements, the major development opportunity on Pella land depended on water rights and, in turn, the ability of residents and facilitators to obtain permits and resources through an apparatus of official requirements, technical investigations, committees and procedures.

#### 14.2.3 An initiative by the Pel Boerdery

Three farmers and TC members launched an initiative to apply for irrigation land under a Pel Boerdery BK (approximately Pel Farming Ltd., though not a formally registered company). The initiative in various ways expresses the complex situation with regard to tenure and development: the constraints of the past, the dynamics of tenure under commercialisation and the success of local ANC, the TC and SPP in containing a potentially serious conflict. It also contrasts with the otherwise open, informed and democratic debate so characteristic of the Trancraa process in Pella, and which these members too often contributed to.

In the September 2002 TC meeting, two of the Pel Boerdery members (not including the presumed leader) pursued questions about ownership to land under a large-scale irrigation

project, expressing a desire to move from tenure studies to action. For a long time it was initiative was somewhat unclear, because the two members used changing strategies to promote a suggestion that the TC or the municipality should approve new applications for land. One was to stress that subsistence farmers on existing garden plots by the river and required improved legal protection; a second was that commercial developers from outside the community could not wait for the transition phase to be over because they needed to act quickly with the funds they had raised; a third was one ought to grant land to Pella actors, to avoid external influence. The arguments were presented within a discourse of concern about employment, economic development and welfare.

One of the farmers stressed the long history of subsistence use of garden plots by the river, where he also held a plot: 'Look, the guys subsisted there. We farmed there even before there was any association. At a stage we paid five rand to the *raad*, regardless of what we cultivated. ... At that time we applied legally for the land, and the land was always used by the people from generation to generation. Go out and you shall find.'<sup>278</sup> On the basis of the long existence of the garden plots by the river, he suggested that it would be possible to process larger applications to develop land: 'I know about specific people who have applied to be developers. We must give them permission'. However, through several exchanges, the ANC Vice-Chair, the Ward Councillor and the SPP all stressed that the municipality was responsible for land allocations, that Trancraa restricted allocations and that no application could be processed in the current phase: 'we will definitely not be able to handle or approve applications ... you must understand that we cannot commit ourselves ... We cannot give a developer permission to develop the land or enter into a partnership with the community' (SPP<sup>2</sup>, TC Meeting, September 2002). She also suggested that 'we have the same situation as we had with the [past] councils who gave land away. They were not supposed to do that, for it had to go through the Minister but it did not work like that. Now we want to make everything right (*Nou wil ons alles reg stel*). So we use Trancraa and we make the proclaimed regulations'. The TC Chair (ANC) insisted that one must avoid the encroachment on common land which he saw at Swartkoppies Guest House and stressed that 'applicants would have to wait 'till we have an authority over Rooipad. Once the four months have expired, and there is a mother or a father that can take responsibility for the land in cooperation with all of us, the whole Pella community, then we have a father for the land' (An metaphor that may refer to the historical role of the holy fathers at Pella). The two members stressed that food security concerns demanded urgent action:

We complain every day that we have a big problem with unemployment. We say our people don't want to work. We just want handouts. Now this man wants to try to make a living for himself. From today onwards it is time for the summer harvest, from August to December month. The man who really wants to earn something can plant something, even if he may

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<sup>278</sup> 'Ons het wetlik ansoek gedoen destyds vir die grond, en die grond was van geslag tot geslag al in mense se gebruik gewees. As jy uitgaan sal jy sien.'

only make a few cents. Someone in the community can produce cheaper vegetables and it is things that we must look at. I am talking specifically about the poor guy ... should those guys be hindered during that time period? (Farmer, TC Meeting, September 2002)

The TC Chair insisted that such small-scale gardening by the river had always been going on and would continue. The TC would not 'bind ourselves by giving people permission, for it is going to backfire'. The two members then tested other arguments to support allocations of land decisions. One argued that developers 'want to start working on a big scale' and could not wait:

The community can benefit from people like that because they create jobs. Now you are letting him wait until the transformation process has been completed. That man must first go and look for money. People like that, who do business on a big scale, don't have money lying around. He has to go and find money from somewhere. He must at least get some assurance from us that he has that land to cultivate. Talking about Rooipad, we are talking about an amount like thirty or forty million that is going to be spent. And not everyone has that kind of money, even if he is a rich man. Now, there are specific people within our community who are looking for money to develop land. Those men cannot wait four months, for in four months the plans will still not have been launched. (Farmer and TC member, TC Meeting September 2002)

SPP<sup>2</sup> said that that developers may 'have to wait four years. Look at Goodhouse! It takes years if you are talking about million rand projects'. The member dropped then this strategy and reacted against the anticipated long waiting for a development project. '.. there you are again mentioning an outside developer. I am talking about *our* people. You are discouraging that man ... We have people who are interested in developing the land, people who are from this place, so we have to speed up this process.' He argued that in the past residents had applied through the *Raad* and that 'that is exactly what we need to do again. So if there are people who want to apply, let them come ... but we need to ensure that people from the community get the land, so you don't have outsiders on the land' (Farmer, TC member, TC Meeting, September 2002). A version of the theme that *it is our land* was thus that it is better that a few residents are empowered than land goes to outsiders. These members had defended community rights in other connections, but here mobilised a discourse of economic development that marginalised the land rights of other members. The TC should attend to residents:

If we apply to the municipality or a developer or a tourism project, it should immediately be considered and settled. It should not be rejected and be told that the transformation process is still on and therefore we cannot attend to you now. People should feel that we are giving them prompt attention even if we may be unable to give them the green light as yet. We should talk about it. We should not wait until Mr. Millionaire [*Baas Miljoenêr*] comes along, because then the poor people will be told later that 'we don't have money to continue with the project.' (Farmer and TC Member, TC Meeting, September 2002)

The entrepreneurs evoked a populist development discourse around an initiative that it was difficult to table directly and which therefore remained unclear until the end of the meeting when a letter forwarded to the TC for orientation was read aloud, throwing light on what the



very intensive and very long debate was about. A letter It was from Pel Boerdery BK (Pel Farming Limited) to Khâi-Ma Municipality was read aloud:

**Application for irrigation authorization:**

The Pella commonage and state farms have 300 hectares of irrigation land where small and large-scale farming can be established. This resource can create jobs and generate an income for both the community and the Khâi-Ma Municipality.

Because these benefits were not available in the past and in light of the government's plan, the abovementioned group hereby applies to become the developers of this land. This is now a golden opportunity for your favourable consideration. We are aware that some major constraints remain, for example the shortage of knowledge and finance. We trust that this will not cause a negative response. The above-mentioned problems can be overcome.

**Business description:**

- To plant short and long term crops.
- To establish black economic entrepreneurs.
- To train women and men of our own ranks as able agriculturalists.

Through the above-mentioned opportunities we want to enable a large percentage of the community to become self-sufficient. The municipality will benefit from the project by the taxes payable from the project. A small percentage of the net profit will be converted into bursaries that will enable our children to pursue tertiary education.

A speedy but favourable consideration will be appreciated. Thank you in anticipation,  
The Board of Directors, Signatures [three men, members of Pella TC]. (Pel Boerdery BK to Khâi-Ma Municipality. Undated, presumably August 2002. To Pella TC for orientation 2 Sept 2002)

Following the long debate above, the letter was summarily put aside. Three female voices closed the meeting. SPP<sup>2</sup> said, 'the letter is addressed to Khâi-Ma municipality, not to us. Give it back to Khâi-Ma municipality.' The Secretary asked about the next meeting and SPP<sup>1</sup> said 'the 2<sup>nd</sup>', and that ended the TC's formal attention to the Pel Boerdery initiative.

Thus, late in the process three TC members came forward as entrepreneurs in irrigation development at Rooipad. For Pel Boerdery members the transformation process had been an opportunity to get information and develop an initiative. They were frustrated with a slow process in which there had been no break-through regarding plans and funding for irrigation development. The TC Chair (ANC) led the rejection of the proposal.

Once members of the *Raad* at Pella had reportedly been treated to food and drink by a neighbour who sought to get control over Pella's valuable land by the river (footnote 238). This time the TC was treated to arguments, development visions and impatience but again passed the test. The ANC and other members defended transparency and respect for rules, without which community land rights may be vulnerable. The TC meeting illustrates the point one can talk oneself into owning something (Rose 1994), but only sometimes and not in this case. An SPP facilitator expressed that she felt that the three members 'could disrupt the whole process' and the same afternoon reported her worries to the Khâi-Ma Loods (Steering) Committee Meeting with the Municipality and DLA, requesting them to 'wait until everything is in place ... before more land is given away, which will only lead to more problems in future' (SPP, Loods Committee Meeting, September 2002).

#### 14.2.4 Further discussions

The discussions around Pel Boerdery continued outside official meetings: a TC member told in November 2002 that Pel Boerdery had continued to quarrel with the new TC Chair, who wanted community control of the irrigation development project. In November 2002 Pella was visited by a representative of the provincial Department of Agriculture, a project leader of the Spatial Development Initiative (SDI) for the Gariep and a consultant hired to help communities develop project plans. The TC arranged a meeting and trip to the river, where the consultant exclaimed: 'This is a gold mine, there is no reason that anybody at Pella should be poor'. TC members were inspired by the meeting and the entrepreneurs of Pel Boerdery said that they only wished the resource persons had come earlier, so that something could have been set up before the referendum.

Pel Boerdery members readily discussed their ideas. In the letter to Khâi-Ma Municipality, they had kept their suggestion vague but in an discussion they suggested that plots of thirty hectares be allocated to each of the three members and kept 'outside the referendum'. They would invest their own labour and financial resources to put land under irrigation, possibly collaborating with outsiders. The Chairman, an influential and very articulate farmer, believed it was not necessary to compensate other residents for the loss of community land, since it was 'only grazing land' of low value. Asked whether they saw a 'conflict of interest' as TC members advocating this allocation of land, two members said 'no': They felt that it would be unfortunate if they were hindered from realising a development with great benefits for the community. Pel Boerdery did however give up the idea of getting Rooipad land 'out of the referendum', though they argued in favour of a future arrangement with their company (personal communication, Pel Boerdery members, November 2002). Pel Boerdery member used terms from the immediate past when proposing *economiese eenhede* ('economic units', the name for the forced subdivision programme in the apartheid era) for themselves in the Rooipad area, while the Mik area (with difficult access poorer soils) could be developed under community project. I discussed tenure with the Chairperson of Pel Boerdery:

PW: What form of tenure do you suggest for the irrigated land – do you want to own it?

Pel: We can hold the land in trust for the community, say for a period of thirty years.

PW: But is it not strange that you have worked with a process to change the status of the land from being 'held in trust' by the state to ownership, and now you suggest that Pel Boerdery should hold the most valuable land 'in trust for the community'?

Pel: That is a beautiful question (*mooi vraa*). (Pel Boerdery Chair/TC Member, November 2002)

He spoke the last words were spoken with a winning smile, leaving the question unanswered. I understand the initiative and this answer as opportunist exploration of possibilities. It violated the Trancraa principles of consultation, transparency and protection of rights advocated by SPP in Pella but appeared to be taken rather lightly by other actors. As

the debate about the affair showed, it is related to many contextual factors: a certain fluidity in the meaning of tenure; fear of outside investors; exasperation with the long process of study and a year of discussion and postponement, and now the realisation that the Trancraa process itself would not lead to the contracts and commitments anticipated by some members. I suggest that when Pel Boerdery members claimed in their own way that *it is our land*, they used three major discursive resources: One was that of private ownership, (which they had experienced as unconstrained by social considerations around the Act 9 Area). Secondly, a discourse of trusteeship, protective control, from the apartheid era; thirdly, the ideas about elite formation of the 'economic units' that one of them had referred to; and lastly the rhetoric of 'black economic empowerment' mentioned in the letter to the municipality).

The Pel Boerdery initiative illustrates that vigilance and transparent governance may be needed to protect the rights of residents. Late in the transition phase, the LRC drafted a set of regulations for development projects on the common land, such as the irrigation project at Pella (LRC 2002b). It focused on project appraisal, sustainability assessment, impact studies and tender procedures, seeking to protect land rights and right to benefit from land use (quoted in SPP 2003: 47–8).

Later one of the members of Pel Boerdery, active in the September 2002 TC meeting, elaborated his worries about Pella's future and dependency on investors who may become the 'new masters' while Pella people, who lack capital, become 'workers on their own land.' He argued that ownership of land was impossible due to the power relations between actors and lack of other resources:

I won't have ownership, it is not possible. That is the problem we have. Those guys [investors, land developers] are very big in the private sector. They are also big overseas. They have the knowledge and they have the money. We have the land, we have the water but we don't have the knowledge. They want to exercise control on my land, in my court. In other words, I will once again become part of the working class. I can become a director, but one without rights. I don't have a say. (Farmer, TC member and Pel Boerdery member, 7 December 2002)

He believed that investors 'have swayed the elite to their side' and therefore community suggestions or protest would not be heeded. Furthermore, powerful actors did not respect the rules of transparency, which therefore became unfair:

Everybody demands that you play your cards openly, but you don't see any white man who does the same. All the guys who have money and what not only show a small part. Afterwards you discover that he controls everything. He doesn't bring all his documents and place them on the table. Only when you are committed to the process and you have signed the necessary documents do you discover that this man has all the control and you don't have any rights. Then everyone says that we cannot dispute it, he has the experience. No one is prepared to give us any documents with the necessary information without us having to promise him something. We struggle with that problem, man, and that is the trap for people. (Farmer, TC member and Pel Boerdery member, 7 December 2002)

He argued that the Pella residents were 'sitting on white gold', the irrigation land that while

not every resident of Pella would drive a BMW, they could 'at least lead an above average life if we take this land and develop it' ... But then we must dissolve the community business. We must privatise, establish companies under a big umbrella'. He envisaged one lead company directing all activities: 'Each household in Pella runs its own company and makes its own money, but we all belong to one big company.' He believed that then one could manage without external investors, 'those guys are automatically excluded. Then we eliminate that one-way world market: it will be such a shock to that one-way world market. Sure, you can give them a shock' (Farmer, TC member and Pel Boerdery Member, 7 December 2002). Thus, the refashioned commercial version of the community could remain integrated and autonomous, turning the 'one-way market' where knowledge and capital are concentrated outside Pella. During many years, including the whole of the Trancraa process, residents had debated and planned for irrigation development but it was clear to this speaker that more than tenure reform was needed to combine market integration with protection of rights.

#### 14.2.5 Irrigated garden plots

The existing small garden plots along the Orange River (mentioned in Section 11.3.1) represent land rights that it could be difficult to document and protect. In the September 2002 Loods Committee meeting SPP had noted limited progress with registering the garden plots compared to a year ago and was worried because a recent community meeting had flopped ('It was pension day and everybody went to the party'). One could see from documents from 1995–6 that the Transitional Local Council had approved the allocation of plots without ensuring follow-up and documentation. Some individuals had an approval letter, but no gardens had been measured or mapped and few holders had ever paid the symbolic annual lease. There were recent cases of trading these land rights, including one where a recent immigrant had been misled to believe that he had bought private land. The SPP recommended a set of regulations comparable to those for dryland plots to introduce law and order, and was supported by the Ward Councillor who stressed the need for rules to facilitate leases or trading of plots. The Mayor referred to the lack of evidence about permits to hold land: 'So according to us there are no tenants on irrigated land: it is just pieces of land that the people themselves have appropriated.' The DLA official asked how one could protect the current use for food security and income generation. SPP argued that during the current phase of legal reform the municipality had no power to approve or reject applications, while individuals could make agreements among themselves. The Loods Meeting resolved that in the interim the municipality should neither grant formal approval for cultivation of the plots, nor hinder it in any way and should accept the informal arrangements. The DLA official stressed food security and the ability of residents to use their political leaders to complain in case of infringements: 'Even if they only want to plant one *mealie*, if anyone tells them they are not allowed to plant there, we will hear about it from the Premier' [political leader of the

province] (Representative of Provincial DLA, Loods Committee Meeting, September 2002). The SPP facilitators later met with and registered 22 holders of plots by the river, five of whom women (SPP 2002a). The holders of the plots had expressed concern that their situation had received less attention than that of stock farmers. They were concerned about the right to transfer their plots to their children and, according to the minutes, welcomed the effort to strengthen the administration. The SPP and the LRC prepared a set of 'Irrigation and garden plot regulations' for promulgation by the municipality (SPP/LRC 2002) and with the goal of 'recognizing and protecting the rights of residents of access to irrigated/gardening plots' (Article 2.1.) The municipality must treat resident in a reasonable and fair (*billike en regverdige manier*) and give preference to the poor and disadvantaged, to women and to individuals with handicaps. The plots would be surveyed and entered in a register and could be allocated to individuals by the municipality or an entity with delegated authority such as the Meent Committee. Irrigation farming and gardening not approved under the regulations would be illegal. The Garden and Irrigation Plot Regulations (2002) are an example of rule making during Trancraa. They suggest procedures that leaders and at least some users were demanding, so the temporary agreement about the gardening plots at Pella was potentially another small Trancraa step towards tenure security.

#### 14.3 Land? Which land? Redistribution farms and the referendum?

The February 2002 Newsletter listed all Pella lands (Act 9 land, new farms and state farms) and suggested: 'After the Referendum all these lands shall be transferred to the entity/entities of peoples own choice'. The 95 000 hectares of old and new land was the prize for the efforts through all the Pella workshops and other events, as was often confirmed:

What lands are we referring to for this process? We are talking about the old Act 9 communal areas; we are talking about those state farms, the Witbank farms, and about the purchased farms. The Transformation process and Act, is only for the old communal areas but in terms of the Article 12 notices, the process has been expanded to the new farms and the state farms that have already been awarded to a certain community. *We are talking about all those farms.* (SPP, Options Workshop, July 2002)

Residents in various connections questioned why municipalities were holding the new farms. The Chair of the Farmers Association in Pella saw a contradiction between the fact that farms were bought for Pella, a 'certain community', but were now held by the municipality, a 'broader organisation' ('Daar is sekere plase wat vir 'n sekere gemeenskap gekoop is. Die munisipaliteit is 'n breer liggaam.'). He said that 'we from the *meent* or the community don't really understand the new farms ... They say that they are the assets of the new municipality.' According to him people were arguing that 'the government gave us the land, then why is the municipality now the *baas*?' (Farmer Association leader and Chair of TC Sub-Committee Agriculture, Group discussion, December 2002). SPP had proposed plans for the transfer of state farms in 1999, but they had not been implemented. One could include the

state farms in the Trancraa process since it only meant to clarify to which institution the farms should be transferred, and did not require authority to implement the transfer. A Notice about the establishment of the municipality was made in terms of Article 12 of the Municipal Systems Act 32 of 2000. It held that municipalities could let the redistribution farms, for which they hold the title deed, be transferred in the Trancraa process. In July and October 2002 SPP wrote to the Namaqualand municipalities asking them to formally confirm the inclusion of the redistribution farms and state farms in the transfer process (SPP 2003: 14). In September 2002, SPP argued that 'as we said informally at the start of the process it does not make sense to have different processes in every place. We make it one process for all the land that has been awarded to Pella. But it was never official' (Loods Committee Meeting, September 2002). The SPP representative pointed out that planning would be made easier and that the costs of surveying and transfer would be covered by the State in the present process, but probably not in the future. The provincial DLA also argued in favour of one transfer process for all lands, warning the municipality that 'even though the new lands have not been included in the Act, they have been given exclusively to Pella. I have little doubt that it is now half one and half the other. It is not governed by Act 9, but you cannot do with it as you please'. The DLA official also said that the state farms fell under the Department of Public Works, not the Minister of Land Affairs: 'Full stop. It is not up to her'. He elaborated the steps of a complicated process of transferring state farms and said that one should be careful: 'Don't mess up the thing, for the Minister can turn around and say, 'tough luck, what you have just decided means nothing. This is state property'. He advised that 'then you must argue from the point of view that people did not go for land claims [restitution]. The residents of this area have inhabited this land for generations, for there were no other people here. It was seeing it from that point of view that we came back and distributed the land as requested by the communities' (Provincial DLA, Pella Loods Committee Meeting, September 2002). However, he also pointed out that the current Minister was known to prefer private ownership:

I am mentioning this for the benefit of the council, because they must see if LRAD cannot be applied to the land. You know we may not transfer it communally, but maybe two or three of Pella's burgers can get a piece of land. I am only mentioning this as an option. It is not the alpha and omega. You must have a look at it, because the Minister would like to see private ownership on state land. So if there are two or three big farmers in Pella, why don't you give them their own piece of land? That is my view, and if he gets the land, then he will be off from the *meent*. You must have a look at those options. (Provincial DLA, Pella Loods Committee Meeting, September 2002)

One notes how the tenure, restitution and redistribution are woven together. The policy discourse had changed towards emerging commercial farmers and private ownership. However, the privatisation avenue under LRAD may not have been a good argument for the inclusion of new farms and state farms in the referendum, for the Mayor had claimed that she would like to control land to secure access for the poor. At the September meeting she said

that she would discuss the issue with the municipal council. Despite advice from the DLA and the SPP, the Khâi-Ma and Nama-Khoi Municipalities decided not to approve the inclusion of the new farms under the Trancraa referendum and transfer process. In October 2002 the main SPP facilitator for Pella was upset, saying that councillors were providing ammunition to those who were against the municipalities and that it was a great disappointment to most people. In Khâi-Ma the decision not to include the farms was apparently taken in a closed caucus among ANC councillors (the DA Councillor said in December 2002 that she had not been aware of it). Municipal leaders took the decision to exclude the new farms from the transfer process against considerable resistance. Some were concerned about public access but new farms were also source of power, for the control of access could be used for political reward and punishment, as confirmed in Pella after the referendum.

Pella residents could read in the February 2002 *Transformation News* that they would vote on the 95 000 which after the referendum may be transferred to the option of their choice. It appears that including all Pella lands could have increased the legitimacy and coordination of a future land governance system and confirmed a form of integration into the larger landscape. As it turned out, the 7 December 2002 referendum in Pella was only about the 48 000 hectare of the old meent, and thus back to the Act 9 Area and underneath that the Ticket of Occupation from 1881, which alone had withstood the tooth of time. Anyway, the Pella community had also persisted and was going to vote.





## 15. REFERENDUM AND REFLECTIONS

### 15.1 Referendum

The consultations of the Trancraa process had a temporary climax in the referenda on future land ownership from November 2002 to January 2003. I mention again the repeated emphasis on community choice, and even that the impatience of the Minister for the community to communicate its views. The provincial DLA official said that ‘an entity must be established in the community, and the municipality must sanction it before 19 January 2003. ... If you do not take the decision then unfortunately the Minister will take it for you. She will not give you more time’ (Provincial DLA, Pella Loods Committee, September 2002). In Pella the referendum took place on 7 December 2002. The democratic event epitomised the right to political participation and contained a basic excitement around the outcome. Would the ruling party get support for its campaign for local government ownership of land? At the same time the referendum was a multi-faceted event where individuals, conversations and small clashes reflected the Trancraa process and, for me, visits to Pella over a fourteen-month period. In addition to the collective message given, the referendum would be a test of the Trancraa process, and of popular participation and interest. I had seen Trancraa as a continuation of the ‘negotiated revolution’ closer to the ground and a link between the democratic election in 1994 of who should rule the country and this referendum about who should own the land. I have tried to show how constrained the democratic choice was in numerous ways. When the day was over, a local leader hailed the referendum as ‘free and fair’, which captured an important achievement. Nevertheless, after the Saturday of the Referendum comes a Monday of going back to the politics of everyday life and such mundane tasks as maintaining irrigation pumps. During the last few days of my research in Pella, participants reflected on the Trancraa process and whether government would respect the referendum and whether in other respects it would withdraw from or recommit to the transformation of land and society.

#### 15.1.1 Further debates about ownership

##### *Politicians*

During the preparations debates over ownership of Pella land continued and reached most town dwellers and farmers at their stock posts. The DA had advocated for a CPA and the ANC had advocated for municipal ownership. However, there were also tensions within those political camps and views of land did not fully follow party lines. Two ANC leaders (respectively Chair and Vice-Chair of the party in Pella) explained that the process had been smooth lately and that they felt ready and well prepared (personal communication, November 2002). ANC Vice-Chair said that ANC had been clear about the options and that ‘the community has always felt that it is their land and after 150 years they are now getting it

back'. After getting the advice through the party structure during mid-2002 they discussed with the members in the local branch and decided for municipal ownership, *munisipale eienaarskap*. However, the discussion showed a certain diversity of views as to what the alternatives involved. The ANC Vice-Chair said that in his view one should go management through a locally elected municipal committee but for 'community ownership ... the title cannot go to the municipality' (ANC Vice-Chair, November 2002; he was also acting TC Chair). I asked why the municipality should not hold the title, and the Chair of Pella ANC said that in her view residents feared municipal ownership. Other participants in the discussion referred to the fear that Khâi-Ma leaders would not respect Pella land under pressure from landless groups in the municipality. The Vice-Chair suggested that that after ten years of empowerment and capacity building the community should take over the full management responsibility: For now one should have municipal management through a Meent Committee with delegated powers, that is the current model. However, there could be 'no negotiations about ownership – it belongs to the people ... there should not be the Khâi-Ma Municipality name there. Khâi-Ma will try to get a group of ten to say that they can give others access. We seek exclusive ownership' (Deputy Chair, Pella ANC, November 2002). The entrepreneurial Chair of the TC Sub-Committee Agriculture commented on the suggestions by the ANC leaders that he had no problems with community ownership and municipal management, but asked: 'Would the Municipality see it like that, that land was actually community owned?' No, he thought ANC was using this version as a 'dummy'. He stressed that there must be a *liggam*, an entity, that gets ownership, as the LRC had done in their information. The ANC Vice-Chair added that 'land is like a foster child', which I interpreted as meaning coming back to its rightful parents, the community, but still in need of protective care, by the municipality. He once used the metaphor of 'finding a mother or a father for the land'. Thus, one sees an example of a living discourse about ownership cannot be fully reduced to legal options or clear-cut political choices. Leaders applied 'options', concepts and metaphors to the Pella's land and future in a probing way. Our Land is like a 'cell phone', a 'foster child' or 'land is money'.

### *Farmers*

In July 2002 I interviewed farmers who had not heard about Tranraa, but during the last few months before the referendum the handful of farmers I spoke to were aware of the process, although the depth of understanding varied. In my view, it was difficult to understand the alternative and the nuances of ownership, management and combinations. Two Nama speaking brothers (Interview, November 2002) said that they had attended a meeting and read some notices, but were not entirely sure what the referendum was about. They said the land belonged to the community and was free for all. A stock farmer (37) said that he had worked away from Pella from 1992 until he lost his job for a state mining company in 2000, when he returned with a retrenchment package of R55 000 and took up farming. He had

heard about Trancraa but did not really have time to attend meetings and needed to ask his relatives in the TC more about it. He said he 'was ANC', had signed up for the referendum, and would talk to his uncle (a Pel Boerdery member and CPA advocate) about the right choice (Interview, November 2002).

Ms Johnson (50), stock farmer at Annakoppe, whom I had spoken to almost a year earlier, was still taking care of her small herd and three male relatives who needed medical care (Interview, November 2002). In our previous talk we had she asserted her 'equal rights' against big farmers trying to squeeze out the small. She had attended several meetings, noting that small farmers showed up and the big farmers stayed away. 'Nobody knows why, I don't know how they think'. About the neighbourhood and the community she said 'we are not really friends, we are on our own, we talk, but we stick to ourselves'. Two weeks back there had been a meeting about the *verkiesing* (referendum), and her husband and brother had attended 'since not all could go'. Her male relatives had reported from the meeting that participants talked a lot about 'municipal'. She had registered for the referendum and said that the land must belong to someone (*Die grond moet aan iemand behoort. Dit is baie belangrik*). Asked if the ownership option mattered for them, she replied that she was not sure (*ek wet nie*). She added that her family currently had to register and pay for their stock. She went every month to the *raadskantoor* to pay for her adult stock (8 X R0.30 = R2.40 per month). She used to get water from the nearest pit, but since her closest neighbour had started charging R30 a month, she now went with the donkey kart to carry water from a pit further away. The neighbour's control over water may be a greater threat to her family's livelihood than municipal fees, I thought. However, she said that all would get water if they had a need. I recalled her reply to a question about whether it was good to live at Annakoppe: 'Ja, ons bly lekker hierso.' It was free and cheap, she had said. And last week a wind was blowing from the southeast, and she hoped that the next time it would bring rain. It did not, but she made it to Pella for the referendum.

### 15.1.2 Ready

During 2001 and 2002 the SPP and TC had completed an intensive and successful registration campaign. By July 2001 resident had registered, by September 755 and by November 860, equivalent to 75% of those on the ordinary voter's roll. One decided to keep the registrations open until the day of the referendum, and the number finally reached 1 114 registered, almost as many as in the 1999 national elections (1 159). The Leliefontein referendum had been held on the 16 November with a disappointingly low turn out of about 30% of the voters in the area, and a clear victory for the municipal option (59%) versus CPA (37%). In the different mining towns referenda were held on 4 December 2002. The ballot paper was ready (Table 19)

**Table 19: The ballot paper in the Pella Community referendum 7 December 2002**

<b>Transformation of Certain Rural Areas Act 94 of 1998</b> <b>Pella Referendum</b> <b>Who should become the owner of the Act 9 land in the remainder</b> <b>(excluding the town area)?</b> <b>Please indicate your preference with an 'X' (you may only choose one option)</b>	
Common Property Association ('CPA') with a community management committee, for example the 'meent' committee	
Municipality with for example 'meent' committee	
Your own choice: Please fill in who should be the owner of the Act 9 land in the remainder (excluding the town(s)). (Please note: If you choose this option, you must indicate who the owner of the Act 9 land in the remainder should be, otherwise your vote will be invalid)	

The ballot paper reflects the magical choice – municipality or community? – but choice is inscribed in discourses that give meaning to, for example, 'community', 'municipality' or 'private'; is affected by uncertainty, such as about future public support; constrained by other decision-making, such as other legislation (on mineral resources) or municipal decisions about which lands to include, but most of all the Minister who will deliberate and decide. Nevertheless, residents had been asked to bring their considered decision and advice to the attention of the South African Government: that appeared significant.

#### 15.1.3 Pella, 7 December 2002: Referendum

##### *Breakfast – Knowing and respecting the will of the people*

For once I had spent the night at Klein-Pella Guest Farm with the SPP and the DLA.<sup>279</sup> At breakfast we discussed the power of the referendum. An ANC leader had suggested that the results should not be made public, so that the Minister would be free in her consideration of it. An SPP staff believed that such a decision would cause anger and impressed on the DLA representative to ensure that the results would be made known. Asked how binding the referendum was, the SPP senior facilitator (SPP<sup>1</sup>) said that 'if she thinks the decision does not match with the facts or whatever, she is not obliged to stick to what they have chosen, but she has got to give her reason'. She added: 'in Leliefontein only 30% voted – to me, if I were the Minister, I would think, "these people don't give a damn about their land, they cant even be bothered to vote"' SPP<sup>2</sup> said that that she could not understand view that the Minister would not be obliged to accept the outcome: 'It is going to be chaos, man!' This touched upon the justification for the referendum. SPP<sup>1</sup> explained that community leaders and SPP had decided to hold a referendum to give credibility to the advice and take pressure off the SPP:

The Act does not refer to a referendum. The Act refers to a 'transformation'. We put that in

<sup>279</sup> The two SPP Pella facilitators through most of the process and two representatives of the provincial DLA, including the official in charge of Namaqualand, who led the Loods Committee meetings quoted, for example in Sections 10.3.3 and 14.3).

our proposal, that we should test it, knowing that if you give an opinion, everyone will say: 'who made that up? ...we wanted a referendum, to say that 'it is not coming from SPP, it is coming from you' ... That is why it is a bit flying free, because there are no rules and regulations, because it wasn't envisaged in the Act. (SPP Pella facilitator, Klein-Pella, 7 December 2002)

The senior DLA official stressed that the facts must be reported to the Minister and suggested that in case of different outcomes in the five voting areas she should abide by the result in each case: 'how on earth could she just change it and say "no", for she said that the people must indicate their view'. He stressed that the Minister had the final decision and could 'turn it around' after consultation with the Premier or the President. In the case that Pella voted for a CPA (SPP<sup>2</sup>: 'Which is likely to happen. I didn't say that. '), the municipal council could also try to convince her that land must be with the Council. 'But that will be against the will of the people, more or less ... it would be completely against the rules and regulations'. [Ja, dit sal absoluut teen die reels en regulasies wees, maar you must just remember sy het die laaste sê]. However, he suggested that political unpredictability remained a factor: 'I saw in my life of twenty years [as a government official] very strange decisions by politicians because of circumstances or whatever.' SPP<sup>2</sup> said: 'No, it is not because of circumstances: it is because of power or own gain'.

### *To Pella*

We drove from Klein-Pella to Pella town, 45 km, through a magnificent landscape, up the smooth road on which trucks can carry sensitive table grapes to the market. Past Springputs, Swartkoppies, Annakoppe and down to Pella bathed in morning sun. At 7.00 voters have already lined up outside the Pella Raadsaal where voting is to take place, police are present and plastic ribbons mark the entrance and exit to the voting hall. TC members in light-blue referendum T-shirts are putting up signs and tables. The South African Council of Churches is going to monitor the referendum. At 7.20 voting starts and after the first hour and twenty minutes 110 voters have voted. The Pella Raadsaal is buzzing with excitement, chatting and smiles.

Tension and fatigue were also involved. At 8.00 the Mayor was sitting in front of the Raadsaal ticking off voters on a sheet. Asked, she said, 'I am counting my people', meaning ANC members. She expressed that it would be a relief to get the result. Another ANC leader said 'You see, some of our own people are turning their back against us'. He said that ANC would call a mass meeting to 'deal with the traitors and discipline them'. The Pella ANC was not so confident on this morning and about this referendum.

### *Registrations and fairness*

Ms Johnson, the stock farmer at Annakoppe, comes to vote. She is not on the list but knows she has registered. Due to a computer error some registrations have been lost. However, at the late registration she is told she cannot vote because she only came back to Pella only in

1999, having lived for a while in her husband's town. She is disappointed but says she understands. A TC member asks a colleague: 'Was this right? and insists: 'We must know. It is degrading (*vernedering*) for her not to be able to vote. We must know'. SPP lost entries due to a problem with the computer, which in most cases did not matter due to the late registration, but for Ms Johnson it did. 'She was treated wrongly in the first place', SPP point out. Later, there is heated debate about another woman's right to vote. She married a Pella man in 1991, but lived outside Pella until 2000. She stressed her 'community of property' with her husband, 'It does not make sense to me that I am not able to vote, for we are married in community of property. What is his, is mine, so what does that matter? I am his from the start and he is mine from the start ... That is also how he explained it to me, or else I would not have come here to make a fool of myself! (Pella resident (f), Referendum, 7 December 2002). She challenged the individual economic criterion used to determine the right to vote, the fact that her husband could be away but pay taxes while she was not considered party to that, but was rejected. In another case, a woman had a plot for which she was liable for taxes, and she could vote on that basis, whether she had been paying or not. SPP was concerned that all cases should be resolved correctly, since errors could be used to challenge a result that was seen as 'undesirable'.

The TC Chair and Vice-Chair of Pella ANC is worried about the result. he claims that the DA has been campaigning from door to door, 'telling people that they will lose the land, and that taxes and rates will increase if they let it go to the municipality.' ANC also campaigned, but 'was more strict to the point in its information' and 'did not tell lies or try to discredit the other party'.

Around noon we talk about the partial solar eclipse on 4 December. Today the sun is very much felt. It is about 38°C. There is a dip in the flow of voters: SPP asks how to 'chase people out of their houses in this heat'. It is a long walk from many parts of Pella. Some TC members complain about work with re-registrations. Tempers flare and SPP<sup>2</sup> asks who from the TC are in the Ward Councillor's office watching the *Chiefs vs. Pirates*? I note the words on the wall of the front office where Pella people meet local government: 'Don't loose your temper, coz I don't have time to find it for you'.

*Looking ahead: 'But we have a policy'*

The SPP<sup>1</sup> facilitator says that 'we so underestimated the work in this process – it is ten times more than we thought. And there is still the reporting to do. So I guess we know what to do for Christmas'. She notes concrete things left to be done under Trancraa: the surveying of plots by the river and of Swartkoppies; getting the Swartkoppies Resolution 2 December 2002 approved by the Council, and so on. She discussed achievements and prospects with one of the key players in the community who expressed uncertainty: What has one achieved? What will happen? How long will it take? He thought it could take three months before the Minister had decided (Chair TC Sub-Committee Agriculture). SPP suggested

'probably 12 months'.<sup>280</sup> The farmer leader asked about 'the interim story with the "municipality entity". Will it still continue until we hear from the Minister?' and the SPP suggested that it should continue until a transfer of land was completed. SPP assessed that 'one can continue with small things, but the big things [mentioning getting loans] will be hindered until the Minister has made her decision, but maybe you should just put a little pressure on the Minister to make her hurry up' (SPP, discussion with TC member, 7 December 2002). The dialogue ended on a mellow note. After the development efforts under Trancraa (irrigation development, minerals, the 4X4 route and so on), what was achieved was a kind of policy but perhaps not the means to realise it:

TC: You know, as far as I am concerned, things are not really in place.

SPP<sup>1</sup>: They are not.

TC: What do we have so far? Nothing.<sup>281</sup>

SPP<sup>1</sup>: But we have a policy. I mean, the work of the Transformation Committee was not to start projects, but there is that draft policy and all those sorts of developments. Things are in place, but money must still be provided.

During the referendum the DLA official confirmed that he foresaw problems with getting state support for a new transfer process regarding the new farms: 'The Loods Committee wanted all the land under the same process. It is better to finalise all at one shot, then people know where they stand, then planning can proceed and be coordinated. That was our idea – to get rid of it at once. Now the municipalities must do it. Now I do not think there will be support for it, so then they must do it alone'. I asked the DLA representative whether 'the DLA was finished with the Act 9 Areas after Trancraa?', but he replied: 'No, after Trancraa, I am finished with DLA!'. He added that the DLA must follow up any CPAs established and he had stressed to national DLA that they 'must support the Act 9 areas when they make regulations under CLRB. There is lots of work to be done. It must be coming from the national side' (DLA Official, 7 December 2002).<sup>282</sup>

### *Progress*

At around one o'clock we learn that in Richtersveld about 100 residents in each of the four towns have voted. At quarter to two the first workers from Klein-Pella have come to vote. The manager has arranged for a short work day, since a referendum is important in the new South Africa. At 16.15 there are 411 votes. A TC member (and presumed CPA advocate) is collecting voters in his *bakkie*.

Unrelated to the referendum, an ANC leader from outside of Pella is getting married and has borrowed the large 'Pella Progress Hall' for the celebrations. So on the day of the land referendum influential visitors with white and silver Mercedes and BMWs were in town.

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<sup>280</sup> 'They will not start working on it until the end of January... We know how they do things in Pretoria. It takes them months to write a letter, never mind reading one. So it will probably take a while'.

<sup>281</sup> The same member gave a strikingly different assessment a few days later (see Section 15.2.2).

We watch the ritual of driving around town, swirling and sliding and raising the dust of Pella's sandy streets, encircling the voters and the event at the *Raadsaal*, and eventually ending up by the Progress Hall.

A guest in the wedding, Johannes (Boeboe) van Wyk, Namaqualand Member of Parliament (ANC) visits and talks with young ANC leaders. He said that he was pleased with the process: there had been many of meetings and much information. He was relaxed about the outcome: ANC had made a clear recommendation in favour of municipal ownership, but that people must make the choice, the most important thing is to keep options open, for people are likely to think differently in a few years.

*Closing, counting and result*

A 19.00 we go to Ouma Toekoes, who started the Koffiekroeg and the Cultural Festival but is handicapped following a stroke, to enable her to cast her vote in her home, for which she had dressed up. Voting started late and therefore continues till 19.20. An hour later five people who have walked from Mik come to vote – too late.

While the counting is starting up, the Mayor leaves saying, 'I have had enough, I can't change anything'. Some young women ANC members, who judge the result based on whom they saw vote. One said: 'From nine o'clock I saw a disaster looming'. They are sad and angered, crying, because they believe it will be a CPA victory. They think the CPA will alienate land to individuals or lose it through financial mismanagement. 'The land will be lost forever – it is tragic!' At 20.40 p.m. the results were announced by the Council of Churches: 'According to the ballots there is for the 'own choice' option one vote. For the 'municipality' there are 231 votes. For the 'CPA' there are 317 votes. And there are five spoiled votes. In total 553 voters participated in the referendum.' [excluding mining town votes]

The DLA official thanked the Raad, the Transformation Committee, the Mayor, Police, SPP, and so on and said that 'Land Affairs are satisfied'. The TC Chair thanked everyone on behalf of the Transformation Committee and the Pella community:

The result may not have been as expected but the people have spoken. On behalf of the Transformation and the community we can say that we accept the process, which was conducted in a free and fair manner. (En van die Transformasie se kant af, en die gemeenskap se kant af, kan ons ook sê ons aanvaar die proses, en die proses het vry en regverdig verloop). We will wait for the final report. Thank you very much.

One SPP facilitator commented: 'I think it was very significant that he said that. I hope you have taped it.' It was taped, almost the last words for the day. The TC Chair confirmed the achievement of conducting a fair and free process and perhaps created an arena that bridged the political division in the community. Critics may say that the referendum epitomises the 'democratisation of disempowerment', which will not change the land. I have

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<sup>282</sup> The DLA official left the DLA from January 2003. The main SPP facilitator also left the SPP. This added to my feeling that a stage of Namaqualand land history had come to an end.



documented that residents and facilitators invested much thought, care and feelings in the referendum in Pella. It was well carried out and may matter to the extent that the state and other actors pay attention. In Pella, despite political tension, the Transformation Committee, the SPP and the Municipality, supported by the LRC and the DLA and other actors, succeeded in running a constructive consultation process culminating in the charged referendum on 7 December 2002. Of the five areas, Pella had the greatest turnout. 1 114 individuals registered to vote (54% were women), almost as many as for the 1999 national election (1 159). An impressive number of residents (653, now including those in the mining towns) turned out to vote, close to sixty per cent of registered voters (SPP, 2003a: 64). This testifies to the thoroughness of the information and mobilisation campaign led by the SPP and the Transformation Committee.

#### *Results in other Namaqualand areas*

Five of the six Namaqualand Rural Areas, Leliefontein, Concordia, Pella, Richtersveld and Steinkopf, held land ownership referenda during November 2002 to January 2003. Owing to the conflict discussed later, Komaggas residents did not vote. All the referenda involved three ownership alternatives: 1) Communal Property Association (CPA), 2) Municipality or 3) Option of own choice (including individual title). The referenda were exciting events but uneven participation and a referendum turnout of about 37% were disappointing, and partly reflected a 'boycott campaign' in at least one area and the fact that many residents are not active land users. Some residents also pointed out that the government had ignored past consultations about municipal demarcations and mineral rights.

The results showed a majority for CPAs in four of the five areas, on average 58% for CPA versus 39% for municipal ownership (Table 20). The Pella result was thus close to the average for Namaqualand (57% for CPA, 42% for municipal ownership). A majority for the CPA option was pronounced in Richtersveld (94%), where community mobilisation had been more vigorous as a result of land claim court cases and because a CPA had already been formed. Throughout the areas, less than 1% voted for the 'own choice' option, reflecting a common view among residents that individualisation of commons is impractical and socially irresponsible.

Table 20: Community referenda on land ownership

	Municipal %	CPA <sup>1</sup> %	Own option %	Spoilt %	Votes Total	Voter turnout <sup>2</sup> %
Leliefontein	59%	37%	1%	3%	889	31%
Pella	42%	57%	0%	<1%	653	47%
Richtersveld	4%	94%	0%	2%	1 000	61%
Concordia	44%	53%	0%	3%	419	14%
Steinkopf	45%	52%	1%	2%	2 064	42%
Overall	39%	58%	1%	2%	5 025	37%

Namaqualand November 2002 – January 2003. 1: Communal Property Association. 2: Voter turnout in percentage of number of voters in each area (SPP 2003: 4, 64).

## 15.2 Reflection

### 15.2.1 Political comments

#### *The Mayor of Khâi-Ma – ‘a bit of sour grapes’*

Some ANC leaders indicated that they found it difficult to accept the result. On the Monday following the referendum, the Mayor of Khâi-Ma was forthright in her interpretation of the referendum. She emphasised the party mandate and her concern to protect ‘the poorest of the poor’:

You will remember that right in the beginning, at our first meeting, I said that it would be good if the land was taken away from the municipality because the maintenance puts pressure on the municipality. But after discussions we all got a mandate from the ruling party that it would be the best if the land remains under the municipalities. So we all accepted that.<sup>283</sup>

I am now disappointed, for we have tried to cover the poorest of the poor, since people who only have two or three goats might be swallowed by this thing of a CPA. We as the people of Pella are not ready for ownership. That is my personal view.

The ANC standpoint was that the land must come to the municipalities and then we would gradually transfer it to the people, also in ownership, but more in a family way (ook eienaarskap maar meer in n’ familie-verband). For example, if the Bassons come and claim Mik, then we give them Mik. But we would make sure that we retain 40% of the land for the poorest of the poor. (Mayor of Khâi-Ma, 9 December 2002)

Thus, the municipality should take over the trusteeship function for residents who are unprepared for ownership, and lead a reform process that may gradually create different forms of tenure (individual private, family, and community-owned).<sup>284</sup> I see it as an extended process whereby local government could achieve Trancraa goals of protecting rights and creating new institutional arrangements. Such a process would likely be hampered by lack of resources and would be vulnerable to non-transparent deals, such as with the ‘family at Mik’. Given her disappointment, the Mayor explained that she would now prefer to see the CPA implemented as a ‘lesson’:

We are waiting for the Minister’s final decision. But I feel that we should let thing run its due course, that the CPA should manage the land and whatever, that it should be a lesson for our people to show them that we are not ready yet (dat dit n’ leerskool vir ons mense is wat kan wys dat ons nog nie gereed is nie). I don’t want to have people saying in fifteen years that [her own name] was the mayor and why did she not tell us that we ought not to put the land under the community. Maybe it will be for the good or maybe for the bad, but I feel that it should be a lesson for our people. So I’ll stick to the results and I will make the people feel, rather we as a municipality will make the people feel, that ‘you took this decision’. (Mayor of Khâi-Ma, 9 December 2002)

<sup>283</sup> ‘[N]a besprekings het ons almal n’ mandaat van die regerende party gekry, dat dit die beste is as die gronde onder die munisipaliteite bly en ons het mos nou maar ingeval daarby.’

<sup>284</sup> Several different leaders used the idea of a trusteeship. A professional in the education sector said before the referendum that people were confused by conflicting information. ‘Someone must tell them what to do, our people are not so good, so intelligent, to know what to vote for’. He was, however, critical of the municipal leaders, and recommended continued state trusteeship: ‘the best thing is to just leave it as it is’ (Educator, personal communication, November 2002). Recall also that the Pel Boerdery Chair recommended himself and two colleagues for trusteeship over valuable irrigation land. ‘Trusteeship’ in various forms was one of the most powerful idea in the Trancraa implementation.

This view may be linked to the disciplining of party members that she and another ANC leader advocated at the referendum. In this view, residents' lack the capability for ownership and political decision-making. Here apparently the local ANC took on the role of patron or trustee; the discourse of trusteeship is still a readily available language for understanding and addressing the lack of power that characterises community institutions.

Interpreting why residents voted as they did, the Mayor emphasised the legacy of suspicion of the authorities. She claimed that the opposition had campaigned by telling residents that 'the municipality is a thing of the whites, as it has been all these years. ... and that if people voted for the municipality, the whites would come and take the land.' These were points that I had not heard from any resident or member of the opposition. She held that campaigners for the CPA had exaggerated slow delivery in the housing programme and municipal taxes. Furthermore, residents failed to 'understand' the link between their choice of a CPA and municipal services:

Mayor: For example, this morning someone came and complained about a broken pump, but then NN [the Ward Councillor] made the person understand that they must do everything themselves from now on, so that they can already feel what it is like. This person then said that was not how had understood it, but he had voted for a CPA, and he even said so! So I do not know [the reasons for voting CPA].

PW: But doesn't the municipality still have a responsibility, since the land has not yet been given to a CPA?

Mayor: Yes, but we do it differently, we are letting them feel it already. We want them to experience already now what it feels like to claim ownership and be an owner. We are wrong, we know, but we decided to do so: there may be a bit of sour grapes in that.<sup>285</sup> (Mayor of Khâi-Ma, 9 December 2002)

Drawing on a discourse of private ownership she suggests that voting CPA means to 'claim ownership' and reject public support. She notes she may 'be wrong' but it was not merely the anger of the moment, for an SPP staff reported a month later that '[The Mayor] says ...these people chose a CPA – they have made their bed and now they must lie in it! They will get no help from the Municipality or any other government department according to her' (SPP facilitator in Pella, personal communication, January 2003). The Mayor also suggested that new rules would soon have to be applied to the new farms, some of which were used by farmers known or believed to have switched to the CPA side. It was thus unclear, at best, whether local government would support land ownership and management by a community-based organisation.

*ANC discussion – 'let them do their own thing'*

This was confirmed a few days later when some young members of Pella ANC told about their initial discussions, stressing that this was not caucused at higher level. The main

speaker, the TC Chair, said that ‘the majority feeling from the ANC point of view is that we must not get involved. We must let the people who support the CPA do their own thing’. They were aware that in doing so they may ‘give power to the other side, to our opposition. So they will be laughing behind our backs. They will claim the process, partly the opposition and partly some of our own members who turned against us and our vision’. He argued that they could mobilise to influence or control a CPA but most of them were against that at the moment. He felt that cooperation across political divides in the TC had not been difficult (‘at the end of the meeting we always made one statement or one conclusion’) but he expected that different party lines would cause conflict in governing a CPA together (TC Chair and Pella ANC Vice-Chair, 11 December 2002).

Another difference with a CPA would be the control over income. The younger ANC members told that ANC leaders and the municipal administration had formed a ‘Khâi-Ma Trust’ with themselves as board members (I had not heard about it before), which was to handle incomes from the land in cooperation with the municipality. Given the referendum support for a CPA, one leading party member believed that the ground was now pulled under such a trust: ‘It will not work because they cannot pay two different institutions and the CPA is the landowner and not the municipality. So they must pay directly to the CPA because the mine is on Pella land, and the CPA will want their part of the royalties’ (ANC leader, 11 December 2002).

Through its clear stance in favour of municipal ownership, ANC had politicised the alternative (CPA), which rather than a neutral legal option became a venture by the opposition. By discrediting the alternative the local ANC in some ways questioned the ideas of a consultation and a democratic choice. However, ANC leaders strongly assumed that the people’s voice would count: a CPA had virtually taken over the land from the moment the result was known. In the face of the result, ANC chose crisis maximisation, and suggestions about dispelling the right-holders from the realm of public responsibility.

*DA – ‘Now they can talk about land in their own name’*

Not surprisingly leaders of the Democratic Alliance (DA) interpreted the referendum differently than the ANC, namely as a claim for ownership. ‘The only reason is that they want the land back. If they can possess land, they will be far better off, and now they can talk about land in their own name, as something that belongs to them (DA Chair, 10 December 2002). Surprisingly he saw the referendum as an undesirable event. He said that ‘I would rather like to join Komaggas: no vote’. I asked if it ‘was it not good to have a referendum?’

No. Only the votes of the DA could not bring out that vote. I am sure that there are some ANC people who also voted for CPA, and this will just be another split, another unhappiness against people. A division. Some people will be told, ‘you did not vote for the

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<sup>285</sup> ‘Ja, maar ons maak anderster, ons laat voel hulle nou al. Nee ons wil he hulle moet dit nou al ervaar hoe dit voel om eienaarskap te eis, en hoe dit voel om n’ eienaar te wees. Ons is verkeerd, ons weet dit, maar ons het nou so besluit. Dit mag seker bietjie suur druiwe wees.’

municipality, so no privileges anymore from my side.' I cannot stress that but I get the feeling. Definitely, many ANC voted for the CPA, that is why they bring out such a good vote. (DA Chair, 10 December 2002)

In this sense he regarded leadership as not 'mature' enough to carry the conflict-potential of the democratic process. He immediately read the message of a split in the governing party as ominous, leading to 'another happiness against people'. However, the DA Councillor saw a general protest as a valuable dimension of the referendum. She said: 'I think it is because of the treatment we have recently been subjected to by the municipality ... that also motivated many ANC members to vote for the CPA'. She saw it as a protest mainly against the 'municipality' as an organisation, rather ANC as a party. 'It was not a political issue', both agreed.

DA had campaigned for the CPA option by holding some meetings in homes in different parts of town, and asked households present to bring the agreed messages further. The DA Chair told people that 'for years the people blamed the Catholic bishop for giving the land away. And now they have the opportunity to possess the land if they vote for the CPA. But I also told them that this is going to be your vote, and not what I told you to do' (DA Chair, 10 December 2002). The two DA representatives agreed that the Trancraa process was free and fair. 'I would also say that it strongly motivated many people to participate. I personally feel that the SPP ... did their job very well, and therefore people could decide to get their land back and never more to give it to anyone else. (DA Councillor, 10 December 2002). The DA Chair followed up by saying that the main SPP contributions were information, problem solving, 'helping people with their fears' and explaining advantages and disadvantages. Such recognition was not so common in a process where the effort of SPP was often taken for granted or sidelined by conflict.

#### *DA: New farms out?*

However, the DA leaders had not been aware of the fact that the new farms were not included in the referendum and expected transfer process (I became the messenger). The DA Councillor said: 'I don't understand. It was included! (Ek verstaan nou nie. Dit was mos ingesluit! ... the old meent and the new farms were all included and that was stated in the notices by SPP itself.' DA leaders believed that residents' expectations of the same were based on the February 2002 Transformation News (Section 0):

It is people's perception that the farms are included in the land. This new thing is going to cause quite a commotion! It is written in bold black [reading]: '**All this land will after the referendum be transferred to the entity of the residents' choice**'. The referendum has stated the community voice. A person rests after you have won. This information will just upset people (Die referendum het gesê die gemeenskap praat. 'n Mens is rustig as jy gewen het). (DA Chair, 10 December 2002)

DA leaders argued that the the municipalit was only 'holding' the farms (Die munisipaliteit is net die houer) but did not own them, 'so why do they now want to own it?' They foresaw

problems if people were told that new farms were the property of the municipality, and thus 'still belongs to the government' (DA Chair, 10 December 2002). I suggested that the municipality may have a right to choose separate processes for different categories of land.

But then the leaders are fighting against the community, since the municipality kept the land in trust for the people. Pella people got the land, it has only been kept in trust by the Minister. That which was in trust with the municipality was included in the Transformation process. So then the new farms also belong to the choice that won. (DA Councillor, Pella, 10 December 2002)

They emphasised procedures of decision-making. The DA Councillor said that she was not aware of any council decision concerning the farms: 'Not once in a council meeting was this discussed. ... Even if they discussed it in their caucus, it should be passed in a council meeting.' Both leaders argued that such a decision should have been consulted: 'they must come back to the people to get their support. But now we have already voted.' The DA Councillor mentioned with acclaim the Swartkoppies Guest House resolution where the community had approved the municipal management while recognizing community land rights (see Section 14.1.3.) The DA Chair said, 'it is a stupid decision. Maybe there will be another referendum. The people will decide.' My research assistant asked if they suspected 'some foul play' regarding this issue. The DA Chair said 'Of course!' He had already been frank about his own interests in land: 'For example myself, I also want to have finger in the pie outside [that is, in the *buitemeent*], because I am interested in tourism, mining and so on'. (DA Chair, 10 December 2002). The Councillor said that the referendum result was a bitter pill to swallow and that the municipality resisted that its operation should be restricted to the town for 'on the *meent* they could have got a lot of income with the prospects that are there'<sup>286</sup> (DA Councillor, 10 December 2002).

In the evening I called the main SPP facilitator. She mentioned that the ballot paper (Table 19. p. 278) clearly indicated that only the remainder of the Act 9 land was voted over, so people ought to know. However, not everyone did. After years of consultation, and a formal 24- month implementation phase with a vigorous and in many respects successful information campaign, it is not satisfactory that residents should get the information about which land they are voting over at the referendum itself. A referendum is important for that, a highly formalised point of articulation between the state's offer that *it is your land* and residents' claim that *it is our land*. Which land ought to have been clear. Asked about the information that all the farms were included in the process, the SPP facilitator in Pella suggested, 'that was our little dirty trick' (personal communication, 10 December 2002). To me it is a trick supported by the political thrust of the pre-1999 land reform in Namaqualand: one could assume that the government would back a coordinated transfer of land. But it did

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<sup>286</sup> 'Ek dink die munisipaliteit al rol wat hy nou in Pella het is om te speel is nou net binne in die dorp. En dis hulle probleem. Kyk, op die meent kan hulle baie nou ingekry het met die vooruitsigte wat daar is. So miskien is dit die rede, want ek weet dit was 'n bitter pil om te sluk nou na die referendum.'

not. The local state is responsible for the exclusion of the new farms. The longer it takes to make any transfer of land at all, the less it seems to matter. Also the municipal tenure, as for example the Mayor of Khâi-Ma had argued, could be part of greater public responsibility and promotion of rights to economic and gender equality. Though its significance should not be exaggerated the exclusion of the new farms did cause concern among residents and some political leaders, because of the undemocratic processes and signs of undue municipal control over land that was felt to contradict the purpose of land reform.

### 15.2.2 At the *Kultuur Koffie Kroeg*

#### *Tranccraa, the Farmer's Association and the Meent Committee*

On 10 December I discussed the Tranccraa process and referendum with TC members, the Vice-Chair of Pella ANC and TC Chair through the past half year, the Ward Councillor joined, and a younger woman, also an ANC TC and MC member. The omnipresent Chair of TC Sub-Committee Agriculture and Farmers Association Chair<sup>287</sup>; a prominent woman farmer and leader joined for a while. It was a discussion with centrally involved actors that brought out interpretations of Tranccraa and the referendum.

Discussing the outcome of Tranccraa, the FA Chair said 'the community has spoken, and that is probably what is important' (*'Die gemeenskap het gepraat, en dit is seker wat belangrik is'*). To the SPP he had expressed disillusion on the day of the referendum: 'You know, as far as I am concerned, things are not really in place ... What do we have so far? Nothing.' Now his review was in line with the SPP stress on putting a policy in place:

As far as I am concerned, many things happened during the Transformation process. We worked on a Management Plan, for example, and from that point of view I can say that the Transformation process was very successful. The Transformation opened many roads for us. It did not necessarily generate money for the farmers, but it did save us a lot of money in the sense that we can build on what we planned in the Transformation process. ... My view of the Transformation is that it was a process, which was meant to lead people to a choice. Everything that was made, these regulations and things brought out by the municipality, is still in place. That is why I said that the Transformation completed a lot of Henk's [LRC lawyer] work. It doesn't matter what entity takes the management of the land forward, be it a municipality or a CPA, they will have to continue with the things that have been finalised in the Transformation process: they will not come and change those things again. (FA Chair, Chair of TC Sub-Committee Agriculture, 10 December 2002)

This is situational, 'politically correct' but yet an important assessment of Tranccraa by a land user and powerful local leader. The stress on cooperation and on preserving what has been gained is reconciliatory. 'I never really saw the Transformation process as political process.' Politicians lead people in a certain direction, he said, but Tranccraa was just 'an attempt to help people up a bit.'

TC members explored the differences between a CPA and municipality, the discussion

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<sup>287</sup> Also a key figure in Pel Boerdery. In this section I will refer to him as FA Chair. The Farmers Association (Boere Vereniging), established in 2001 to support agriculture and represent farmers.

revolving around the fear of alienation of land. ANC leaders held that a CPA was more exposed to the risk that the majority of a small meeting could decide to allocate the land to a few. The TC Chair argued that 'We have a fall back system with the municipality, but with the CPA we do not ... If the municipality collapses, then we have the province and if the province falls apart we will have national, but we will not appeal for help on that level because we have participatory management with the municipality, and that is our fall back' (TC Chair/ANC Vice-Chair, 10 December 2002). The FA Chair held that a CPA is equally accountable to right-holders since only the majority of a meeting convened for a the purpose could validly decide to alienate land: 'Now, I say, we *do* have a fall back'.

The young ANC member, among the women who cried after the referendum, said that with a CPA 'it will go just as at Witbank, each gets their piece of land.' The Ward Councillor (ANC) also held that with a CPA 'the farms become community property (*gemeenskap eiendom*). In due time they will decide that the land is divided up under ownership (*eienarskaap*). They decide that each shall get a piece of land', and said, 'Look at Annakoppe: they have a clear understanding that it is their land'. The FA Chair retorted: 'that during the transformation process that was not the message we got from people ... who instead want to keep the land the way it is'. He held that the community agreed not to subdivide, while he also gave greater weight to family claims to land than I had found in the TC committee and in interviews:

The framework set up in the Transformation process has led us in a certain direction: We said first that we could not afford to cut the land up in small pieces, but that it must stay the way it was. We said that in the past families had unwritten rules and we can look it up in the history books. Families farmed a certain place for generations and the same with other families over there. This type of land use was respected by the different families. I think that is basically the framework for the road ahead. (FA Chair, Chair of TC Sub-Committee Agriculture, 10 December 2002)

In an earlier interview, the FA Chair had argued that it would be 'undemocratic' to go back to the traditional family based subdivision of land, but the family option was also mentioned by the Mayor above. Many small holders expressed resistance to it, insisting on the equal right to movement, grazing and erecting of stock posts across the meent. The tension here is likely to be important within either the CPA or the municipal framework.

*Why CPA victory? 'You campaigned as our leaders directed us to'*

The ANC Vice-Chair stressed that the ANC mandate to advocate municipal ownership came from 'a district point of view, not from provincial or national. From the district the mandate was that we as ANC support the option "municipality". And we in Pella ANC said that our members must support and vote for the municipal entity' (TC Chair/Deputy Chair Pella ANC , Pella, 10 December 2002). The Ward Councillor told that when the mandate came, the FA Chair had proposed 'closer cooperation' around the option of community ownership, which



Pella ANC had rejected referring to the mandate.<sup>288</sup> Now the FA Chair again challenged the top-down approach, pinpointing the power of the word 'municipality':

Let me tell you one thing. You campaigned as our leaders directed us to, but do you realise how difficult an assignment that was for you? Look at the municipality, just the word 'municipality'! Wherever you go, you will find that people detest that name! (net die naam munisipaliteit, ooral waar jy gaan is dit 'n haat naam vir mense!), and that you cannot deny. But you said 'municipal option'. If there had been another scientific name for 'municipal option' then maybe people would have decided differently, may have followed you. But when we held up that word, 'municipal option', you should have known that you must put in 175%, but you only put in 25% and if I were NN [the Mayor], I would have fired you! (FA Chair, Chair of TC Sub-Committee Agriculture, 10 December 2002)

He said that many ANC residents did not vote because they did not support the municipal option and yet 'did not want to stab their leaders in the back'. He fired the younger ANC leaders, and I assessed that age did play a role, again later saying, 'if you had done your job, the results would have been different and according to the direction you led us.'

ANC members defended themselves by saying that that CPA campaigners turned the referendum into a question about the town area and municipal services, lying 'that water will be cut off and I do not know what else'. When I consider residents' reports about discrimination (household interviews, 2001–2002), I find it likely that 'town-issues' was a significant factor, and not an irrelevant concern. The FA Chair 'That is politics, man: they played a dirty game with you and their dirty tricks gained ground'.<sup>289</sup>

The Pella ANC Vice-Chair said that the party needed an internal process: 'We know who voted for the CPA and who for the municipal entity'. He distinguished between the right of free opinion and the duty to respect the party line:

We are a democratic South Africa and hence should have respect for democracy. So each one has his or her free choice about who or what he wants, and to say what one wants. We respect that. That is not what the matter is about. But as an organisation that has rules and regulations, we did not change our position regarding the options. So we expect members to respect that and stay within the rules and regulations, for members who go outside the structures and decide to change the decision taken by the majority, *that* can become a problem and it *is* a problem. (TC Chair and Vice-Chair Pella ANC, 10 December 2002)

TC members again discussed 'the road ahead'. The FA Chair argued that 'the municipality will remain in place until the Minister makes a decision, whether it takes a year or two. Who says that the Minister will give her approval for the CPA? We don't know what she is going to do. Everything rests with her', though she could not chase residents away: 'Die Minister kan ons nie jag nie. Alles lê in haar hande'. In the meantime the municipality and the Meent Committee should continue as before (FA Chair, Chair of TC Sub-Committee Agriculture, 10

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<sup>288</sup> This emphasis on the mandate from above is consistent with the Mayor's presentation the day before. On may of course see it as a strategy to reduce responsibility for a political proposal that did not get public support; however, I also an expression that it was difficult for Pella ANC to reconcile the party mandate with a strong emphasis on community ownership of land.

<sup>289</sup> 'Hulle het 'n vuil streep gespeel met julle, en daai vuil streep het grond gedra' (FA Chair, 10 December 2002).

December 2002). The Farmers Association Chair advocated ANC leadership through the municipality: 'Now that we and the ANC have seen what the community wants, all that needs to happen is that the ANC must take the community through this process.' He said that 'at this stage the ANC rules this town ... if there is going to be a CPA, then there will be a CPA-ANC community within the CPA, and that is why I say, you must not step back now. ... The community will have to come back to elect a management structure for the CPA. Now if the majority of the people are ANC, then whom do you expect that will be? But you sit back! Why are you sitting back? It is nonsense, man!' (Farmer Association Chair and TC Chair (ANC), 10 December 2002)

He had an exchange with a younger member of the ANC and the Meent Committee who said that she was 'now waiting for the new Meent Committee to establish the CPA ... We cannot lead them. They must continue on their own, so that they may realise what they have done'. The farmer leader insisted that a CPA did not have to be political and 'that the transformation was not a political thing'. The woman member had the nerve to say that Trancraa was political: 'How can you say it wasn't a political issue? It was a political issue', and when he insisted she retorted with laughter that 'each one sees what he is looking for' (*Elkeen kyk wat hy kry*) (Member of ANC, TC and MC, 10 December 2002). The FA Chair was looking for cooperation and tried to depoliticise the process rather than claim a political victory. However, he argued that land policy appeared contradictory to 'the man in the street', saying that 'the government of the day, the ANC government has a policy to give the people land' but suggested that with Trancraa 'people' (I think he meant leaders) were saying 'no give it to the government. Don't you think in that regard we fought a losing battle right from the beginning?' The Vice-Chair of Pella ANC said that 'you don't understand that bit so well, Oom' and elaborated his vision of participatory governance:

You will get your land. We are talking about participatory governance. You get your land, you are just joining government in a learning process about how to manage your land. Once you have mastered that, you will be fully able and ready to go and manage your land on your own. But we cannot yet. Now we get the land, but we have nothing there. We don't have the know-how. Then we take impulsive decisions, we lose the land and end up fighting with each other. Then it is a big mess. We get funding to develop the land. The money is not used for the purpose for which it was given.

To avoid all these things, let us rather go and learn first. The most important thing is not that the municipality comes and runs workshops or something. It is that we stand together with our councillors, the municipal manager, government and the municipal officials, and *they* push that side of the computer and *we* push this side. We draw the incomes on *this* side and put the expenses on *their* side. So we make joint decisions. If we say no, they say no. We say yes. You see? That is the way forward, until we say, 'now we are ready, we don't need your help anymore'. (ANC Vice-Chair and TC Chair, 10 December 2002)

The young ANC leader elaborated his ideas notion of participatory land governance and a continued, yet temporary, trusteeship. He used the image of officials and residents operating a computer together and the attractive idea of placing costs on the government side and benefits with the community. In many ways, this is the best articulation of the participatory,

developmental land governance, containing the many contradictions between market and public control that were inherent in the ANC position on land in Pella.

However, another question is whether local government is willing to support land management without control. The farmer leader pointed out residents could also learn through community-based governance and asked why ANC could not accept that. The Ward Councillor conceded that 'the only problem we have with the CPA is that we [meaning the residents] are not ready to take the land'. He also stressed that 'we do what the law says. ... We will proceed according to the ANC's policies' (ANC Ward Councillor, 10 December 2002). Thus, the 'party mandate', party 'rules and regulations' and 'law' were important for how ANC leaders understood land governance. ANC leaders remained sceptical of working with a CPA assuming that the 317 CPA votes 'were in favour of the DA. So if a management mechanism is put in place, it will obviously be theirs'. They argued that a CPA would likely not get support from the state 'Government has a responsibility to the majority of the people ... NGOs or other public partners, or some community organisation, do not agree with that policy, they are not government; they don't have the resources, so it won't work' (TC Chair/ANC Vice-Chair, 10 December 2002). This, again, confirmed the Mayor's view, and left an impression of doubt on the purpose of the democratic consultation about alternatives.

The Farmers Association Chair turned to a practical issue diplomatically said that 'I have a problem. I got a message, probably terribly wrong, that you have said that no maintenance would be done to a single pump'. The TC and Meent Committee member told that she had urged this response: 'Everything will be cut ... You are using my property. It is my farm ... No, they must go and fix their things: They have a CPA. That money will be frozen until we hear what is going to happen.' The committee members claim that it is my farm, was another variation on the theme that it is our land. The Vice-Chair of Pella ANC said that 'you are playing with our budget... with our taxpayer's money' while the Farmers Association Chair insisted that there was 'no new owner yet' and, realistically, that 'the municipality will remain in power for the next year or two'. He said that the taxpayers' money was not used to repair the farms and that the money available had been paid by the farmers and would not be put on hold. (FA Chair, 10 December 2002). The Ward Councillor capped the discussion by saying that 'to be honest, we cannot pay the accounts because there is no money. We cannot even pay the R1°200 expenditure that we incurred last week. We cannot pay it, for no fees are coming in' (Pella Ward Councillor, 10 Dec. 2002). Thus, the Monday morning 'punishment' of farmers who came to get pipes also reflected that there was no money. As, the final grievance, the farmer leader said that people did not understand how the municipality could treat new farms as 'their assets', holding them outside the referendum:

ANC:	The municipality is still responsible for the new meent. These farmers on Springputs, Dabenoris ... the municipality is directly responsible ..so maybe their position is in danger: They don't have a future anymore.
Farmer leader:	We have a future! How can we not have a future anymore?
Researcher:	Your future is in the hands of the municipality.

ANC: Yes!  
Farmer leader No!

This is the end of my last recording from Pella: a 'no' to placing the future of farmers in the hands of the municipality. That 'no' was certainly an element in why the majority of the Pella residents' said no to municipal ownership in the referendum a few days earlier, on of the many statements in the complex theme that *it is our land*. As the debates in the preceding year and the Koffiekroeg discussion show this 'no' followed many attempts to negotiate cooperation and insist on the accountability of local government that had been given such a prominent role in promoting democratisation and human rights. The representatives of the ANC also showed how they tried to forge a compromise between the various government policies that *it is your land* and the community claims.

### 15.2.3 From Pella to Komaggas

Thus, the Pella case of tenure reform implementation illustrates the diverse and tenuous connections between a partly rights-based national tenure reform act (Trancraa) and local practices and views of land tenure. I have followed an intense Trancraa consultation into some, certainly not all, the complex tenure issues and political processes that implementers addressed during a little more than a year. I return to the theoretical approach to the institutionalisation of human rights mainly in Part IV but briefly note the main argument, also to see where the following more narrowly focussed chapter on Trancraa experiences in Komaggas fits in.

An assumption in my approach is that land tenure policy, including legislation, has the task of institutionalising the enjoyment of human rights. The Pella case shows, first, how complex and historically and locally embedded the reform task is. Presenting the history, the context and the processes of the institutionalisation of rights, reflects, the reality of tenure reform as carried out in Namaqualand in 2001–2002 and perhaps more generally. This suggests that social reality is not as transparent and amenable to normatively based institutional redesigning as human rights propositions, such as the South African Constitution, lead us to expect or hope. However, in the field of land tenure, one needs a degree of awareness of this resource and process complexity (although I may have gone too far).

Secondly, human rights assert the interdependence of rights, for example rights to political participation and economic rights, also an important development theoretical perspective, particularly in the work of Amartya Sen. The Trancraa process in Pella may illustrate how such connections exist but are yet highly unstable. I am thinking of the way political rights and rights to freedom of communication was a central precondition for the work of the TC and the SPP, and that they used these rights when addressing resource management issues, such as, community control over the land for a guest house or the access to information for irrigation development. The case cannot be conclusive on these

connections, both because the time span is so short and because land tenure and the legal reform interact with so many other human and socio-ecological processes. However, in Part IV I pursue this theoretical discussion of whether the Trancraa process of debate and institution-making enabled actors to strengthen land based entitlements and capabilities.

However, important actors in Pella in various ways expressed that they were sceptical about the value of the political rights and democratic process: the local ANC tried to control the outcome of the consultation and in challenged residents' right to choose. A DA leader said that the conflict unleashed by a referendum and a 'defeat' for the ruling party could harm residents. More disturbingly, observers sometimes expressed that it was difficult to see in Trancraa 'what was in it' for residents. That may point towards Komaggas, where a major issue was power and control over the process and where one group in the community assessed that Trancraa was not appropriate or worth the effort. As a result, Trancraa was not implemented, which in turn puts the very large and diverse effort during the transition phase of Trancraa in Pella in a new perspective.



## 16. KOMAGGAS

### 16.1 Introduction

Through the case of Pella I have explored the diverse activities and debates of Trancraa in one of the six Namaqualand Rural Areas. I now turn to a much shorter presentation and discussion of a different experience with the tenure reform, that of Komaggas in central Namaqualand. In Komaggas the Trancraa implementers met strong resistance from community members organised in a local organisation representing a section of the residents and which in its own way fought for ownership and governance of land. Therefore Trancraa was not implemented in the period of my field study, 2001–2002. In this chapter I address a limited question of why it proved impossible to implement Trancraa, despite its emphasis on returning land to local institutions.

Although Komaggas was the only of the six Namaqualand Rural Areas where none of the major components of Trancraa, including surveying of family lands and the referenda, were implemented, the experience does in my view show similarities with experiences in Pella and other areas. One is the tension between community practices and a socio-political identity in past history and the new municipal level of governance. Another is the competition about control over the political arena created by the tenure reform, the Transformation Committee. In addition Komaggas experienced a special division in the community, which appeared to make control over the process even more important. While many residents welcomed tenure reform as a measure to integrate Komaggas into a changing South Africa, the community organisation questioned the state's claim to ownership of land inherent in Trancraa; it was also strongly against Trancraa's division of the Act 9 Rural Area into 'town' and 'remainder' (the common land), which excluded the 'town' from the transfer to the local level. Opponents of the Act also expressed mistrust of the new municipality and the district level campaign by the ANC in favour of local government ownership of land. Paradoxically, a strong local sense of ownership became an obstacle to a reform aimed to 'return the land'.

### 16.2 Location and land

Komaggas has about 4 800 inhabitants and has from 2001 been incorporated in Nama-Khoi Municipality, though separated by seventy kilometres (rough gravel road at the time of study) from the municipal and district capital of Springbok (Figure 7). Further west, on the Atlantic Coast, diamond-company De Beers owns Kleinzee mining town and is the major employer for Komaggas residents. Household incomes vary greatly, but show the highest average among the Namaqualand Rural Areas.<sup>290</sup>

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<sup>290</sup> In 2000, average monthly income was R3 028 per household and R590 per capita (Macroplan 2000) (1 Euro was about 8 Rand). Such figures conceal great inequalities linked to, among other factors, unemployment which the ward office estimated at 40%.

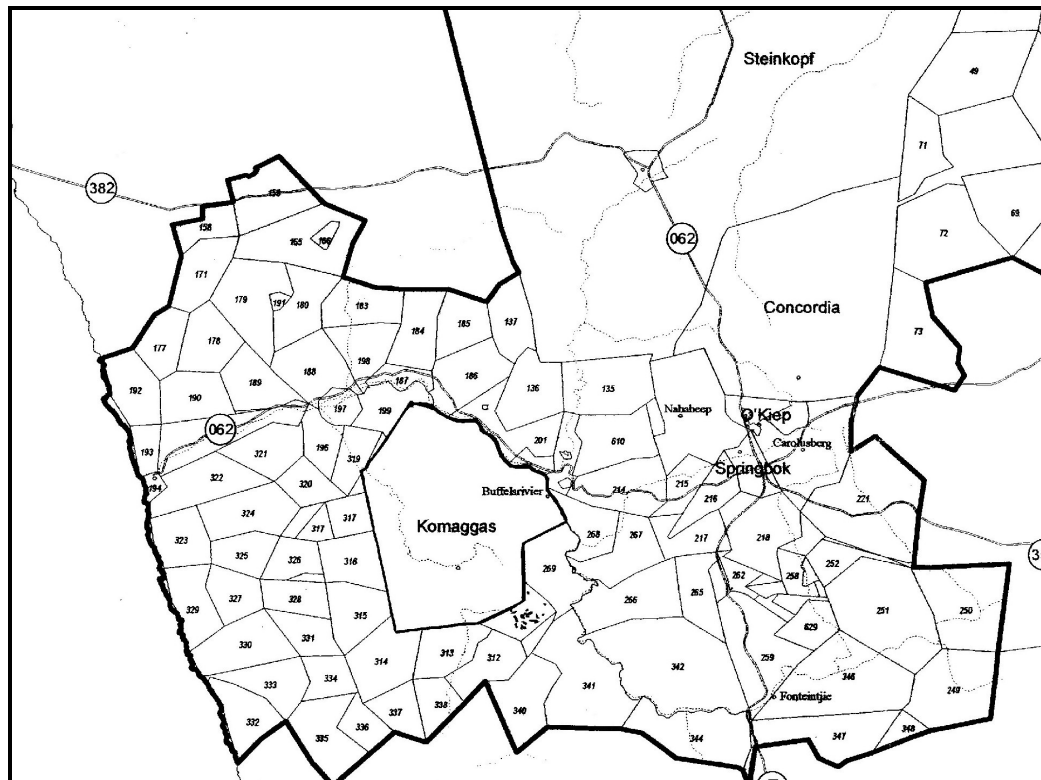


Figure 7: Komaggas in Nama-Khoi Municipality

Source: Municipal Demarcation Board: Category B Municipalities Northern Cape. NC062 (2000). The bold black line marks the boundary of the Nama-Khoi Municipality where close to 60% (45 000) of all Namaqualanders live. Nama-Khoi includes three Act 9 Rural Areas, Komaggas, Steinkopf and Concordia, which together have about 17 000 residents and 6 500 km<sup>2</sup> of land (SPP 2003). Most of the remaining land is farmland under private ownership. Black lines and numbers indicate property units. Komaggas town is located centrally in the Rural Area. A smaller settlement is Buffelsrivier on the boundary towards the west.

The land is generally semi-arid, with a precipitation of 200–400mm per year, and combines mountains (*bo-veld*) and coastal plain (*sandveld*). Although most people live in a town, about a fifth of households engage in livestock and dryland farming, which contribute to livelihoods and are cherished as a 'birth right', 'way of life', and a link to the Nama heritage. Land also sustains projects in tourism, conservation and agricultural development, and various yet unrealised plans such as game farming, as two men suggested in 2001. The 'old commonage' (*ou meent*) of 63 000ha is used for grazing, cultivation and firewood collection. Scattered around the common land are springs, seasonal streams and boreholes, abandoned mining sites, stock posts (*veeposte*), and dryland plots (*droeëlandpersele*) with cultivable fields (*saailande*). Farms purchased by government from mining companies and farmers after 1996 are called new farms or 'new commonage' (*nuwe meent*) and make a total of 27 000ha. The Nama-Khoi Municipality, headquartered in Springbok, holds the new farms for the benefit of Komaggas residents. Including old and new land, the average land endowment is about 90ha of rough, semi-arid terrain per household or about 450ha for each of the estimated two hundred households who own livestock, in total estimated at 6 200 goats, 4 300 sheep and



370 cattle (Dip figures, April 2002 by G.J. Fredericks, Chief Animal Health Inspector, Department of Agriculture, Steinkopf).

### 16.3 History

In 1798 the colonial state annexed Namaqualand as far north as Komaggas. Mr Joseph Grace, Komaggas elder, told that land at Komaggas was granted to a Nama kaptein and his subjects by, as he said he had always heard, from Queen Victoria. He said that the area was about 370 000 *morgen*, almost 320 000ha and that 'they received the land with a contract: The land that is given to you is yours forever as an inheritance. It will stay like that from generation to generation. The land may not be appropriated or sold', words that are often evoked in discussions of land (Interview, November 2001). At one point a son of a Boer, Jasper Cloete, came to the Komaggas area and married the daughter of a Nama chief. She mediated in a conflict between her husband and father and became 'the mother of Komaggas', setting a precedent for women to share in land rights and mediate between male-dominated groups (Sharp 1994). In 1829 the London Missionary Society applied to the Cape Governor to secure land tenure for people at Komaggas. An area of 59 000ha was demarcated in 1831 and approved with a Ticket of Occupation in 1843, as the first for a Namaqualand mission station. Through generations a contentious issue has been whether an earlier agreement with the colonial government gave Komaggas residents rights to a much larger area, or if the 1831 demarcation had originally included a larger area than later acknowledged. Mr Grace said that 300 000 *morgen* was lost when the demarcation was made (Interview, February 2001); according to a group of elderly men, the historical Komaggas was about five times the size of the present reserve (Group discussion, October 2001). Researchers have not found formal agreements or authoritative maps that support these claims but it is well supported that the residents at Komaggas historically accessed and controlled much larger areas than today (Sharp 1994). From around that time the state gave lease farms to *Boer* settlers around Komaggas. As mentioned in Chapter 9, in 1851 some of them wrote to the Governor to complain about the large areas lost to reserve dwellers and to protest against extending their rights to the open pasture lands, *trek-veld*, between mission stations (Van Zyl and others 1851). By 1915, private farms encircled Komaggas, although Komaggas residents could still access and cross them since many of them were neither fenced nor permanently occupied (Sharp 1994: 404). In 1925 diamonds were found at Kleinzee on land historically used and claimed by Komaggas people. By the end of the 1920s the state had sold the land to diamond companies. According to a group of elderly men, during the following decades parcels of Komaggas land continued to be 'cut off' for white farmers, the present boundary being established as late as 1947. These experiences were underlying some of the resistance to official policies, since the restitution process in Komaggas had been affected by inadequate information and conflict and since

Trancraa did not address past land losses and present land distribution.

Kommagas had a history of division and conflict in the community. It apparently arose when the Rhenisch Mission decided to leave Komaggas and transfer its rights to the Dutch Reformed Mission Church without consulting people. 'That ultimately led to a split within Komaggas ... in 1950/51 between those who were prepared to work with the Dutch Reformed Church and mission society and those who wanted to be independent. It was a question of the possible dispossession of people, it was the time of apartheid, 1948, and the Nats were busy instituting their apartheid policy, so that sharpened the whole conflict' (Reverend P. Grove, Oct. 2001). Protesters against apartheid in the Dutch Reformed Mission Church invited the Calvinist church to Komaggas: 'They went looking for a preacher and came back with a church!', the Chair of the TC said in a discussion. A divide between 'pioneers/conservatives' and 'newcomers/progressives' was documented in the 1970s (Sharp 1977). It was reported that at the time of study most ANC supporters belonged to the church that evolved from the Dutch Reformed Church while members of the Calvinist church are associated with the opposition from the Democratic Alliance opposition (Interview, Reverend, Uniting Reformed Church, October 2001; School Headmaster, April 2002).

Participants in a history workshop arranged for the research (February 2002), where I tried to get unprompted suggestions about important events, mentioned only one legislative change, namely the granting of the Ticket of Occupation in 1843 (for example, none of the apartheid era legislation was mentioned). Members noted the beginning of the Calvinist church in the 1950s, that P.W. Botha visited at Minister of Coloured Affairs in 1963 and that the 'first coloured preacher' was admitted in the Dutch Reformed Mission Church in 1971. Post-apartheid changes noted were that in 1994 electricity came to Komaggas, in 1995 a new library was opened and in 1999 electric streetlights were installed. Unmentioned here were the major political changes, also locally, perhaps partly because they involved increased community tensions. In an interview, a school headmaster said that the 'political movements of the past were not firmly established' but became stronger during the run-up to the 1994 elections and by that time 'one could clearly see who the opposition was – when a structural form was given to certain parties, you also got a structured opposition (Interview, April 2002).

#### 16.4 Introducing Trancraa in Komaggas

##### 16.4.1 The 1996 consultations about the revision of the Rural Areas Act 9

The Komaggas transformation process was thorny from the outset: at a consultation meeting in August 1996 the SPP facilitator<sup>291</sup> urged the community to contribute its views (Landelike Gebiede Komitee 1996a). Through what in the official transcript from the meeting is recorded

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<sup>291</sup> B. van Wyk, later member of Parliament for the ANC, who also led the 1996 consultation in Pella.

as 25 pages of unbroken speech he then explained the need for a new act because the current Rural Areas Act 9 from 1987 conflicts with the Bill of Rights in the Constitution from 1996 with respect to such features as the old restrictions on who can settle in the area; the authority of local government to evict people for improper behaviour ('put across the line'); and the concentration of decision making power at national level. It was well known at the time that land tenure was a particularly contentious issue in Komaggas, whose leaders had chosen to stay away from an earlier information meeting in Springbok concerning the proposed legal reform. The facilitator only hesitantly entered the sensitive question of land ownership: 'The land is the matter that is close to our hearts, right, but today we shall not talk a lot about the land'. He did, however, explain that the 1987 'Act 9' placed land 'in trust' by the Minister but made provision for granting individual rights to residential and business plots in 'towns' and sowing or grazing rights in the 'remainder'. Apparently the ideas of the existing state ownership of land and an envisaged movement towards privatisation touched the fears of some participants. A senior resident, *Oom* Joseph Grace, pointed out that many community members were boycotting the meeting and that it was ominous to be offered something you already regard as yours:

I deplore the community of Komaggas. We are not here today, Komaggas is not here. We are more or less a committee who are sitting here and I am worried. ... We have never spoken the truth. As far as I know the people, and if they come, let us hope that a success comes out of this beginning, but then you must not think that it is you who have created it. You must also not think that it is your land that you are giving to us. *It is our land (dis onse grond)*,<sup>292</sup> which is just coming back to us. Thank you, Mr Chairman. That was all I wanted to say. (Mr J. Grace, Komaggas consultation, 1996)

In the 1996 hearing Mr Grace he did not trust title deed: 'Sir, I would still like to say, and I have lived a few years too, that title deed [kaart en transport] was never anything for this Nama area, for Komaggas. Because title deed was already given to the Nama kaptein who got the land'. Title deed was in his view 'hopeless', perhaps relevant elsewhere but not for those who 'live in a Nama area: *For us, the owners of Namaqualand*, it was never worth anything. Because, the surveyor comes, and he comes to cut off parts for his white brother ... There is no help for you there. So, Sir, I would really have asked that you do not speak about such a title deed. So long as God wills, the days that God will still grant me, I shall not swallow that one' (J. Grace, Komaggas, 1996, emphasis added).<sup>293</sup> One could have thought that, indeed, the community was vulnerable because it lacked full legal recognition for its land rights. However, the stress is on the historical experience of the erosion of land rights and that actual power relations and practice were decisive rather than any title granted to the community.

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<sup>292</sup> *Dis onse grond*: *Onse*, our, is a solemn form also used in for example religious prayer.

#### 16.4.2 The TC and a process at a standstill

After further community consultations and the passing of Trancraa in 1998, communities and SPP prepared for the prescribed transitional phase to begin in January 2001. In Komaggas, as elsewhere, a Transformation Committee (TC) was established to facilitate the process in 2000. After that, however, Trancraa remained at a standstill due to resistance by a Komaggas Residents Association, *Komaggas Inwoners Vereniging* (KIV).<sup>294</sup> KIV had initially favoured participating in Trancraa, but it demanded a majority of the seats on the TC, referring to an alleged majority support in the community.<sup>295</sup> Other stakeholders, including ANC leaders and the SPP staff responsible for Komaggas, rejected this demand and offered two seats. The SPP and the TC wrote letters to the KIV and consulted with and involved the Department of Land Affairs (DLA). Community meetings were held, but due to discouragement by KIV very few residents attended; the majority of the nominated TC members withdrew from their position. At a district meeting of all Namaqualand Transformation Committee members in February 2002, only the leader and his deputy from the Komaggas TC met. When other TCs presented quite comprehensive group deliberations, the Komaggas TC report on 'group work' was a poster asking: 'What can one do when +/- 50% boycott the Transformation process?!'

SPP staff and a local ANC member argued that more active leadership, household visits and community meetings could have broken the standstill, but during early 2002 the conflict rather intensified. It related to more general problems in the relationship between community and municipality, for example tensions over the management of the new farms<sup>296</sup> and resistance to municipal tariffs. KIV sent an 'interdict' against Nama-Khoi Municipality warning that it was not wanted in the community. The oral version held that KIV would 'chase Nama-Khoi over the mountain' on Youth Day, June 16 2002, a day symbolic of anti-apartheid struggle. In spite of diplomatic efforts by the SPP and the DLA, resistance persisted. In a meeting in June 2002, the representatives of the SPP and the DLA accepted that the

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<sup>293</sup> Another resident pointed out that i) not everyone shared the opposition to 'title' to their property (for example to houses and residential plots) and ii) a photo (which he had displayed on his wall) taken a few years later showed the Minister of Agriculture Derek Hanekom together with Mr Grace holding up a title deed to a new redistribution farm over his head in triumph.

<sup>294</sup> I will use the Afrikaans acronym (KIV) or the name Residents Association for the organisation.

<sup>295</sup> The Transformation Committee was formed by asking the municipality, a youth group, the Farmers' Association and the KIV and other groups to nominate members. Four out of twelve nominees were women (SPP 2001a). KIV not only withdrew its own representatives but convinced others to stay away from meetings (TC Chair and SPP, Nov 2001).

<sup>296</sup> A *Meent Komitee* (Commonage Committee) had been established to assist the municipality with managing the redistribution farms. It had tried to enforce grazing regulations and other rules, including a moratorium on grazing 'to let the land rest' from 2001. Most farmers had moved their livestock back to the old commonage, but a few, including a central KIV committee member, refused to do so. He argued that new farms belonged to the community and should not be governed by the municipality. He referred to the handing over ceremonies in which the Minister of Land Affairs gave title deeds to community members. In 2002 the municipality launched court action against the KIV member and farmer, which they subsequently withdrew, which was then hailed by the farmer as a proof of the community rights (personal communication, KIV member and farmer, 2002).

Residents Association could get the requested majority on the Transformation Committee and agreed to hold a community meeting in which they would respond to people's concerns about the transformation process. Between two and three hundred people participated; the KIV had called the meeting so they were mainly from the KIV section of the community and observers, such as an local NGO staff, had understood it to be a 'KIV meeting'. Government representatives stressed the need to participate in a national legal process, but the meeting ended in disagreement: It became the last effort by the DLA and the SPP to implement Trancraa in Komaggas within the prescribed 18 (later 24) month transition phase and, thus, the period of my field research. In August 2002, the TC Chair threw in the towel:

At our Transformation Committee Meeting on 21 August 2002 we have decided to report to the Municipality that we have done everything within our capacity to bring the disagreement between the Komaggas Inwoners Vereniging (KIV) and the Transformation Committee out of the way (so that the transformation process could proceed), but that we were unsuccessful. It is evident that there is a grouping within the KIV that is not willing to move from its conviction (Transformation Committee Chair, letter dated 22 August 2002).

Nama-Khoi Municipality forwarded the case to the Minister of Agriculture and Land Affairs, requesting her to make a decision. Most observers expected that, given the conflict in the community, she would choose to transfer the land to the municipality. Some residents protested against this prospect and demanded their right to vote (Interviews, Komaggas, October and November 2002). However, while referendums were held in the other areas, Komaggas residents of either conviction started to realise that they had missed that opportunity.

#### 16.4.3 Working in Komaggas

It was enjoyable and interesting to work in Komaggas, but the community conflict also affected the research process. After initial meeting with the KIV in October 2001, the organization decided not to participate in the research. This situation lasted till April 2002, when again the Executive Committee and individual members agreed to have meetings. The efforts of my research assistant were important to achieve this. Communication between the two groups was generally limited, particularly about politically sensitive issues. The headmaster of a school said that 'there is no communication among the parties; what we have is open conflict or refusal to speak to enter into discussions. The groups itself may know what its agenda is but I call it some kind of hidden agenda for they do not make it public' (Interview, April 2004). Therefore, particularly the supporters of the ANC side were often interested in getting information about views 'of the others'. We presented preliminary findings at a public meeting in May 2002. We had prepared and announced the meeting in advance, asking members of both parties to participate. I admit that at that time, when we were on speaking terms with both parties, we had a faint hope that we could stimulate a discussion across the divide, which could possibly lead to renewal of the dialogue about implementing Trancraa. As it turned out, the KIV representatives decided to stay away from a

not very well attended meeting. At the meeting a young girl made a drawing that appears to me to aptly sum up some central land reform experiences in Komaggas and the cycle of inputs from various speakers.

Figure 8: The land claim cycle in Komaggas: 'Die grondeis siklus'



- Scene 1: Meeting: Speaker and overhead projector: 'Land claim: land and human rights'. The land claim cycle.
- Scene 2: Community: 'Komaggas people'. Two people fighting: 'It is our land', 'No, it is ours'. They were not at the meeting.
- Scene 3: Hospital: The patients say: 'Oh, my back' and 'I feel so sore'. The speaker from the meeting asks: 'Why where you not there?' They decide to hold another meeting.
- Scene 4: New meeting. 'And the cycle starts over again. Overhead projector: 'Land claim'. Paul and Francois speak: 'Blah, blah, blah,...'. Again people do not show up.
- Source: Received from Dineo Grove, Komaggas, May 2002. The author is gratefully acknowledged.

## 16.5 The Komaggas divide and Trancraa: conflicting views

### 16.5.1 The parties

#### *Resistance to Trancraa – Komaggas Inwoners Vereniging*

In Komaggas the Trancraa process was generally welcomed by the local ANC but resisted by the KIV which had a strong bond to the Democratic Alliance. KIV leaders claimed to have broad support in the community and it was acknowledged to be effective in mobilising people for meetings (personal communication, SPP staff). Although KIV had few paying members, it could raise funds on ad hoc basis. The KIV executive committee had seven middle age and

elderly male members and one woman member, the secretary. KIV had prepared a written 'Constitution' in compliance with rules about the conditions of receiving land under the Communal Property Associations Act of 1996. The front page of the Constitution featured a logo with a loincloth bearing 'Khoi' and 'San', livestock and grains (Figure 9), combining Nama culture, farming introduced in the missionary era and recent legislation.

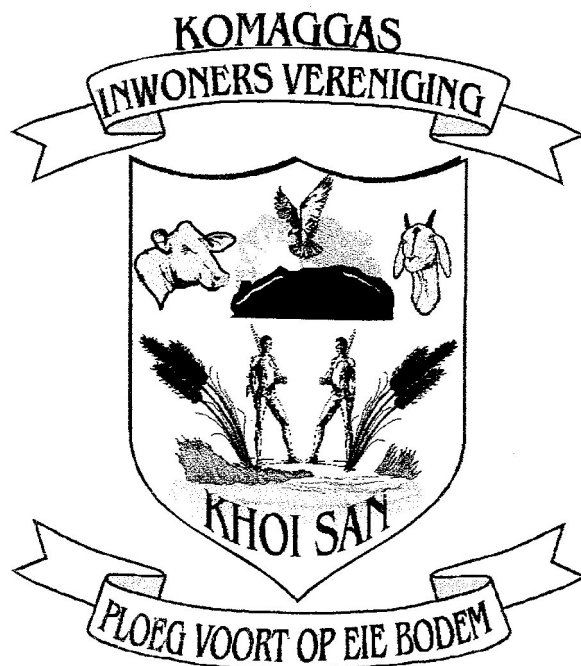


Figure 9: Logo of the Komaggas Residents Association

Source: KIV 2002, the Constitution of a proposed Communal Property Association.

'Ploeg voort op eie bodem': 'Continue to plough our own land'

The KIV Constitution notes that 'the members of the community have been alienated of their rights to land and land ownership as a result of the promotion of racially discriminatory legislation and practice. The community has never accepted the alienation and has taken action to get their land rights back'. It states two main objectives:

- To keep, protect and manage the land in the Farm Komaggas as it was demarcated in 1843 and adjacent land, with moveable and immovable properties, and for the benefit of the residents and in accordance with the Communal Property Associations Act.
- In the name of residents to make legal claims and demands for reparation and restitution, as already initiated, and to further pursue, maintain and win the claims: And to thereby facilitate a process of restitution and compensation to the benefit of those who have suffered losses and become impoverished as a consequence of the action of the State. (KIV 2002)

One may note how first the right to *govern* land is stressed, and the compliance with new national legislation, and next the right to lead the process of seeking *redress* for the economic losses and state responsibility for those. These objectives appeared to be shared by most residents and to fall well in line with Trancraa and could have led one to predict a

transfer of land rights to a legally aware local organisation, but reality was another matter.

### *Supporters of Trancraa*

The Executive Committee of Komaggas ANC, the ANC municipal councillor, the administrator of the municipal ward office, the leaders of the Farmers' Association and several other community members expressed support for Trancraa, saying that it was an opportunity to strengthen community land rights (Interviews, October and November 2001). While supporting the Act, the ANC Women's League said that agriculture and land governance was not among their priorities (Interview November 2001); another member criticised the attitude of the league, saying that it was too reluctant to engage in land and economic development issues (personal communication, November 2001). Komaggas ANC had received majority support in the elections in 1994/99 (national) and 1995 and 2000 (local), and highlighted this to show that KIV and Democratic Alliance did not enjoy majority support (an NGO staff and community member said that 'they are all the same people', and presented the DA rather as an official political wing of the KIV, but secondary in terms of power). A school headmaster said 'KIV took a term with a positive meaning such as *inwoner* (resident) and abused it to fit their agenda. ... They have a name that sounds as if they are so representative but in reality they are a very small part of the community. So that is where the word resident becomes a very negative thing for us.' (Interview April 2002).<sup>297</sup>

A supporter of Trancraa said that KIV refused to participate in broader processes of a new South Africa: 'Most of our people have still got this tunnel vision that *it is our land*, so nobody can come and do anything on it. They feel that the municipality will come and do things and that we will lose everything. It is a fear of payment, a fear of losing *baasskap* [control, leadership] over something.' He used the phrase that the attitude of KIV and its supporters was a 'tunnel vision' that *it is our land*, referring to a too narrow focus on land, isolation from current political process and to unrealistic assumptions about possible land claims: 'Komaggas cannot claim the whole Namaqualand from Springbok and seven kilometres into the sea ... but would only get more land under the laws that are there now' (Interview, former Chair of the Komaggas Land Committee, November 2001).<sup>298</sup>

Many respondent expressed frustration with a division that hampered developments efforts, for example construction of a school hall and community projects from which De Beers had withdrawn due to the conflict. Apparently the rivalling parties maintained the Komaggas divide by withdrawing from committees or projects that they could not control,

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<sup>297</sup> Having used the term 'resident' throughout my work I therefore point out that I use it in the former neutral or positive meaning referred to by the respondent.

<sup>298</sup> The Land Committee had assisted with the land redistribution process, but had been replaced by the Meent Committee now responsible for land management and the Transformation Committee.



rather than negotiating compromises, as seen in the case of Trancraa.<sup>299</sup> While KIV boycotted the TC and several other projects at least in one case that came to my notice the local and district ANC practiced discrimination of the opposition: on a road project in 2002, ANC members ensured that only party sympathisers were employed against official employment criteria about poverty alleviation.<sup>300</sup> A youth forum established to bridge the divide only had eight members left in February 2002: their wish for the future was 'peace in Komaggas' (Group discussion, 2002). An activist and teacher compared the conflict to a 'Corsican feud where the parties have forgotten the original cause' (Interview, February 2002). She also stressed that not only the KIV but also the ANC needed and increased emphasis on democratic debate:

Well, the ANC use some of the same methods sometimes. People need to talk much more in the open. ... We need more of a democratic culture. Particularly on the background of some of the weird things also ANC [members] have done in the past. Sometimes ANC people just accept everything that comes from above ... we need to discuss things here, not just follow the party line. ... NN (the TC Chair) is like on of these headmen, coming from a family that is very powerful here in Komaggas: When they have said how it is going to be, that is how it is going to be. They do not want to go out and discuss it with people. (Teacher and ANC member, Interview, February 2002)

In the following I discuss the major points of contention in the tenure reform, the legal status of Komaggas land, the division between town and land, a restitution claim by the KIV, user rights to land and the relationship between community and municipality.

#### 16.5.2 The title

Komaggas people have always 'put a different construction' on the Ticket of Occupation than the state (Sharp 1994: 405, 410). KIV argued that Trancraa is wrong in assuming that Komaggas belongs to the state. It held that Komaggas is different than the Act 9 Areas because residents hold a private, group title to land based on historical use or granted to them in the early nineteenth century. No transfer back to the people was therefore required. A member said that 'Komaggas was not an Act 9 Area ... in 1910 with the Union Board the state took all the Rural Areas that were recommended and placed them in trust, but Komaggas was not placed in trust at that time, only in 1955'. They claimed that at that time a council of the Dutch Reformed Church transferred the land to the state 'and all the information that counted against the council and favoured the community was taken away'

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<sup>299</sup> At one level a similar pattern was noted in Pella, where the municipal councillor for the DA never used her right to participate in TC meetings. However, here the TC nevertheless appeared to be inclusive of diverse viewpoints, just as the local ANC party spanned different views on the ownership question, at least early in the process.

including 'the map from 1843' (KIV Executive Committee Interview, October 2001). The Constitution for a CPA prepared by the KIV also states that 'the Farm Komaggas exists under one title deed (*Een title aktes*) as it was issued in 1843' and requests self-management to 'ensure the security of ownership and use rights as per the agreement between our ancestors and the government of the day stipulating that the land must remain from generation to generation eternally unchanged as it is determined in the map from 1843' (KIV 2002). The emphasis on historical continuity was very strong. A member said that 'our elders have insisted that the place is unchanged, that is how the contract was made out to be ... and therefore no person can come here and make changes' (KIV Executive Committee Interview, October 2001). Confirming a shared understanding, two KIV supporters also referred to a map of the original Komaggas land had been removed from the parsonage during the change of churches in the 1950s, with an emphasis on a family and gender aspect:

Mr Jones: We knew about [the map] from our parents and grand parents, that the land is unchanged. The land actually belongs to the Cloetes and their offspring.

Ms Jones: The bond on the land includes the Cloete women, it includes all of them: the mothers' rights too.

Mr Jones: And fathers' rights. It is legally so, and the map is legally endorsed by the queen. It is legal. (Interview, farmer and his wife, KIV supporters, February 2002)<sup>301</sup>

While linked to the 1843 Ticket of Occupation community tenure has a deeper source in historical rights, recognition the colonial government and continuity of use 'from generation to generation'; therefore the need for a transfer of ownership rights by the State was less apparent to many residents. Members of the KIV Executive Committee stressed that Komaggas 'is private land. We don't want to be part of the transformation process. We want our land to stay the same, the way it was claimed. They way it was published in 1843 ... We want it to stay under this multi ownership' (using the English term). (KIV Executive Committee Interview, October 2001) They stressed that 'the transformation process ... will change Komaggas ... will change the whole map.' Thus, another major assumption in Trancraa also caused problems. The Act distinguished between town (*dorp*) as municipal land and the 'remainder' (*buitemeent*), the farm and pasture land: only the latter could be transferred under the Act (Sections 2 and 3.1). KIV leaders insisted that Komaggas was *one* property and should be dealt with as a unity. They rejected any previous town demarcation

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<sup>300</sup> At the initial selection of workers, non-ANC members had been included. An ANC member argued that this was unfair, since the ANC was the ruling party bringing the benefit of the new road. The local ANC branch had protested to the political leadership of the District Municipality, which had responded by requesting the removal of residents who were not ANC members from the work team. Another Komaggas activist and ANC member stressed that this practice was against the principles previously discussed and agreed upon in the local ANC branch (Interviews two ANC members Komaggas and a member of the Komaggas Road Committee, September and November 2002.)

as having 'never been accepted' by residents.<sup>302</sup> The KIV sometimes employed a certain flexibility in interpreting Trancraa:

There are some articles that fit the other areas, but not Komaggas. We want to use what is applicable. Komaggas is not a 'Certain Rural Area' [*Sekere Landelike Gebied*], but a farm [*plaas*]. It is actually at the provincial level that they want to make Komaggas the same as the other areas. At the national level, they *do* recognize that Komaggas is a *farm*, here there is no reference to a reserve with a *dorp* and a *meent*. We respect the law but not the way it is being implemented. We have a right to decide, and we support Option 1 [CPA]. We do not speak of 'meent', 'restant' etc. *It is our land*, and it is *one farm*. The current border defines Restant 200 of the Farm Komaggas. The Farm Komaggas includes the white farms, De Beers land etc. (KIV Executive Committee, interview April 2002)

At this time during the first half of 2002, when we had resumed discussions with the KIV, we sensed a greater interest in understanding Trancraa as a possible bridge to a new situation that would be acceptable to them. However, insurmountable obstacle was the division of *dorp* and *buitemeent*, the rejection of One Farm Komaggas.

### 16.5.3 The land claim

Komaggas has a long-standing and reasonable claim to land beyond the reserve boundary (Sharp 1994: 403) but residents have also fiercely debated how to justify their claim. The dominant view has been that claims should be based on a 'Queen Victoria title', while another group supported a claim based rights of aboriginal title or rights of occupation as acknowledged in Roman-Dutch law (Sharp 1994: 406). People were also aware that they had limited political influence in the new South Africa and feared that 'if they jump the gun with an aboriginal rights claim, they might hinder the chances of appealing to the new government for grants of additional land on other grounds' (Sharp 1994: 412). In the post-1994 strategising about land reform in Namaqualand, government and civil society stakeholders in consultation with communities decided to prioritise redistribution and tenure reform over restitution.

KIV mobilised people around a claim to historical lands, including the diamond rich coast. Leaders stressed that their land was a 'clean area' (*skoon area*) in 1913, with no mining companies and conflicting claims on the land. The KIV had submitted a claim in 1998 and said that for them that the success of the claim was the main land issue (*'dis die hoofdoel – die eis moet slag'*) (Interview, October 2001). The KIV had sought legal advice, but appeared not to have found lawyers who were both competent on land reform legislation and willing to work with them over time. The SPP saw the moves of KIV as sectarian and

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<sup>301</sup> I have referred to the interview with this couple several times (not their real name). My purpose here was to characterise some attitudes underlying resistance to Trancraa and support for the KIV. I found the attitude recurring in some other interviews, but in general, there was some reluctance among KIV supporters to speak to me on these issues.

<sup>302</sup> According to KIV a 1998 statement from the Deeds Office confirmed the unified title of 'the farm': 'Sertifikat van verenigde titel erf 250', dated 2 November 1998, T 10244098 (I have, however, not further established the legal import of this document).

maintained that their land claim did not meet formal requirements (Interview SPP staff member, 2001). KIV leaders said that they had forwarded their claim to government and repeatedly, but unsuccessfully, requested official responses to it, although they did possess a letter from December 2000 confirming that the claim had been received. They envisaged the Minister, as landowner, giving her personal attention to the claim and to Trancraa, ensuring the coordination of the two processes.<sup>303</sup>

We have said we support option 1 [in Trancraa: CPA ownership]. Although the Minister is in Pretoria, if she knows that the Inwoners Vereniging will win, why should she waste thousands on a referendum and all that? The Minister has our land claim with 1 300–1 400<sup>304</sup> names as signatories. The opposition did not make a land claim. The Minister might look at the voters roll. Why should she then spend a lot of money on the referendum? If SPP had looked at the options of everybody, and not decided on the municipality, then it would have gone well. The Minister said in 1998: '*it is your land*'. We were told to claim land before the cut-off date [1999] and we have done so. We have written many letters, but they totally ignored them. (KIV Executive Committee, interview April 2002)

KIV implied that Trancraa was unnecessary because the land claim had already demonstrated that they enjoyed support in the community. KIV leaders said that 'our Residents Association has claimed the land. The unity of this organisation strengthens us ... the land claim is for the people who stand together with us.' Asked specifically, they did assert that the claim was made on behalf of the whole community (Interview, October 2001). However, a KIV sympathiser (quoted above) assumed that only the signatories to the KIV claim would benefit from a restitution award and even saw Trancraa as a process to promote a competing land claim by supporters of the opposition:

That Transformation' is for Certain Rural Areas. It is a new law, a property law. Komaggas is not part of that demarcation. They said before the [municipal] demarcation that you must apply for your land. We did that before the demarcation. Komaggas is not demarcated. They said that if a claim were not submitted, then it would later form part of the greater municipal land ... however, the application has been submitted in time. It [Trancraa] does not apply. The people who have not applied for the land have their own little groups that they have elected [the Transformation Committee]. And now they want two representatives of the residents who have claimed the land [KIV representatives for the TC]. But *they* did not apply for the land and that is why we are not prepared to support them [although] some of them are of our own people. (Komaggas resident. Farmer and KIV supporter, 2002)

Here, (i) the claim for land restitution, (ii) the demarcation of the new municipalities and (iii) the land tenure reform process are all woven together by an individual who is trying to make sense of land policy and other institutional changes, for example seeing the land claim as a means to avoid enrollment in the municipality. It is the voice of someone who is poorly informed or misled. He and his wife have placed their stakes with the Residents Association, an organisation that is somewhat similar to the past local councils and which could possibly gain a similar power through a successful land claim.

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<sup>303</sup> Even if the specific KIV land claim had been correctly processed, such coordination would not have taken place due to the delayed government process of handling restitution claims (see Section 9.3.2).

<sup>304</sup> One of my notes had 3-400, but the KIV stressed this figure in Interview in October 2001.

#### 16.5.4 Contested user rights

Scepticism about Trancraa was linked to people's experience of having relatively secure access to grazing land and various family-held residence, gardens or dry land plots. A resident presented the old *Raad* nostalgically as the provider of use rights:

Everything we have was put in place by the Council [*Raad*]. If you wanted land then you would ask the Council. And then it comes and gives it to you. And you pay taxes. If you want cultivation rights, sowing rights then you ask for it from the Council. And all your complaints are laid down at the Council. My mother, my grandfather and great grandfather, have cultivated this garden I am sitting in: Now tell me how many years is that? How old is my great grandfather and I still have that right! It has been passed on from generation to generation. We have had this land for hundreds of years. Now they want to come and boss us around! (Komaggas resident. Farmer and KIV supporter, 2002, also quoted in sections 16.5.2 and 16.5.3).

From this point of view it was hard to imagine that Trancraa was about increasing tenure security and easy to suspect other motives.

Some farmers have dryland plots (*droeëlandpersele*) with stock posts (*veeposte*) and cultivable fields (*saailande*) in areas where rainfall can support the growing of cereals or other crops (*saailande* was often used to refer to the whole plot of cultivated and grazing land). Dryland plots have been passed from one generation to the next as a respected 'family right'. Komaggas residents stressed that in the past such user right were reserved for *inwoners*, who would either be born members of the community (*boorlinge*) or residents approved after a period of about five years of residence and 'proper behaviour'.

The current use rights to *saailande* were officially based on regulations from the 1960s and on lease agreements with local councils, but a study of the dryland plots in all of the Act 9 Areas showed that payment and registration were highly irregular (SPP 1999). The SPP therefore recommended surveying of dryland plots to make future transactions legal and prevent conflicts. During the Trancraa process SPP and professional surveyors assisted farmers in other areas with recording and surveying *saailande* rights, using funds allocated under Trancraa (Article 3.16). The surveys carried out, primarily in Leliefontein, Concordia and Steinkopf, confirmed that there were many unclear boundaries and overlapping claims. Draft maps of newly recorded boundaries were posted and discussed at meetings and most of the conflicts resolved. However, in some instances surveyors had been 'persuaded' to mark off unduly large areas of common surrounding these plots (personal communication, Rick Rohde, 2003). When dryland plots were mapped in Leliefontein as part of the Trancraa process, it turned out that a considerable amount of what was previously common grazing land became registered as family held plots. A study compared farmers own drawings with those of the subsequent survey and found large increases in the surveyed plots (Husum 2004: 52-55).

In Komaggas the leaders of the defunct Transformation Committee prepared a 'rough' list of twenty-nine *saailande* owners (twenty-six men and three women). Some right holders

argued that a survey would be useful to clarify disputed boundaries, which were often indicated by natural features such as trees, a stone or a path. However, KIV leaders firmly rejected a survey and argued that it would lead to privatisation of community resources. No survey was therefore carried out in Komaggas during the transition period 2001–2002. In the first half of 2002 residents led by KIV leaders even chased away surveyors who were on duty to demarcate residential plots as a basis for transferring title to owners (a process carried out outside the Trancraa process).

KIV leaders held that Trancraa a strategy of the municipality to create private property, saying that 'you can go to a bank and apply for a loan. When you fail to pay back the loan then they can lay claim to it. It will become theirs and that is what we want to try to avert.' One may thus see in the organization a protest against privatization and making land into a commodity. However, many supporters of Trancraa would partly say that they too would resist that. It was sometimes held against the KIV leaders that they were against all immigration, and particularly by other racial groups than coloured (for example argued by the ANC Councillor, Interview, April 2002). KIV leader did present immigration as problematic but argued that it was a matter of maintaining established rules ('the law') about access to land so that it would not go out of the community:

Most of the people who are voting for the municipality are people who are from outside the borders of Komaggas who are not born here. They are incomers, and they are the ones that make things so difficult ... they cannot claim it is the property of their ancestors. Whereas you who are the owner of the land can say that it is the land of our ancestors, they cannot. Now they want cause suffering by securing the land for the municipality and then sell them off as plots. Here has already been sold land for which they have received the money. (KIV Executive Committee, October 2001)

They stressed that according to the law of the community the tenure should not be ownership but life long tenure that is passed on from generation to generation.<sup>305</sup> They said that *inkomers* or immigrants could obtain voting rights after three years (when he would have to pay half the taxes of a *burger*) and then full *burger* rights after three to five years, which would include the right to hold *saailande*, to farm with livestock and to apply for mining permits. They said that immigrants 'don't have problem with that law' and also held that a woman who married a Komaggas man would get rights to land (not further specified). However, all residents had to respect the community law to maintain their rights:

What we are saying is that each and everyone has the same rights when the land is transferred; only it will be according to the law. If you don't abide by the laws of Komaggas and the community decides so, then you will lose your rights. You must abide by the law: If you come and smuggle here, you will be ousted. (KIV Executive Committee, October 2001)

It is generally true for Namaqualand that rules gave preference to sons, so women would mainly become registered right holders upon the death of a husband. Women had earlier

resisted formalisation of rights but that was in the context of late apartheid (Archer and Meer 1997: 92). In Komaggas women missed an opportunity to assert equal rights to family-held resources. For example, in one case in 2002, a woman lost the fruits of the hard work she had invested in a tourism and environmental conservation site and orchard, because her relationship with her partner came to an end and because he was the sole holder of the lease right to the area. One's view of the gender dimension of the rejection of the surveying of dryland plots under Trancraa depends how one assesses the benefit and risks of this partial formalisation, but I regard it as a missed opportunity to insist upon and clarify gender equality in the rights to land.

#### 16.5.5 Community and municipality

Trancraa was implemented simultaneously with the new local government structure, and for some residents the two processes were difficult to distinguish. This came in addition to a general reservation or antagonism towards the new municipality. A survey in Komaggas in 2000 had found that 69% preferred the existing Komaggas Council (*Raad*) as the system of local authority, while 16% preferred the Namaqualand District Municipality and 14% the proposed new municipalities (Macroplan 2000). Nevertheless, from January 2001 Komaggas became a ward in Nama-Khoi Municipality. Leaders of the KIV claimed that the new municipality aimed to use the act to increase control over Komaggas land and community. The KIV Executive committee said that 'SPP ... came into the process when the land reform process started ... they ignored us and they ignored the community ... SPP's main objective has to do with the municipal system. There is that thing about 'Certain Rural Areas' [i.e. Trancraa], and therefore they classified us as one of the Rural Areas that belong to the municipality'. The Executive Committee argued that 'Article 2 [of Trancraa] stipulates that the trust will fall under the municipality of the area' (*volgens wet 98 ... gaan die trust onder die beheer van die munisipaliteit van die gebied*).<sup>305</sup> They said that 'while there are various options under the law, we chose, and it was right to do so, local management ... as we are transferring the land to the entity, the people [involved in Trancraa] are busy transferring the land to the municipality' (KIV Executive Committee Member, October 2001). It was not entirely clear to me and perhaps them at this stage, but it appeared that they saw the municipal option as somehow a predetermined outcome of Trancraa, and from the point of view of the town itself, important to them, that was correct. Furthermore, KIV complained that a concession to re-work old diamond mines was given to a well-connected outsider rather than Komaggas residents, and in doing so interestingly pointing out that Section 6 of

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<sup>305</sup> 'Ja dit is nie hulle se eiendom nie, is net hulle se lewensreg, maar hy gaan van geslag tot geslag. Hy kry daardie grond, maar hy kan dit oordra van geslag tot geslag.' (KIV Leaders, October 2001).

<sup>306</sup> KIV leaders were among the relatively few residents who had read Trancraa, at least to the extent of quoting from it. Article 2 has: At the commencement of this Act, all trust land situated in a township must vest in the municipality of the area where such land is situated'. However, where the Act refers to the town land they extend that to all land

Trancraa gives residents preferential access to such concessions. However, it was mainly the incorporation in a new governance system that was problematic for KIV leaders at Komaggas. Municipal fees and taxes also caused resentment and KIV carried out a non-payment campaign, from August 2002 even asking supporters to pay municipal fees into an KIV account: The municipal ward office manager estimated that it led to a temporary drop in the payment rate from the normal 50% to less than 10% of the rates due (personal communication, September 2002). Yet, resentment of the municipality went well beyond taxation:

This is the only complaint we have: We don't want them here. We have gone to a lot of trouble. We don't have to go to court to get the land, because the state has promised to give us the land back. We have proof that the land is ours, so now we must just wait until it is given back to us. We hate Nama-Khoi. We don't want it here. It does not fit here (Farmer and KIV supporter who also praised the old Raad above).

ANC leaders at municipal and district level deplored the lack of progress with Trancraa, and ascribed it to the historical conflict and allegedly illegal claims by KIV, such as the demand to control the Transformation Committee and to hold the ownership of the town area. The ANC municipal councillor for Komaggas felt the Trancraa stalemate would exacerbate the isolation of the community (Repeated interviews, 2001 and 2002). Asked about the progress of Trancraa, he presented and explained KIV attitudes and motives in the following words:

The Inwoners Vereniging is impeding development. They are retarding the future of their children because they don't want to participate in the transformation process. They still want to be a part of the old Apartheid regime. That is the biggest problem. The community is development oriented. ... For me, as I told the government official [from the DLA] the other day, they are not a factor. I consider them to be ignorant people who don't matter in the least. The reason why I say so is because they wrote a letter to Nama-Khoi requesting self-governance. They want Apartheid. They want Komaggas to be an island. It is people without a vision. That is what I have to say about the Inwoners Vereniging. (ANC Councillor for Komaggas, Interview, April 2002)

Thus, the attitude was not favourable to reconciliation. The ANC Councillor added that the KIV 'is actually the opposition of the ANC' and lost in the elections and were now 'trying their luck with these things'. He mentioned that a provincial DLA official had visited to investigate the conflict but that the KIV 'don't want to discuss land affairs because it is their land and they don't negotiate with anyone about their own land. But the land is in trust with the Minister of Land Affairs' (ANC Councillor for Komaggas, Interview, April 2002)

The ANC side thus primarily saw a power struggle underneath the stance of the KIV. In late 2001, Trancraa supporters talked about KIV as '*the Taliban*'. Trancraa supporters (generally ANC leaning) accused KIV of advocating a return to the past. 'Taliban has made some advances with their disinformation process ... People are very sensitive about land and they use the issue for personal gain. They seek independence of all government, self-governance their own 'homeland', '*tuisland*' [Afrikaans] ... but the fight for a homeland can never become a reality but is basically about power' (Staff of Komaggas NGO, February



2002). Thus the conditions for democratic debate were poor. In November 2002, issues that had been subject to protracted debates related to the ANC and KIV conflict (including the building of a school hall) were resolved through community voting, which was won by the ANC. An ANC supporter commented: 'So much for the *Inwoners*' claims that they represent two thirds of the community. It has never been proven at the polls. This again is proof that they merely represent a strident group of people who want to derail development in Komaggas and are merely power hungry' (personal communication, November 2002). However, the KIV reportedly grumbled that the voting had been rigged.

#### 16.6 Tenure reform and rights in Komaggas

Falk Moore (1973: 3) writes that law as process, communicated, created through 'a peculiar mix of action congruent with rules...and other action that is choice-making, discretionary, manipulative, sometimes inconsistent, and sometimes conflictual'. James Scott has shown how legal reforms may cause suspicion and resistance, 'individual acts of foot dragging and evasion, reinforced by a venerable popular culture of resistance [that] make an utter shambles of the policies dreamed up ... in the capital' (Scott 1985: xvii). Such policy failures have often involved 'seeing like a state': simplified readings of 'exceptionally complex, illegible, and local social practices, such as land tenure customs' (Scott 1998: 2). All these insights appear to be relevant to understand the case of Trancraa in Komaggas.

In Pella and in Namaqualand in general, the 2001–2 transition phase of Trancraa was a fairly successful consultation, and as such departed it from earlier apartheid governments tenure reforms and from the prescriptive and state-centric privatisation or nationalisation schemes criticised by Scott (1998). Many welcomed Trancraa as a step towards clarifying land rights and promoting social and political integration. However others felt that it put local governance and well-established tenure rights at risk. Residents in Komaggas had preserved a fragile sense of self-governance well into the democratic era, with the locally elected Transitional Local Council running community affairs from 1995 to 2000.

Komaggas is characterised by an entrenched and polarised conflict, exaggerated through manipulation and a paranoid imaginings. Instead of bridging the divide Trancraa got stuck the conflict. The Komaggas case illustrates the difficulty of predicting law as process and power struggle. Nader has written that 'speaking about conflict resolution without speaking to and about power' is inadequate (Nader 2001: 21, 25). The repeated efforts by the SPP and government to resolve the conflict were unsuccessful because of the underlying, long-standing power struggle.

The KIV questioned the state's underlying claim to ownership of land and rejected the apartheid era division of the area into 'town' and 'remainder' (the commons), which excluded the 'town' from the 'transfer' and expressed mistrust of the new municipality that they had become part of at the same time. Paradoxically, a strong local sense of ownership became

an obstacle to a reform that aimed to 'return the land'.

KIV leaders believed that the act would not further their interest in controlling a future land-owning institution (such as a CPA) and defended a sense of local land ownership against what they saw as illegitimate local government control. The KIV saw Trancraa as cementing mistakes of the past, such as dividing town and land, and as a threat to the community control over family-held resources through surveying leading to 'privatisation'. These concerns were not unique to Komaggas: several of the arguments and emotions about 'love of the land' and 'fear of payment' were known across Namaqualand, including Pella. In the intensive late phase of Trancraa in November 2002 some groups in some other areas were threatening with a Komaggas-style boycott, and an SPP staff commented that 'the contagion is spreading, Taliban is gaining ground'. It is also reasonable to see a link to the fact that four out of five Namaqualand areas voted for community ownership of land, against the ANC campaign for municipal ownership.

Democratic rights played an ambiguous role in the Komaggas process. Both sides claimed to support the 'rule of law'. Yet, they could not agree about democratic principles, for example when establishing a Transformation Committee. The SPP and ANC representatives argued that the Act required that diverse groups be represented, and that it would not be fair to accept KIV domination, although they later abandoned the principle, in an attempt to save the process. It was clear to a few local critics, and I agree, that lack of a culture of democratic political debate and information sharing was a major problem in the process. The community missed a chance to debate their contrasting views of history and land, so these views are likely to remain stumbling blocks for consensus and development. Lack of information played a large role. The Residents Association unfairly hindered fellow citizens from getting information about national legislation and demanded control over a consultation that involved many different interest groups. While people in other areas used Trancraa as an opportunity to explore land development options, in Komaggas residents mainly discussed such ideas informally and never across 'the divide'. On the other hand they were spared from having to invest time of effort in activities that might turn out to be futile.

Many Komaggas residents felt that *it is our land*, that they owned the land to a greater extent than the state and implementers imagined. It proved difficult to link the legal and political process of Trancraa to that experience. As a consequence, it was as if one did not heed the warning by Oom Joseph Grace in the 1996 consultation when he said that that, 'let us hope that a success comes out of this beginning, but then you must not think that it is you who have created it. You must also not think that it is your land that you are giving to us. *It is our land*, which is just coming back to us.'

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## 17. CONNECTING HUMAN RIGHTS AND HUMAN CAPABILITIES

### 17.1 Making connections

With the goal of contributing to an empirical and theoretical understanding of land tenure as a human rights issue, this thesis has explored the context of and a critical phase of tenure reform in Namaqualand in 2001–2. Connecting the theoretical approach with empirical evidence, Part IV addresses how human rights, entitlements and capabilities were at stake in the process (Chapter 17) and agency, cooperation and tensions in the use of discourse and making of institutions (Chapter 18). I place Trancraa within the context of the Communal Land Rights Act (CLRA) 2004 (Chapter 19) and draw conclusions in Chapter 20. Major empirical and theoretical connections addressed are as follows:

1. The case illustrates the diverse normative and empirical interaction between land tenure and human rights. Respecting protecting and fulfilling human rights may remove major sources of tenure uncertainty. Through Trancraa, actors promoted rights to information, participation and protection of land rights but social and economic rights were neglected (17.2). To strengthen connections between human rights and land use, one may analyse social and economic entitlements and human capabilities (17.3).
2. Building a bridge between rights and human capabilities is seen as a process of discourse, agency and institution making. Actors may be seen to have articulated two themes – *it is your land* (by the state and civil society) and *it is our land* (by residents) – that showed the tensions, changes and diversity in discourses about Trancraa (18.1). Central to the process were interplay and tensions between residents, emerging local government institutions (18.2) and civil society organisations (18.3). The horizontal, networking construction of land tenure is a major process identified by the study. Actors could draw on policy discourses of market-based development or rights-based reconstruction but their institutionalisation and transformative impact appeared constrained, among other factors by limited public support under the economic policy in the period studied (18.4).
3. In the process leading up to the CLRA 2004, human rights concerns, particularly with respect to democratic governance and gender equality, were interestingly articulated in ways they had not been in the Trancraa process, (19) reflecting, and pointing towards continued, social tensions over rural democratisation.
4. Based on the case study, it is possible to link key concepts in a human rights based understanding of tenure security. Human rights are codified collective commitments that help us identify and prioritise capabilities, such as being able to enjoy equality and informed political participation. To institutionalise human rights with regard to land tenure is to create or strengthen the social and legal entitlements that enable individuals to use land to expand human capabilities. The politics and practice of doing so may be complex and full of human ingenuity and surprises, as they were in Namaqualand.

## 17.2 Human rights in the Trancraa process

### 17.2.1 Historical context

Tenure reform was carried out within a landscape of social, economic, racial, legal and material boundaries and contrasts. Hacking suggests that constructionist studies should display the historical interactions or causal routes involved in creating present entities or facts (1999: 48). I have described a few steps in the making of Certain Rural Areas and surrounding farms as relatively stable landscapes with a matrix of resources, law and human relations (Chapters 9 and 10). Following a history of settler penetration, mission stations or communal reserves facilitated both subordination and protection. During the 20<sup>th</sup> century minority governments and a racial elite controlled the extraction of Namaqualand's mineral wealth and constrained the political participation by the majority. At many points in time actors could have done things differently. Pastures did not have to be privatised, privatisation did not have to be racially discriminatory and private farms did not have to be fenced during the 20<sup>th</sup> century, restricting movements in the landscape. Profitable enterprises were moved out of the reserves, such as wine and date cultivation which, locally, had originated in Pella.

In this history human rights were widely disregarded. Rights violations included: (i) disrespect for indigenous rights to property; (ii) racial discrimination when land was allocated under various forms of individual tenure and when the missionary stations were established; (iii) women's inferior position in land tenure due to indigenous and official institutions; (iv) restricted freedom of movement due to racial zoning in towns and cities and denied access to land ownership; (v) unequal access to the protection of the law; (vi) denial of the right to participate in farmer cooperatives; (vii) denial of equal pay; (viii) discrimination in the allocation of government support for farming and water rights; (ix) placing of public institutions and infrastructure; (x) lax protection of family use rights in some periods, leading to conflicts and encroachments (SPP 1999); (xi) insecure and/or inadequate access to land and water, making livelihoods precarious; and (xii) cases of harassment and abuse by land owners (Resident interviews, Pella, 2002).

This history caused lasting substantive inequalities in employment and incomes; distribution of land, water, capital, technology and organisational capacity; services and infrastructure. It caused a high level of segregation. Due to authoritarian practices such as 'economic units planning' and town planning, residents engaged in a politics of resistance (for example Klinghardt 1982). There were also measures that benefited Rural Area residents, such as services by missionary organisations (education, training and health), infrastructure investments by the state in the 1980s, and access to housing, land and social networks. There are entitlements connected to the Rural Areas that residents are concerned to protect. The small town attractions and the potential for business development, tourism and so on are more evident than in surrounding areas of isolated white-owned farms.

The state paid continued attention to the construction of the Namaqualand Rural

Areas (Chapters 5 and 9), which underscores state responsibility. It does not, in my view, imply restoring a certain past state of affairs but rather working for redress, removing the effects of past violations and creating institutions that respect, protect and fulfil human rights. Since the introduction of democracy, the state and other organisations in the Namaqualand land reform network have initiated important changes related to land and human rights: (i) land reform consultations with Namaqualand communities from 1994; (ii) leading and financing land-redistribution; (iii) initiating land restitution; (iv) municipal reform to develop local government and transcend the apartheid geography; (v) redirecting agricultural extension services from 'white private' to 'black communal' farming, along with other investments in infrastructure and services. Residents in Pella also emphasised a new freedom of speech and support by the Legal Resources Centre (LRC) and Surplus People Project (SPP) and other organisations. In the 1996 community consultations where many residents demanded an end to the state's trustee ownership, to which the state responded with the passing of *Trancraa* in 1998 and implementation of the transition phase (2001–2002) through the SPP, LRC, DLA and municipalities.

In the Rural Areas of Namaqualand one meets the signs of a new human rights culture, particularly in public offices and information: The Pella police station has colourful murals advocating the protection of children and women against violence; a poster at the Pella *Raadskantoor* states ten principles of government service in respect of people's rights (*Batho pele* (Sesotho) – 'People first', with reference to a government policy document (RSA 1997).

Land and land reform touch upon people's sense of rights and worth. When asked if land (*grond*) has anything to do with human rights (*mense regte*), for some residents it did not make sense, I think mainly because the term human right was unclear or seen as too abstract and removed from daily life. For others it did make sense to see a link between their land rights and human rights such as: movement, food and freedom.<sup>307</sup> A farmer and leader stressed the violation experienced through the loss of land (further elaborated below). The Mayor of Khâi-Ma said that more land has given some individuals opportunity to regain their dignity (Interview, October 2001). Written comments by a small group of Pella residents made the points that land is a human rights issue because land is related to making a living, to traditional rights and citizenship (Group discussion, Pella, November 2001). Asked what gives a person a right to land one wrote: 'To live, to survive, a traditional right, property,

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<sup>307</sup> However, a language point may have led to superficial agreement. Human rights are *mense regte* (compare Norwegian: *menneskerettigheter*). But people use, and when asked may easily hear, the phrase *mense se regte*, the rights people have (Norwegian: *menneskers rettigheter*). Land was certainly often linked to rights that women or men have because they are from Pella or Komaggas (*Pella/Komaggas mense se regte*), not by virtue of international law or status as a (universalised) human being.

economic survival' (*'Om te lewe, voortbestaan, tradisionel regte, eienaarskap, ekonomies voortbestaan'*). Asked if land is a human rights issue an answer was: 'Yes, everybody must have a right to a piece of land in his/her country. It belongs to the people who live in the country' (*'Ja, almal moet 'n reg hê op 'n stukkie grond in sy/hom land. Behoort an die mense wat die land bewoon'*). This stressed a substantive citizen's right to own a piece of land, an interpretation I think is common among the landless and land insecure. In comparison, my interpretation in Chapter 2 with emphasis on deeper but more abstract social, economic and political rights that provide *arguments* for access may appear abstract and less attractive. I would still maintain that an a strict protection and promotion of these rights would have substantial outcomes, as they would also have made South African history and current land dispensation impossible.

Residents in Komaggas and Pella were often arguing that they were getting back rights to *our land*, basing their arguments on a historical tenure, deeper than the formal private property rights that accompanied dispossession, but still not human rights. It was generally my impression that those who incorporated the human rights language merged it with an established and stronger discourse of community rights to land (and subordinated to that, family and individual rights). However, awareness of deep human needs – for water, for life and freedom – affected the interpretation of land rights. This is consistent with a human rights view of property but may, as may an insistence on individual private property rights, exclude others from view.

### 17.2.2 A list of human rights

Chapter 2 (Table 1) suggested a list of human rights related to land tenure. Implementers did not approach tenure reform according to a human rights checklist, nor did any resident, facilitator or local official ever in my discussions refer to human rights as tenets of international law, though they did occasionally refer to the rights as guaranteed by the Constitution. The following skips many issues raised by each right but considers their context, and claims by residents or others during Tranraa in 2001–2002.

#### *Redress for past violations*

Redress for past violations is a human right (UDHR 8, CPR 2.3). Land reform over a number of years by the SPP, LRC and government may be seen as efforts to fulfil a right to redress. While 'restitution' was nationally the most urgently legislated land reform, in Namaqualand it was to some extent abandoned in a legal and political compromise that emphasised redistribution and tenure reform, and had not had any impact till the time of this study. The DLA presented redistribution as 'restitution with another name' (DLA 2001a). Pella residents chose not to seek restitution of land within the 1999 deadline but not all had fully understood the process ('But what about the farms that people are still waiting for', said a leader in a meeting in October 2002). Pella residents expressed appreciation of the redress inherent in



land redistribution ('The best thing the new government had done', a farmer said). Yet, the new farms helped only a few right holders and fell short of fostering conditions 'which enable citizens to gain access to land on an equitable basis' (Bill of Rights, 25.5).<sup>308</sup> Komaggas residents did seek restitution of land, but due to conflict and inadequate legal assistance the claim was apparently not correctly forwarded (SPP staff, interviews 2001). Thus, information, legal considerations and debate affected the way residents interpreted their right to restitution. The Constitutional tenure reform mandate gives a right to 'legally secure tenure or comparable redress' (Bill of Rights, 25.6). Redress would have required resources to compensate farmers whose access to resources suffered because due to a rapid population growth that was in part induced by government resettlement policies. *Trancraa* (the Act) did not give effect to the Constitutional right to tenure redress.

### *Livelihoods and health*

The rights to livelihood and welfare are central in constituting land as a human rights issue, but affected by numerous conditions and policies. Land policy (RSA 1997) addressed links between insecure tenure and vulnerable livelihoods. *Trancraa* was partly justified by the view that secure tenure could serve economic development and livelihoods. This is relevant in Pella and Komaggas where many residents have low incomes and combine salary, welfare payments and land-based enterprises and subsistence to make a living. Among the households I interviewed in Pella, stock keeping generated about ten percent of the income, and it was important for some poor households. Some talked about land as a human rights issue, stressing farming, finding minerals and making a living. Some residents evoked the idea of a bare minimum necessary to sustain life, something that may never be taken away from anyone. A policeman in Pella called collecting minerals a 'right of life' for those with no other option. Another resident said that no one could take away somebody's house, therefore a title was not essential. Members of a meeting in 2002 said that no one could be prevented from getting drinking water, although the individual who dug a well may for other purposes be seen as the owner. A DLA official referred to a basic right to food security when advising against interfering with food garden cultivation in Pella. Thus, in various ways such a basic right to livelihood was invoked.

In Pella, *Trancraa* implementers promoted livelihood rights by exploring irrigation development, by bringing up the issue of income from tourism with the District Council officials; and by trying to remove bureaucratic and economic barriers to the collecting and selling of minerals (Transformation Committee Deputy Head and ANC leader in Pella). These efforts were not mandated within *Trancraa*, and activities were rather characterised by a gap between the SPP and the Transformation Committee ambitions and the resources allocated.

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<sup>308</sup> In Pella about two hundred households engaged in farming share less than 100 000 hectares of land, while surrounding households with private ownership normally hold between 5 000 and 10 000 hectares (ten to twenty times as much land per household).

These, also, did not include special measures to assist vulnerable groups such as those with very few stock, herders from outside the communities, the young, or women farmers.

The Trancraa implementation did not to my knowledge address HIV/AIDS. Meetings could have been an opportunity to inform about HIV/AIDS, particularly if concerted with other government agencies with this mandate. There were known cases of death from AIDS in Pella, but the local nurse found that the issue was stigmatised (Personal communication). Apart from counselling at the local health clinics there were to my knowledge no HIV/AIDS activities in Pella and Komaggas during the time of field research.

### *The right to work*

To have work under fair conditions is a human right (UDHR 23; CESC 6 and 7), perhaps the only major right not protected by the South African Constitution. A rise in unemployment is a feature of socio-economic change in the 1990s (Chapter 6). In the Namaqualand Rural Areas, major sources of income are public welfare payments and paid employment, particularly with mining companies, now affected by downscaling in mining. Residents stressed that the problem of unemployment and the dependence on casual, poorly paid work gave rise to undignified conditions, such as waiting in vain for employers, riding on the back of trucks in unsafe conditions and low pay. A young woman and mother of four in Komaggas had inadequate housing and food because her husband's salary as a farm worker was only R600 per month (Interview, 2002). In Pella a poor resident received R200 per month plus subsistence for herding for one of the larger farmers and committee members during 2001. Young people said they had few opportunities to get jobs and that they either wasted their talents or were forced to leave for the cities (Discussion with youth group, Komaggas, 2002). Many residents called for commercial ventures, such as in tourism and irrigation development. The Transformation Committee and facilitators in Pella pursued opportunities to increase employment, for example at the new guesthouse and in irrigation development. Although economic policy is likely more important, an integrated tenure and agrarian reform would need to have employment generation as a major goal.

### *The right to hold property and the equal protection of property rights*

In Namaqualand Act 9 areas the 'trusteeship' was a relatively clear, durable and state-backed tenure arrangement, but it did not comply with human rights, primarily because of racial discrimination at various stages. Trancraa is a step in a process of constructing a new tenure institution. The central articles 3.2 and 3.3 make protection of land rights the condition of a transfer to a new owner. It recognises that different pieces of land may be transferred to different entities, and acknowledges 'rights of use' (3.2.b). Land 'or any portion thereof' *must* be surveyed, and the state may carry the expense (3.14 and 16). Residents have 'reasonable preference in decisions about access to the land' (4.1.c) and land may not be alienated without consultation. If land is transferred to a municipality, protection of rights will

be subject to municipal legislation and accountability principles as listed in Article 4. If transferred to some other entity, the Act (3.2.iii.b) stresses that new rules must make suitable provision for the 'public interest of access to land'. In Khâi-Ma, a few politicians and municipal leaders argued that (poor) residents of the municipality ought to get access to Pella land. This concern about poverty and landlessness may appear consistent with human rights concern about livelihoods. Yet, to select Pella or other Namaqualand Rural Areas provide poverty relief for citizens from other areas may be seen to encroach upon the land rights of Pellanaars and reflects a view of the Act 9 area as public and 'available', as opposed to private individually owned farms. Thus, despite the concern about poverty, the selection of the land appears discriminatory. Other practices also revealed weak official respect for the residents' property rights, perhaps because of the legacy of state governance. The new farms were in a limbo. Some residents in Pella and Komaggas regarded new farms as 'our land' as much as the 'old land'. The official position of the SPP and DLA was that redistribution farms should be included in the Trancraa process. However, facilitators failed to protect these interests of residents when the ANC in Nama-Khoi and Khâi-Ma decided to hold 'new farms' outside the advisory referenda. Out of deference to the municipalities, the DLA and SPP refrained from ensuring that new farms were included (Personal communication, November and December 2002).

Protection of land rights was also a community responsibility. Many residents stressed the common right of access, including freedom to make stock posts. A woman small farmer in Pella complained that the 'big farmers' were trying to squeeze out the small ones and that 'big farmers' stayed away from meetings (Interview January 2002). The right to livelihood may favour protection of the general right of access to the meent (common land) but challenges the de facto stronger access of (fewer) established farmers. This demonstrates a tension between a human rights view and a more market-oriented view. To partially resolve the conflict between 'big' and 'small', a rule limited stock ownership to five hundred small stock per individual, but the enforcement of this rule was lax (Personal communication, SPP and leaders, Pella). One reason that this conflict was not addressed may have been the social composition of the Transformation Committee, with several centrally placed individuals and owners of large herds. The Trancraa Committee's focus on market development and avoidance of conflict and inequalities in livestock management may express a tendency to capture of the benefits by powerful groups, which has been discussed regarding South African land reform elsewhere (James 2000; Woodhouse 2003). However, Committee members also defended community rights, for example concerning irrigation development.

Debates during the preparation and consultation phase of Trancraa focused on the administrative confusion around dryland farm plots and residential insecurity. During Trancraa the SPP and professional surveyors mapped, adjudicated and registered family-

held plots in three of the six areas. By publishing maps and consulting the community the SPP tried to secure a transparent process, but some farmers apparently succeeded in expanding their 'private' plots into the common land (Husum 2004). This is a demanding part of the tenure reform process that this study has not addressed, partly due to the absence of dryland plots in Pella and the resistance in Komaggas. Exclusion of other users, including non-registered family members (particularly women), was an inherent risk. An example of tenure insecurity due to male-biased registration of land rights (in this case a leasehold) was seen in Komaggas in 2002. A woman had invested considerable labour in leased land for gardening and tourism, but lost access after the relationship to her partner, the registered leaseholder, was interrupted. This particular and general issue could have been addressed through implementing Trancraa, and is an example of the possible human rights costs caused by non-implementation in Komaggas. In Pella, implementers chose not to interfere with the contested rights to garden plots by the river other than listing the present right-holders, partly to avoid conflict. The DLA emphasised that residents could create an uproar by calling on provincial politicians if they felt their livelihood rights were threatened, illustrating a link between political voice and economic security.

#### *Privacy, home, security and freedom of movement*

'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence' (UDHR 12) and everyone has the right to liberty and security of the person and to freedom of movement (AC 3 and 12). The old administrative practice of expelling residents ('putting across the line') violated the right to security and freedom of residence. Today, national citizenship is replacing resident or *inwoner* as the main rights-carrying status. During Trancraa this created tensions and dilemmas over how to combine the benefits of citizenship with, for example, land rights linked to *inwoner* status. There was a need to clarify the rights of residents who had left or were returning. However, respondents generally supported the principle that born members (*boorlinge*) have lifelong rights and the practice of extending land rights to new residents after about five years of residence. An SPP staff member commented that it would take a very long time before a recently immigrated white business owner would get land rights.

Residential tenure security was addressed through offering title to housing plots and houses (in a process outside Trancraa), but many residents did not pursue that option, partly because of the costs. Providing this option for tenure security at minimal cost would have been a contribution to providing redress for past tenure insecurity. In Komaggas, a significant proportion of residents appeared to be against private ownership of residential plots and the Komaggas Inwonersvereniging (KIV; Residents' Association) asserted community rights to allocate these. However, residents opposing KIV stressed the need for public protection of secure tenure to residential plots. Residential security is also closely linked to the entitlement to public services: some land tenure options (Communal Property Association, CPA) or

private ownership) were seen as removing the public obligation to provide services. Since Trancraa did not include the towns, this would put relatively few households at risk, but it was important from the perspective of individual rights and a major concern in tenure reform elsewhere in South Africa (Personal communication, Ben Cousins, 2002). Secure tenure at stock posts was important for individuals, both when it was their only residence and when it came in addition to a house in town (for example, household interviews at Mik, Pella). Farmers were concerned with maintaining flexible location and access to stock posts, which may be a reason why no one called for a 'formalisation' of these rights in Pella (in other areas stock posts were registered along with dryland plots).

During the time of my involvement, residents in the study sites respected the rights of home and security of their neighbours and only pursued land through the official land reform programme, making a law-based process possible.

#### *Rights to democratic participation and governance*

'Tenure security' and 'governance' are closely linked. In the past the church or state tenure was clear and stable but unpredictable policy decisions, for example regarding the 'economic units' programme, could cause tenure insecurity. Trancraa promoted rights to information and voice and prepared for a reformed land tenure institution through resolutions and regulations. This demanding work by the SPP, Transformation Committees and LRC, supported by municipalities and the DLA, easily becomes invisible but is necessary for forging links between political freedoms and creating sustainable institutions and economic opportunities. SPP staff expressed surprise about the amount of work, difficult issues and tensions involved (and I was surprised). This work involved (i) meetings (such as by Transformation Committees) and regional workshops; (ii) disseminating information to residents (such as flyers and newsletters);<sup>309</sup> (iii) networking and strategising between the SPP, LRC, PLAAS, government and others; (iv) trying to coordinate with other processes (such as IDP planning); (v) liaison with the government at different levels, through correspondence, and seeking approvals and advocacy (such as regarding tourism and minerals development); (vi) surveying and conflict resolution, for example regarding family held plots; (vii) exploring development opportunities, such as irrigation development; (viii) defending land and participation in commercial land development, such as in the 'Paprika project' in Goodhouse, Steinkopf; and (ix) soliciting community views on a range of issues. In this case the most demanding events were the referenda. In Pella this involved a demanding consultation where eventually more than thousand individuals signed up for the land referendum (about as many as for the local government elections in 2000).

Much of the case study (Part III) is an elaboration of this work. I am not in doubt that

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<sup>309</sup> The South African Human Rights Commission has pointed out that in the huge and thinly populated Northern Cape distances and lack of transport seriously curtail people's access to information and ability to mobilise against various rights abuses (SAHRC 2003b).

each of these activities can be shown to relate to several of the human rights discussed here. In my experience this was a major achievement of the Trancraa process but I am also aware of its ultimate weak articulation with economic rights and material change. Thus, my first question about a tenure reform process would be how these activities are planned for (strategy, budget, personnel and time). My second would be about the strategy for linking them to economic practices and rights, and my third about whether the right to democratic participation in tenure reform is integral to the wider democratic reconstruction, which turned out to be problematic in Namaqualand (subchapter 18.2).

*Gender equality in access to and ownership and governance of land*

The CEDAW<sup>310</sup> makes a clear link between land and agrarian reform and the right to gender equality, a right also guaranteed by the South African Constitution. The Constitutional land reform mandate does not refer to gender discrimination as a ground for restitution or a criterion of equal access to land, an area where an international human rights may be relevant to strengthen the property clause. The DLA (1997a) had a gender policy at the time but Trancraa does not make a positive commitment to gender equality, other than a general ban on discrimination against residents.

In the Namaqualand Rural Areas men generally have a dominant role in local politics and land use (Archer and Meer 1997). Male identity is associated with farming (Example by Wellman 2000 quoted in Chapter 9) and for unemployed men stock farming provided a (minimal) resource security and was central in their struggle to protect human capabilities in an adverse situation, including the dignity of working and providing food (Interviews with stock farmers, Pella). I am not aware of official measures or decisions that specifically promoted the rights or interests of men but debates and agenda-setting in Trancraa were in some cases dominated by men, who did most of the talking in the Transformation Committee meetings. In a few debates, men used a pejorative view of women to marginalise their participation in farming; this was once referred to by the female mayor of Pella. In Komaggas, the KIV appeared to be male dominated in its leadership. In Pella, the issues of irrigation and minerals development appeared to be skewed towards male interests. The attempt by the three male members of the enterprise Pel Boerdery (Pella Farming) to gain control of valuable irrigation land was resisted by both men and women, but women (including the SPP facilitators) secured the final rejection of this initiative (TC meeting, Pella, October 2002).

Women played a prominent role in official politics in Pella (where the Mayor (ANC), Leader of the ANC party, and the DA council member were women). Women were active in

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<sup>310</sup> In particular: 'States parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development'. Rights listed concern credit, access to markets and technology and 'equal treatment in land and agrarian reform' (CEDAW Article 14.2.g).

the land committees and several times outnumbered men in meetings, for example regarding guest house development. In 2002, the SPP arranged a separate meeting for women in Pella to discuss the land ownership options. It is difficult to document that women were effective in informal policy making but three centrally placed women who (I believe) opposed municipal ownership, used other channels to affect the outcome of the referendum (a church, DA grass-roots meetings and the Farmer's Association).

Some women in Pella, including one prominent woman farmer, said that they faced no special obstacles to participating in farming. The SPP's main facilitator said dryly that she thought 'women were too smart to farm', arguing that herding goats in an arid environment in temperatures of 30 to 40C is not very rewarding. Nevertheless, women were involved in farming and some stressed that they had individual ownership of herds, even in cases where these were mixed with larger herds and tended by (often male) relatives. Individual women have a right to equal opportunities in farming to compensate for the disadvantages they have experienced. This, in turn, is likely to affect women's awareness of and participation in farming and other land uses.

There were only a few measures under Trancraa that specifically promoted gendered rights or interests. For example, a Land Planning Workshop in Pella in January 2002 did not address gender. The Trancraa Act and process in some respects confirmed a view of the DLA gender policy as 'piety in the sky' (Walker 2003), in the sense that it was not to my knowledge operationalised, for example through an analysis of gender relations and obstacles to equality. However, regulations on livestock and dryland plots required that municipalities should give preference to women and the poor, as did the rules about access to 'new farms', but this appeared to get little attention. Trancraa activities did not clearly promote gender equality, but the SPP's two facilitators carried out difficult, time-consuming 'social process work' that Walker (2003: 141) calls for. Gender aspects could have been brought more prominently into the debates of tenure options and development strategies (tourism, minerals, stock farming, irrigation). In addition, a general lack of resources to involve and assist vulnerable groups was a constraint, and a serious gender (and racial) bias in a world of inequality.

#### *Right to racial equality in access to and ownership and governance of land*

All the considerations above have to do with the fundamental right to equal worth and respect, and therefore to real equality in access to, ownership and governance of land. To 'respect' means to not infringe on the right to equality, including tolerating action to attain equality (when consistent with human rights); to 'protect' is to ensure that no one violates another's right to equality; and to 'fulfil' means to ensure enjoyment of equality, including achievement of all human rights (refer the General Comment on the Right to Food, Committee on Economic, Social and Cultural Rights 1999, Article 15). The state obligation to facilitate a transformation to a society in which this is possible includes affirmative action or,

better, 'regstellende aksie' (Afrikaans), i.e. action that puts things right or creates justice. To progressively realise the right to racial equality is officially the central focus of South Africa's land reform programme, and the indicator of land redistribution is given in racial terms. If the government does not create a land policy within which people can exercise the right to achieve equality people's autonomous actions will likely cause new human rights violations and damage social relations and the economy, as violent action in South Africa and Zimbabwe has shown. Land policy constrains autonomous action and protects other actors (including current landowners, farm workers and the public), but promises that the state will assist citizens in progressively obtaining racial and gender equality. This is probably the crux of the challenge of human rights based land reform: balancing of the protection of owners with the rights of all who lack life-sustaining resources.

Trancraa's recognition of the right to racial equality may be seen as the sum of the various rights and measures discussed, first of all to legally secure tenure. Trancraa did not address the skewed land distribution but it appears impossible to create real equality of opportunity within the existing structure of holdings and considering the history of exclusion from privileged positions within that structure. Within the given structure, one can either give very few individuals access on a par with 'private farmers' or slightly expand access for more individuals (which was the approach chosen, as explained in Chapter 9). From 1996 to 2000 the government recognised private farmers' ownership rights by buying land at the owner's request and at market prices *and* simultaneously promoted rural residents' rights to redress and equality. Human rights favour the claims by those whose rights are most at risk, a group to which the landless and land insecure will often belong. Realising human rights requires widespread ownership of land to which men and women have equal opportunity of access, use and control, individually or in association with others. In the areas covered by my study, private landowners justify claims to their property by referring to the history of occupation and law. I suggest that human rights weaken these claims and favour redistribution. Given multiple farm ownership in Namaqualand, an elderly farmer in Pella advocated further redistribution of second and third farms to reduce the economic concentration (Interview, November 2001). The law-based approach adopted in Namaqualand requires more funding, assistance and supportive rules concerning inheritance, multiple ownership and taxation. Transformative tenure reform requires that redistribution be incorporated (this is further discussed in subchapter 18.1.1). An internal reconfiguration and legal guarantee of land rights appears inadequate to fulfil the right to racial equality in relation to land in the areas studied.

#### *The right to practise one's culture*

Human rights recognise the right of diverse groups to practise their culture (CCPR 27 and ILO Convention 169, particularly article 8.2; Article 31 of the South African Constitution). Many Rural Area residents speak of a close tie between land use, cultural values and a



sense of identity, saying that 'farming is a way of life', and 'land is an emotional issue', and talking about the 'love of land'. Some elderly residents spoke about Pella land as blessed by the Bishop – one couple saw this as a weighty argument against municipal ownership (interview, Pella, November 2001). An official study made in the preparations for Trancraa had stressed this:

Residents of the Rural Areas have a strong religious view. There is a widespread desire for stability and security and a strong attachment to land [*en 'n sterk gebondenheid aan die grond*]. This must be a starting point for supporting the concerned Rural Areas with their own pride and love for their land onto a path towards stable, independent communities that do not only have the capacity to govern themselves but also the capacity to develop in order to create opportunities for self-improvement for their residents. (Landelike Gebiede Komitee 1996b: 15)

However, the formulation can signal a problematic continuity with the past. In both the areas there were debates around ethnically based 'Nama' claims for land. However, a meeting in Pella in October 2002 stressed the residents' mixed descent. Discussing the Communal Land Rights Bill (CLRB) with its emphasis on institutions of 'traditional' leadership one member stressed the possibility of reviving the Nama (or hybrid) 'kaptein' institution of leadership, but this was a proposition largely rejected by the meeting. Although the KIV in Komaggas used symbolic references to the San and Khoi, I also interpreted this as more concerned with 'local' control than motivated by ethnic difference or discrimination among residents.

Land reform ought to respect and promote freedom and values attached to land and the rather strong emphasis on land use regulations could be problematic in this respect. However, the strategy of strengthening the role and accountability of municipalities may support an integrative strategy of democratisation and public support and, as I interpreted the debates, this was a dimension of claims for *our land* at least as strong as those for cultural difference and autonomy.

### 17.2.3 Reflection on the interaction among human rights

The state and other actors involved in Trancraa must respect and protect human rights and contribute to fulfilling them within their mandate and power. To sum up, the two central elements of the Act are the protection of property rights (Article 3) and the requirement about accountable local government with regard to land (Article 4). Despite being procedure oriented, the Act did not clearly require or explain democratic participation. It addressed none of the substantive equality rights, and disregarded the Constitutional right to tenure redress. The Act (to a lesser extent the process) appeared to reflect a split between civil and political rights on the one hand (some emphasis) and social, economic and cultural rights on the other (limited or none). This is more reminiscent of the split between the two International 1966 Covenants than the current emphasis on the interdependence of human rights, particularly in the Constitution. The idea that civil and political rights rely only on (cheap) non-

intervention of the state, while social, economic and cultural rights require (expensive) interventions is flawed (this is carefully discussed in Vos 1997).

The Committee on Economic, Social and Cultural Rights (2002) has pointed out with respect to the right to water that it has a 'freedom' dimension and an 'entitlement' dimension. One is the freedom from arbitrary interference in rights enjoyed; another is the moral and legal entitlement to a minimum level of services, resources and security. The right to property may be seen as having these two dimensions. Theo van Banning (2002) argues that there exists a 'human right to property': 'Like all other human rights, the right to property entails positive state obligations to secure that, as far as possible, everyone is able to enjoy property rights' (Banning 2002: ix). However, he stresses the close relationship or 'interaction' of property rights and diverse human rights.<sup>311</sup> Van Banning (2002: 207) arranges in a circle what he considers the eleven most important human rights interacting with the right to property. 'Property' is at the base of the circle and 'equality' at the top. Other rights are, on the left, work, health, education, culture, participation and, on the right, privacy, freedom of movement, personal integrity, freedom of opinion and expression, and justice. (Banning 2002: 207). I agree that freedom of expression and the right to information were important in the Trancraa process and that access to the justice system is a potential future benefit. Van Banning places 'equality' at the pinnacle of the human rights circle: for my purpose it was relevant to make the gender and racial dimension of equality clear.

Residents occasionally expressed their claim to land (*it is our land*) as a human right to land. I find this claim consistent with the positive entitlement in the Universal Declaration that 'everyone has a right to own property alone or in association with others', but I would place the emphasis on interaction among several human rights. A farmer and leading committee member in Pella made an interesting statement on human rights and land which was placed in the context of historical dispossessing and a claim to become a private owner of land on terms similar to those enjoyed by commercial farmers in the area:

Lets take 1900, the year in which you had a piece of land and say about 1 000 stock. You could irrigate the land, you could build on the land, it was your land, you could make a living off it. And then came the point when the land was taken away from you. So today you are only starting to get back ... again rights to *your* land. So you have still not moved far, because you still don't have the complete amount of land that you want to have. I want to have so much land that I can have my own farm of say 12 000 hectares. Then I can farm commercially or irrigate commercially or even sell some of that land. I still don't have enough, but there is no moving away from that right, for although the right was lost at one stage, it has come back, although I do not taste the fruit of it yet. (Farmer, TC member and leader, Pella October 2001)

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<sup>311</sup> Interaction refers to the processes whereby the human right of an individual is strengthened or constrained by his or her other rights, or the rights of others. Interaction may denote practical weighing of different rights in decision-making. A limiting interaction is when a right property limits the positive entitlement that others have; an example of a positive interaction is when rights to livelihood, equality and political participation strengthen the same individual's right to property (in turn, livelihood rights of the dispossessed interact negatively with the monopolistic property rights of others).

This opening placed a presentation of land as a human rights issue in the context of historical struggle and the speaker's economic ambition. He explained steps in a process of regaining land, involving legal reform, and then moved on to a remarkably concise statement of land as a human rights issue. I introduced some numerals to suggest 'list' in his integrated image:

... The question is, is land a human rights issue? The answer is 'yes': everybody must have the right to own a piece of land, on his land, on our land.<sup>i</sup> Yes, it is a human right issue when that right is taken away from you.<sup>ii</sup> Land is a people's livelihood because people work the land, they farm there [keep livestock] and they plant there.<sup>iii</sup> It is only that they are not the legal owners yet.<sup>iv</sup> If you take away a person's land then you take away their human rights.<sup>v</sup> So if you own land, then you have the right to freedom,<sup>vi</sup> the right to free association<sup>vii</sup> and the right to security,<sup>viii</sup> so that is the most important human rights issue. (Farmer, TC member and leader, Pella, October 2001)

While this statement was prompted by my question, I had not said anything about my view. One may see how the farmer effectively conveys a string of ideas: (i) a universal entitlement; (ii) the experience of violation and consequent right to redress; (iii) right to livelihood and work, linked to what they actually do or can do; (iv) a deeper right than legal ownership; (v) the right and its violation is linked to personal integrity; (vi) to freedom in general and (vii) more specifically as a basis of political participation. Its pinnacle may be (viii) the right to security (not defined, probably economic and physical). It is the combination of these eight distinguishable concerns, each consistent with human rights, that makes land 'the most important human rights issue'. Underlying concerns about racial equality, and perhaps gender equality, are not directly articulated. His understanding of rights is influenced by the dominant society, as suggested by the opening statement. The statement also reminded me that van Banning does not include the human right to 'livelihood' (probably seeing it as derived from work and property, which in the context of this rural setting is not adequate).

I have reviewed a list of human rights above, aspects of the Trancraa reform process and a voice from Pella: they confirm the extraordinary diversity of the interface between land and human rights. Human rights realisation is not a straightforward state-led translation of codified rights through legislation and implementation, but promoted, contested and realised by many actors. The state enabled the process through passing Trancraa and providing the funding and sometimes leadership. The SPP, LRC and Trancraa Committees improved on the Act by emphasising information, consultation, advocacy and attention to economic development. Trancraa did thus include *process*, and attempts at *institutional development* and *advocacy*, elements that Peter Uvin considers to be central in human rights based practice (2004: 137–46). However, connecting these qualities to land use and human well-being was constrained by many factors, the historical land construct, the current level of government support and the short-term and limited intervention.

### 17.3 Endowments, entitlements and capabilities

#### 17.3.1 Concepts

I develop my interpretation of human rights in Trancraa by using Amartya Sen's and Martha Nussbaum's *capability approach* to land use and human well-being (Section 3.2.3). The capability approach accentuates the good life of individual growth as an end while we may use human rights to make some capabilities the subject of public guarantees. *Capabilities* are desirable things humans can do and be and they mean the freedom of being able to choose among and combine functionings, such as being well fed, preventing avoidable mortality, having self-respect and participating in social life (Sen 1992: 5). Expansion of capabilities may be seen as the meaning or goal of development (Sen 1999; Shanmugaratnam 2001). The environmental entitlement framework (Leach, Mearns, and Scoones 1999) maps dynamic conversions of *endowments* (including land, labour and skills) through entitlements to capabilities. *Entitlements*, the actual command over resources, are a result of law, social practices and rules (Gore 1993) and the broader political economy (Shanmugaratnam 2001). One may see land tenure as a set of 'entitlements' that affects individual and group efforts to transform endowments, via entitlements to human capabilities. Trancraa facilitators and Transformation Committees examined different land uses that involved such conversions and my reflection draws mainly on their effort.

#### 17.3.2 Livestock farming

Residents value *ons grond, our land*, for their opportunities for low cost residence, farming, tourism, biodiversity, and mining, the things one can do on and with land such as keeping horses, cultivating *saailande* (dryland plots), collecting medicinal plants, firewood etc. Individuals and communities use natural resources to produce various goods that support capabilities for a life they value. A young man in Pella told how he collected honey in the mountains to make beer to be consumed around Christmas. A farm owner produced honey on his land, which he proudly shared: two ways of converting a biological endowment to a socially valued capability. Men and women who were born in Pella or have long been residents there have a right to graze the common land as a shared endowment. If they also command labour and capital to invest in livestock this may contribute to their production of commodities and, through consumption or exchange, capabilities. Stockowners on the 'old land' use the diverse and fragmented veld of the plains and mountain ranges and various ephemeral water sources. Pella farmers can generally no longer move along or across the river as in the past. Land and water pose constraints, as stock farmers who have all lost stock in recent droughts know. The cycles can be severe. An owner of a large farm wrote:

Me and everyone else in the area are still struggling to survive this drought. Not a drop of rain since December 2002, except for that small part of my farm in February. The people of Annakoppe's animals are dying. They don't have the money to buy lucerne or mealies or whatever is available. My finances are also running very low at the moment. At least the

summer is here and we can start hoping for the rains to come. (Farmer with private ownership, Pella. E-mail, September 2003)

Here, both the shared climate and the contrasting endowments and entitlements are illustrated. In Pella, the endowment is held within a discourse of community ownership, *our land*, within which stock farmers generally assert a right to go where they choose with their stock (Interviews, Pella). The individual command of a part of the land is linked to possessing a stock post or a kraal by the house. Livestock as capital, source of incomes and object of barter and gifts are other entitlements.

Capabilities achieved through farming include the dignity linked to a cherished form of life that in some cases prevents physical capability failures. The *veepos* and *kraal* is a basis for protecting a herd of animals at night but may be a preferred place to live. A young man in Pella spoke of the importance of providing livestock for funerals in the family. An elderly man in Annakoppe whose old *bakkie*, utility vehicle, broke down was put in a dire situation because he needed to see his doctor in Pofadder weekly. Half his goats paid for the repair and he was safe for some time to come (Interview, Pella, November 2002). One relates to others through activities on the land. In Pella and Komaggas many capabilities depend on land.

Several factors shape the endowment–entitlement–capability conversions: the environment, institutions, material constraints, public support, negotiations and discourse (Leach et. al (1999) refer to ‘institutions’ at micro, meso and macro level). Age or poor health may limit a farmer’s ability to reach pastures in the mountains. Farmers have problems with access to markets, water and technology. Such factors are linked with discourse in the construction of land: for example the negative narrative of ‘communal’ farmers probably affects public support for farming in the ‘communal’ areas.

A couple in Pella managed their herd of some 300 goats and made a variable income of around R10 000 annually, their only income, which they used to secure survival and obtain goods (Interview, Pella, October 2002). They worked within sharp constraints of environment and infrastructure and droughts regularly killed many of their goats. They could not reserve any portion of the Pella land for themselves nor significantly affect the prices offered by livestock merchants. They believed that part of the *meent* in which they stayed, Rooipad and Rooiklippe, had insufficient drinking points and had suggested that the municipality address this. One of them always stayed with the goats, so one always had to miss Christmas or Easter in Pella, and none of them ever went to meetings. The husband worked for the *Raad* (the management board) for some years, constructing physical infrastructure, while the wife tended the growing herd, their joint investment and savings. He said they would take their 300 goats into the Pella Mountains for grazing so long as health permitted. Land–endowment–entitlement–capability conversions are precarious and constrained by conditions shaped by past and present power relations.

### 17.3.3 Tourism and minerals collection

Residents and facilitators often reasoned that if there was a problem, it must have a legal cause and solution. The District Municipality controlled the management and benefits from the 4X4 route across Pella land and an ANC leader in Pella suggested that achieving that would require a change in applicable legislation law, which he feared would be at least as cumbersome as Trancraa (TC meetings 2002). A woman member challenged him, saying it was a political task to negotiate. However, it was not evident that there were legal reasons why residents could not participate in running the 4X4 route as they had done a few years earlier.

Small-scale miners collected a scattered resource get an income to support their livelihoods and families. With no legal entitlement they depended on their social and economic entitlement as part of informal networks of miners and traders, a situation which caused activities to be clandestine and incomes unsteady. To give small-scale miners security one would have had to remove such obstacles as a R10 000 environmental deposits for small-scale collection. A young ANC leader in Pella advocated including small-miners into an organisation through the Trancraa process because he saw a development opportunity and perhaps a chance to gain support but it was difficult for Trancraa actors to remove the political constraints.

### 17.3.4 Irrigation development

The way Pella was made into a 'communal', 'poor', 'subsistence-oriented' society has a long history. However, Pella has managed to protect a potentially valuable strip of land along the Gariep or Orange River. The church pioneered irrigation development there in 1905 (Thünemann 1975: 13-14) but the pump broke down in 1930. Wine cultivation was also introduced by the Fathers at Pella. From the 1950s the state and commercial sector were more interested in mining development and labour for that purpose. From the late 1970s the entrepreneurial neighbour and owner Klein-Pella developed impressive date plantations. In the late apartheid period Prime Minister P. W. Botha wanted vineyards along the banks of the Orange River, and again the focus was on the commercial farm at Klein-Pella, which the former owner felt pressurised to sell (Interview, Pofadder, 2002). A quarter century of state-led separate development after 1974 did not take irrigation development inside Pella to the level that the entrepreneurial Fathers had achieved at the beginning of the 20<sup>th</sup> century. However, the 'certificate of occupation' and the power of the church protected the land through many decades.

The case of imagined and thwarted irrigation development along Pella's bank of the Orange River illustrates the constrained conversion of endowments to capabilities. Many factors are involved, including racial discrimination and political exclusion, which are still responsible for weak organisational capacity, lack of trust and inappropriate forms of tenure. The entitlement to water has been affected by the secondary status of Pellanaars as

compared to neighbouring companies and farmers with private property rights. The reason is not that tenure (state trusteeship) did not give security for investments, for the necessary legal arrangements were made when Anglo-American wanted to invest in the pump station/water pipeline in the 1980s so that today it gets water *across* Pella land.

Irrigation development was the major issue debated during Trancraa in Pella, linked to what many respondents mentioned as their main problem: lack of secure jobs and incomes. The SPP connected people with actors who could help them apply for water rights and move plans towards realisation. Three Pel Boerdery and Transformation Committee members pursued their economic interest in exclusive control over land, justified by one of them as intended to 'hold the land in trust for the community' (Personal communication, November 2002 with farmer (m) who had also eloquently elaborated the meaning of land as a human rights issue, section 17.2.3). The SPP, the majority of the Transformation Committee and the ANC prevented a loss of land for the community and the SPP and LRC also produced guidelines to handle other development projects that could involve such risks. This example confirms the argument by Peters (2002b: 56) that in the case of high value lands informal flexibility may be a cloak for the narrow interests of powerful community members at the expense of the majority.

We have some freedom to discursively construct and reconstruct land and one may talk oneself into some forms of property (Rose 1994), for example obtaining public support for one's farming activities through political persuasion. Yet, in this case the Pella Transformation Committee imagined and talked about irrigation development but found it difficult to talk residents into the missing entitlements such as water rights, funding and information. It is one thing to have land, but another to get a 'ploughing certificate', 'water rights' and the technology to convey water onto dry ground. We could, however, not imagine changing such factors without discursive efforts by the SPP, the Transformation Committee, the DLA and others. In a meeting in 2002 a DLA official listed the individuals and procedures in a bureaucratic process of irrigation development, presenting it as open to manipulation by residents. Residents would have to push this discourse to obtain information, water rights, and capital and thus reconstruct power and land. Facilitators and residents created Trancraa through conversations and action, relating the legal framework to land use and diverse claims for *our land*. Sitting in the *Raadsaal* (municipal hall) in the midst of 95 000 hectares of land in Pella, they had to see land and the people on it through conversations, envisaging herders with their stock on the arid land, the water rushing past, and how a few hundred metres further west, on Klein-Pella, water was lifted onto a bank which was under private property, to irrigate the largest date plantation in the southern hemisphere and bright green vineyards stretching across otherwise barren slopes. There land, with its matrix of power, human relations and flows of water and veld, was overwhelmingly constructed around the invention of 'private' versus 'communal'.

### 17.3.5 Capabilities, public obligations and land reform

Nussbaum notes that all citizens should have some property in their own name and that land is often particularly valuable for self-definition, bargaining power and sustenance (Nussbaum 2000: 80). Her concepts alert us to the way health and bodily integrity are linked to access to resources. John M. Alexander (2004) argues that the capability approach strengthens the emphasis on rights in the social and economic sphere, reinforcing a shift away from an exclusive focus on civil and political rights. 'Rights' are well established in political discourse but the capability idea is also close to political concerns about the interests of citizens, as when a young ANC leader in Pella advocated the organisation of small-miners or irrigation development. Residents also explained and justified 'rights to land' mainly in terms of what they could do (cultivate, keep stock, move) or not do (exclusion). When discussing residence, mining and livestock keeping, some referred to ideas of 'thresholds' of minimum achievement. The capability focus may complement a human rights approach where legalism appeared to dominate normative discourse at higher policy levels. The first TC Chair in Pella (farmer, male) argued that their land represents resources that residents want to use them but asked: 'What is the block in the road?' A capability approach may strengthen the focus on problems rather than formal rights or even resource access on their own, land reform must be directed towards the full range of endowment and the social, legal and economic entitlements such as finance, tenure, and market access needed to ensure equality of capabilities.

The capability approach and entitlement analysis is one way among many to link human rights and land tenure while considering constraints and social processes. One may ask whether Trancraa reform and supporting policy measures made connections between human rights and the capabilities and whether it was fruitful to use both these two normative and theoretical perspectives on land use and reform practice. I found facilitators and participants using a pattern of reasoning quite similar to the environmental entitlement framework, for example asking what land users do, and what were the constraints on production and the consequences of tenure choices.

From this perspective it can perhaps be more difficult to justify a rights perspective. Once we see how a resource supports something individuals value, and which it can be argued is of universal value, it may be considered legalistic to turn to the Constitution or human rights to look for reasons to promote it. However, some versions of the capability approach can lead to a balancing of different capabilities that is open to trade-offs: one could for example focus on a strong connection between farming practice and male identity, overlooking a strict requirement about gender equality of opportunity. One could focus on the access to income that farm labourers enjoy, while overlooking the constraints on their economic and political participation that skewed land ownership causes. Sen argues that the capability approach does not exhaust evaluative concerns – rights is another relevant one, –



and that there is no reason to think that one 'homogeneous magnitude' for evaluation is an advantage (Sen 1999: 77). When evoking human rights we focus on commitments that all shall enjoy certain human capabilities such as informed political participation, food, and work under dignified conditions as of right. In many respects, the South African Constitution's integration of civil, political, social, cultural and economic rights also rejects a rights formalism that disregards what citizens are actually able to do. To institutionalise human rights through tenure reform is thus to create the entitlements that enable individuals to convert land endowments into capabilities, some of which are the objects of their human rights (such as adequate food, and gender and racial equality).

My approach expects a causal flow from 'human rights' through legislation into capability enhancing processes, drawing on human rights visions of state-led progress and Amartya Sen's idea of the instrumental role of political rights in development (for example, 1999: 10 and 146–159). These rights are yardsticks of progress as well as causes of other goods. He particularly stresses political freedoms, economic facilities, social opportunities, transparency guarantees and protective security. Secure tenure, too, is both a political freedom of intrinsic value and may contribute to internal solidarity practices and political and economic development. One must look at the empirical impact that rights and measures have on capability expansion and failures (Shanmugaratnam 2001: 268). A political process such as *Trancraa* is potentially important:

The [development] process needs to be democratically governed to promote expansion and avoid failure of capabilities. In this regard, political freedoms make sense as people's entitlements only where the people are actually able (in the sense that they are free and well enough informed) to participate in political decision-making at different levels and to give expression to their economic and other needs. Such participation is a necessary condition for policy-makers to comprehend and conceptualise people's needs in a heterogeneous society and not to take preferences as 'given'. (Shanmugaratnam 2001: 271)

*Trancraa* was a learning process for residents, local politicians and officials in Pella. Issues were brought into the *Raadsaal* and debated; residents wrote letters to the transformation Committee; some went to the Secretary and talked about Nama culture. Study, advocacy and reports could bring resident's concerns to the attention of government. The many small *Trancraa* struggles showed that political and economic rights were closely linked. For example, weak political participation regarding tourism led to an economic loss for the communities. *Trancraa* facilitators succeeded in making preparatory measures for irrigation development and resolved a guest house conflict but made little headway with mining and the 4X4 route. Thus the interaction of land tenure and human rights does not rely on a general mechanism linking civil-political and economic rights, but on concretely worked out connections that can have an effect in the landscape and society in question. However, the *Trancraa* political process in the phase I studied lacked upward communication to the state and downward responsiveness through substantive facilities, such as guarantees of support

for new property-holding organisations. The Transformation Committee and civil society organisations were somewhat alone, or even severely alone, in their efforts to use political freedoms to expand human capabilities. The Act did not articulate what human rights require of a future tenure situation in the Namaqualand Rural Areas, for example with regard to gender equality. However, implementers were able to draw on a history of struggle for democratisation and more land and through meetings, debates and resolutions paid attention to practice. Then connections were made, as very small steps forward in promoting irrigation development. Discourses, agency and institution-making may be central in determining which connections are made or not made between human rights and human capabilities.

## 18. OUR LAND, YOUR LAND: DISCOURSE AND INSTITUTION MAKING

### 18.1 Themes: your land our land

I see two major 'themes' in Trancraa in Namaqualand: the state's offer that 'it is your land' and residents' claims that *it is our land*. I regard these as situation-specific and practice-oriented debates closely linked to decision-making and agency. Through the themes of *your land* and *our land* I explore why the process was so open-ended and heated. The Trancraa process created space for dialogues and agency; Pella residents and committee members got involved and opponents in Komaggas wrecked the process through vigorous protest.

#### 18.1.1 *It is your land*

Without prior redistribution of land, implementers of Trancraa could probably not have made a credible statement that *it is your land*. Residents, beyond the direct beneficiaries, appreciated land redistribution, which indirectly recognised rights beyond the century-old boundaries of the mission stations and later reserves. In Komaggas a few elderly men drew a map of the Komaggas that (they said) was, five times the size of the current Act 9 Area, listing beacons, mountains and other boundary markers. In the 1996 Act 9 consultation in Pella, an elderly farmer asked the SPP presenter whether by 'Pella' he meant the original Kammasfontein of eight springs or the current Pella of only one, Eenfontein. The speaker said the latter. In Pella in 2001, residents mapped land, river, mountains, springs and farms but only introduced the Act 9 boundary when asked (Workshop with residents, Pella, October 2001). Redistribution responded to feelings of marginalisation and to residents' claim to *our land*, recognising that they were concerned not merely with the old (Act 9) land but the remembered Kammasfontein and Komaggas to which redistribution farms belonged. The new farms were also old.

Thus, redistribution responded to an important meaning of *it is our land*. It confirmed that residents' reading could be as valid as that of law. In the past, private property and state trusteeship had material effects, for example in the form of fences. The new terrain challenged the state-enforced map, giving credibility to residents' more elastic map informed by history. The old large Kammasfontein and the large Komaggas once granted by Queen Victoria had been powerless narratives. Now old stories of *our land* combined became discourse which, in the meaning suggested in Chapter 3, has a material dimension. Land, though arid and distant, was wrung from farmers and companies who had also been claiming that 'it is our land'. However, since their agency and choice was decisive, the discourse of ownership and market was also maintained. 'It is good value', said the mining company manager about redistribution. Rights discourse justified the public expenditure and market discourse and market power gave shape to redistribution. Residents did not base their action on their understanding of history and just claims. Whether it expressed their virtue or their

powerlessness they made law-based land reform possible.

However, this merger of rights discourse, market power and the old discourse of *our land* was not institutionalised as a regular and predictable process. The SPP facilitator in Pella in 1996 called the DLA official a 'Father Christmas', who brings gifts rather than restores rights. Furthermore, security of tenure and public support ('aftercare') was missing on new farms. Municipal owners did not have the skills and resources to support new users who had problems with water, supplies and transport. On arid Eyties, Pella, in 2002 a wind-driven water pump had been pumping up water incessantly for many months because the brake had broken and neither the users nor the municipality would fix it. On this sun-scorched farm, where scarcity of water was always a complaint, the overflow trickled away in a stream. In 2000, a right-holder on a 'new farm' with an orange orchard said that when he bought diesel for the water pump he was on his own, but at the time of the first harvest all new right-holders wanted a share in the produce. He wanted the *Raad* to pay for diesel, but it rejected his claim. In 2001 the orange grove died: the discourse of 'owning' did not become the institutionalised practice of sustaining orange trees. So for land-users getting their land back was an important but fragile business.

A moratorium on redistribution after the change of Minister in 1999 was accompanied by an order that land reform should support 'emergent' commercial farmers, not communities and subsistence users (communicated to Pella residents by SPP and DLA in meetings in 2001 and 2002). The Minister wanted to see private ownership, Pella residents were told. According to the new land redistribution programme (LRAD), beneficiaries should have resources only if they became commercial producers: in other words, *it is your land* if ... This meaning is consistent with a discourse by commercial farmer neighbours who said that the land belongs to those who commercialise. Some Pella stock-owners did link human rights to getting a farm but the SPP and residents could not see how this was possible (Interviews, 2001–2). The discourse of new farms as 'stepping stones' (Rohde et. al. 2002), helping emergent farmers onto their own farms, still did not have traction in Namaqualand. In a market-based discourse, policy became concerned with who the individual must *become* to deserve land. The idea of nurturing the 'black emergent farmer' was less rights-based and more teleological and constructivist. The farmer is not a (human) right-holder but a (legal) rights-acquirer.

Trancraa was a statement within theme of *your land*. The *Mail & Guardian* (1998) presented Trancraa under the headline: 'Hanekom to let go of "coloured reserve land"'. Geoff Budlender (then DLA Director-General) explained that the Act was designed to end the 'paternalistic relationship' inherent in the Minister's 'trusteeship'. 'Letting go' could mean that the state recognised a local demand but it could also mean 'laissez-faire', and it changed towards the latter during the process. However, the Act expressed *it is your land* as the right to consultation and protection of land rights. The appealing information leaflet on Trancraa

stressed opportunities and choice. The pinnacle of the offer was the 2002 Newsletters (such as to Pella), which claimed that land would be transferred to the institution of people's choice. The theme of *your land* was expressed in practice by the SPP and LRC (information, consultation, referendum), which recognised residents as right-holders. The SPP was there for the agreed meetings; wrote letters; brought back reports, listened, challenged and advocated: the hard work of implementing a message that *it is your land*.

### 18.1.2 *It is our land*

*It is our land* (*dis ons grond*) was a phrase that recurred in my discussions with residents and around which the Komaggas process and outcome in particular revolved. It was well captured by Oom Grace, elderly Kommagas resident, in 1996 when he said to the official hearing that 'you may not think that it is your land that you are giving to us. *Dis onse grond, it is our land*, which is just coming back to us' (*onse* is a solemn form). A Trancraa supporter talked about the 'tunnel vision that it is our land', by which he meant that it disregarded legal and political realities (Interview, former chair of the Land Committee, Komaggas, November 2001). Komaggas differed from the other areas in that a significant number of informed residents rejected the state's claim to ownership. In other areas, residents generally accepted the legal status but asserted rights of use and governance. In Pella some farmers were uncertain about the legal status of land. The 1996 community consultations indicated that most residents saw it as attractive to get legal recognition and to democratise the governance: *your land* and *our land* matched. However, when I started my work in 2001 residents and leaders appeared uncertain about how tenure reform could further the claim to *our land*. A Pella committee member said the new era demanded that 'we must think for ourselves, it is difficult, we are not used to that' (Group discussion, October 2001).

### *Community differentiation – organising claims to our land*

Studies of natural resource governance have criticised the notion of harmonious, well-coordinated and egalitarian community (Leach et. al 1997). *It is our land* was a diverse message. It asserted rights vis-à-vis outsiders and the state; it could mean equal membership rights; for some it meant claims to larger areas (restitution). Some claims were linked to 'an inclusivist and communalist discourse' found in other communities (James 2000: 144). The claim that *it is our land* exaggerated community agency. Pella farmers claimed that it was their land but they had actually been poorly protected against a growing number of *inkomer* (recent immigrant) workers. Family histories show that a majority of members had left Pella for better opportunities elsewhere, rather than enjoy the meagre fruits of *our land* (household interviews, Pella 2002). Economic strategies were individualistic and family-oriented; solidarity and security appeared to rely on state welfare payments, (scarce) employment and intra-family sharing. With a discourse of a social ownership, residents defended flexible access to land for a minimum of security in a volatile economy but

competition for scarce space, water and vegetation and large differences in herd size affected individual benefits. Many residents mentioned competition between 'big' and 'small' Pella farmers. Residents asserted a tenure principle that, despite a range of individual and family use rights and despite commercialisation, ownership must ultimately lie with the 'community'. Threats could come from within (as the attempt by the three TC members in Pella to get control of potential irrigation land showed) but TC meetings were more about the fear of dispossession and external dominance.

The way the claims to land were organised differed between Pella and Komaggas owing to historical and political differences, but in both places the theme of *our land* included love of land, fear of payment and suspicion of municipalities. And in both there was division between 'us and them', ANC supporters versus those who said they were marginalised or that they were more genuine representatives of the community, like the KIV. In Pella, resistance to the 'economic units programme' in the 1970s (Klinghardt 1982) had not led to a lasting civic organisation. The Democratic Alliance worked differently in Pella from what it did in Komaggas: It challenged the ANC's advocacy of municipal ownership but did not send interdicts or arrange large community meetings to criticise the SPP or the government. It supported no sectarian land claims but visited households and organised them to hold further meetings (Interview, DA leaders, Dec 2002). The victory for the Communal Property Association was probably strengthened by widespread anger about discriminatory public services (a recurrent theme in household interviews).

In Komaggas, a split between the Dutch Reformed and the Calvinist churches affected the tenure reform. In opposition to official policy and the widely feared municipality the KIV turned to the past and the local. Residents talked about Trancraa as a power struggle. Participating in the official tenure reform became less important than winning a struggle about who had the legitimacy to make the claim to *our land* and define what land was included. KIV leaders feared that Trancraa was part of an unnecessary and perhaps exploitative new government structure and saw the restitution claim and a continuation of local practice as better routes to consolidate local land ownership. KIV praised national ANC leaders and stressed their respect for national law but said they were protesting against forces at regional and local level. SPP staff who spent many hours trying to resolve the conflict rejected this (interviews 2001, 2002). Local ANC leaders expressed concern about the lack of progress but the Transformation Committee said: 'What can we do?'

## 18.2 Trancraa and local government

### 18.2.1 New municipalities, new mandates

I now turn to two major participants, municipalities and civil society organisations and explain how they articulated mergers of the themes of *your land* and *our land*. The South African government has emphasised decentralisation of government, for example for the purpose of

promoting human rights: 'It is ... Local Government which will play a critical role in translating Human Rights into a reality for every person. Local Government in its daily interaction with the communities will bear the responsibility for the creation of a Human Rights culture at local level'. (Mandela 1996). From 2001 a demarcation of new administrative boundaries reduced the number of municipalities from 850 to 241 local, 52 district and 6 metropolitan. One aim of this move was to integrate financially viable and non-viable areas (Pieterse 2002: 4). Municipal elections for the new system took place on 5 December 2000.<sup>312</sup> A White Paper on Local Government held that municipalities should play an integrating and coordinating role between public and private investments, democratise development, provide leadership and empower marginalised groups (Department of Constitutional Development 1998), and this Paper has been followed up by legislation.<sup>313</sup> Pieterse finds the policy ambitious, complex and optimistic, informed by discourses of participatory democracy and 'New Public Management'. It emphasises the role of markets in providing social and economic services: 'The persuasive power of this approach is that it promises financial savings through greater efficiency and less political risk because many state responsibilities are shifted to other actors that can potentially be blamed for lack of delivery' (Pieterse 2002:8). Municipalities were under severe pressure because of the difficulties of collecting service fees, rising debts and inadequate funding;<sup>314</sup> macro-economic policy appeared to contradict the policy of state-led transformation through local government (Hart 2002: 7, 43; Bek, Binns, and Nel 2004: 23).

### 18.2.2 Tensions between Trancraa and municipal reform

Trancraa (the Act) emphasised municipal ownership and accountability to residents. Municipal councillors (elected December 2000) played a key role in implementing Trancraa and, although their attitudes and involvement varied, the process revealed some distrust between Rural Area residents and the new municipalities. It was difficult to reform land tenure just at a time when independent Transitional Local Councils became 'wards' in new municipalities headquartered outside the areas. An ANC leader from Concordia stressed the differences between councillors from the Rural Areas and those from outside and the fact that he was appointed to the Transformation Committee both as an *inboorling* (born member of the community) and a councillor:

Many of the municipal members do not have the same feeling for the land as the community because they never had the opportunity to own a piece of land. Therefore it is critical for the people of the Act 9 areas to have someone to manage the land, because the

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<sup>312</sup> In which the ANC won 61%, the Democratic Alliance 20%, the Inkatha Freedom Party 10% /and the United Democratic Movement 3%. (Independent Electoral Commission).

<sup>313</sup> Local Government Municipal Demarcation Act 27 1998, Local Government Municipal Structures Act 117 1998 and Municipal Systems Act 32 of 2000.

<sup>314</sup> The 2004/5 national budget included R13 billion (4%) to local government (Finance24 2004), equal to R290 per capita. However, 92% of municipal budgets were funded through taxes and service fees and these were concentrated in the six metropolitan areas, which represented 60% of the R75 billion spent by municipalities in 2002-3 (Fairshare 2003).

councillors of the old municipal areas do not worry; they are not so interested as we are. (ANC Councillor, Concordia, interview, February 2002)

He said that in Trancraa, 'people are working together very smoothly. A few of them are questioning the whole Act, but it is only a few stupid guys'. He argued that Trancraa was not a party political issue for ANC. The Councillor rejected the claim that the municipality was 'afraid of giving away the land', for management involved many problems:

People are not disciplinary previous land owners because they say 'it is my land' and don't actually do what any councillor or rule says. So, it is a process that we must [\*] teach people how to maintain law and order in the interest of the land. So that, for example, you do not go and overgraze the land and that kind of thing.<sup>315</sup> (ANC Councillor, Concordia, interview, February 2002)

Thus, residents asserted ownership ('it is my land'), violated rules and needed disciplining. Land users' rights were balanced against the interest of the land (*in die belang van die grond*), a key phrase in a discourse of sustainability. The tendency to overlook resistance was reminiscent of the Komaggas situation. Later in 2002 Concordia residents talked about emulating Komaggas and only 14% voted at the referendum in December 2002.

In Goodhouse, Steinkopf, the provincial government and investors were involved in a controversial 'Paprika Project' with external investors, and here residents sided with the municipality in the referendum:

The last 2 weeks in Steinkopf before the referendum were full of drama as the Goodhouse Project crooks got the Land Bank to send a letter saying that if the people did not choose a CPA they would withdraw their millions! The distributed pamphlets, caused chaos in our public meeting etc. It was disgusting! And resulted in the unlikely scenario of us teamed up with Municipality fighting the developers!! (SPP staff, e-mail, January 2003)

In Steinkopf residents voted narrowly in favour of a CPA (1074 votes) against a Municipality (922). Yet at the Goodhouse polling station 'where the project is and where they claim to have the support of the farmers in demanding private ownership' the results were 18 votes for the CPA and 103 for the Municipality (SPP staff, e-mail, 20 January 2003). Thus, in this special situation with a stronger commercial and provincial government involvement, apparently residents turned to the local government for protection. This indirectly supported the arguments of ANC leaders in Pella for municipal control of an irrigation development. The two examples from Concordia and Steinkopf indicate a situational and unstable relationship between residents, civil society and municipality.

After the transition phase, the SPP and LRC argued that 'the act puts the municipality in a very central position in a process where they are an interested party. This was problematic from the word go and should be avoided at all costs in any further tenure reform

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<sup>315</sup> The Councillor switched to Afrikaans at \*: '...om mense te leer hoe om wet en orde te handhaaf, verstaan jy, in die belang van die grond. Dat jy byvoorbeeld nie die grond gaan uit trap nie, en daai soort van ding'.



consultation processes' (SPP/LRC 2003).<sup>316</sup> They elaborated on the factors that had caused tension as illustrated by this quote:

- Previous consultation processes, e.g. demarcation, minerals act etc where strongly held views and written submissions to relevant commissions were apparently ignored. Many residents quoted these examples and said they were no longer prepared to waste their time.
- Loss of own local authorities after demarcation of new municipal boundaries. Previous consultation in 90s [showed] absolute consensus that land should be transferred to local authority.
- Party politics and the handing out of 'favours' and 'punishments' was a very serious deterrent to many.
- In the case of Steinkopf threats by the developers and Land Bank to withdraw funding if residents did not vote for a CPA.
- Large protest vote against arrogant and undemocratic local politicians. (SPP/LRC 2003: 3)

The integration of the Namaqualand Rural Areas into new, larger municipalities was the most commonly cited cause of the difficulties and resistance that Trancraa faced. The emerging local government had just been through the demarcation and centralisation, and was underfunded and therefore depended on raising taxes and fees, including from land users.<sup>317</sup> However, while tenure reform could have been less problematic if the Rural Areas had remained separate governance units, this would have involved risks of isolation. The Trancraa process did give examples of politics with a new geographical integration, a break with the past. In Nama-Khoi Municipality, Springbok, the municipal hall was once a centre of power for a 'white municipality' but now Trancraa *Loods* ('steering') Committee meetings involved elected representatives of former Rural Areas (Komaggas, Steinkopf and Concordia) debating the implementation with DLA and SPP.

*Die ANC mense* (the ANC people) was a phrase used for those who were on good terms with the ruling party, and challenged the notion of citizenship. Discriminatory allocation of public benefits to the supporters of the ruling party (ANC) was a major grievance (see SPP/LRC 2003 comments above; households interviews). In Pella, these complaints related to the allocation of housing subsidies, employment on public work schemes and admission to 'new farms'. A similar case was the building of a new road to Komaggas in late 2002. While the provincial government had stressed gender and poverty alleviation criteria for local employment, local ANC members mobilised around a demand that only party members be employed. They secured the removal of a number of non-party members initially selected for employment (through the intervention of the political leadership of the district municipality). A member (male) argued that this was just because the ANC government was bringing the benefit of the road while another (female) argued that the local ANC party had resolved not

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<sup>316</sup> This was a comment on a draft 'PLAAS Policy Brief' on Trancraa (Wisborg and Rohde 2003).

to practice such discrimination (Interviews October 2002).

The DLA and SPP had aimed to consolidate post-apartheid land reform by creating one tenure system for both 'old' and 'new land'. Two municipalities refused (Khâi-Ma and Nama-Khoi) to let the 'new farms' be part of Trancraa. ANC leaders, in Pella saw this as taking responsibility for land and securing access for the poor. The decision, at least in Pella, was taken in a closed ANC party caucus without informing residents, many of whom ended up voting without knowing which lands were included. In this case the municipality did not take the citizens into their confidence. The exclusion of 'new farms' symbolised that the old 'Act 9 land' was durable, while new farms had an uncertain status. The Pella ANC also reacted negatively against a politically 'undesirable' outcome of the referendum by (presumably temporarily) withholding public support for farmers. Tenure reform could create a clearer demarcation between property rights and public governance. However, in some cases 'patrimonial governance', treating public resources as the property of leaders, prevailed and contributed to the political polarisation that made tenure reform so contentious.

Local government (officials and politicians) took the claims to 'our land' seriously. Officials in the municipalities and district municipality stressed the importance of land, both as an emotional issue and as a potential resource for development; however, administrators often stressed that they did not have the funding and capacity to maintain and develop land, particularly early in the process (Interviews, municipal officers Khâi-Ma and Nama-Khoi, 2001–2). Local political leaders increasingly stressed public responsibility for managing the Areas. After a period of uncertainty, in 2002 ANC politicians decided to advocate municipal ownership. They referred to a need to protect residents against losing land through market transactions, and to protect weak community members (the poor, women and the handicapped) (Interviews, ANC leaders in Pella). One Pella ANC leader said that the municipality *is* the people. Being accountable (and in many cases from the Rural Areas), councillors were concerned to show that that they represented the resident claims. The community claim (*our land*) and government offer (*your land*) was combined in the municipal bid to govern land (sometimes for a ten-year period to develop community capacity). After the political clarification, administrators also placed less emphasis on financial and administrative problems. Trancraa became tenser everywhere after ANC's clear stance in favour of municipal ownership.

Local government leaders combined the market and rights discourse. A municipal administrator (Nama-Khoi, Nov. 2001), who had worked with land management, stressed the need to intervene in community political processes dominated by nepotism and exclusion primarily by large stockowners. He also recommended that one should abandon communal

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<sup>317</sup> For example, the Nama-Khoi Municipality budget 2002–3 gave income and expenditure for the 'farms': for Concordia (R23 000) and Steinkopf (R87 000) they were in balance, while for Komaggas the projected income was R12 000 and expenditure less than R2 000 (budget overview provided by municipal office, Komaggas).

farming practices and promote fewer big farmers (justified by referring to 'overstocking' and 'land degradation'). The official advocated both residents' right of access (for livelihood security) and the need for commercialisation through, for example, irrigation and poultry production. However, with the low level of public support there were tensions between the goals of livelihood protection and commercialisation; there was a contradiction between the rights-based land policy as a state-led transformation (DLA 1997; Mayende 2001: 2) and the poverty of the local state (Pieterse 2002). The ANC at municipal and district level warned communities that if they chose a CPA they would no longer receive public support but be liable to pay property tax. One administrative leader in Nama-Khoi argued that it would be wrong to spend taxpayers' money on any farms, including the Rural Areas, which he thus saw as commercial farms (interview, Dec 2002). A range of political and economic factors created tensions within the local government message to citizens about land. There was a move towards stressing the need for protection and a somewhat paradoxical reassertion of trusteeship.

### 18.3 Civil society organisations

#### 18.3.1 State, missionaries and contemporary civil society

Historically the governance of Namaqualand has relied on civil society actors, missionaries, corporations and farmers. Missionaries provided training, coordination and disciplining that were useful for the state. They communicated local requests for land and autonomy upwards giving voice to those who were otherwise powerless. The appeal by Nama leader Kaptein Witbooy (1851) had been translated and brought from Pella to Cape Town, from periphery to centre, by a missionary, but with no effect. In other cases, missionaries, leaders and the state together made the stations that provided a measure of protection, control and 'development' of, for example, cereal cultivation and viticulture. The revocable 'tickets of occupation' gave the state a source of control over the civil society organisations and their constituency of *burgers* and others. Missionaries instituted various forms of participatory, authoritarian governance with little space for Nama leadership. However, against a state-centric view of land tenure, residents stressed Nama heritage or the claims of early settlers. Surrounding farmers challenged the claims of Komaggas residents to their 'reserve' and to *trekveld*, the open pastures between them (Van Zyl and others 1851). So the Rural Areas were the result of claims and counter-claims which in turn reflected the power relations amongst the state, mining companies, residents, missionaries and farmers. 'Tickets of occupation' were the legal-administrative devices that residents and their helpers succeeded in defending within the political economy of the day.

#### 18.3.2 Making *our land* legible – seeing *for* the state, seeing *like* a state

Today too, tenure reform is an art of the possible rather than a transposition of ideals. The

SPP, committees, LRC and DLA formed a civil and official actor network that had been responsible for land reform over the past decade. Like the 19<sup>th</sup> century missionary organisations, the network facilitated and softened political and market integration. Also like the missionaries, the LRC in particular depended on funding from the 'old' world:<sup>318</sup> both drew on old and new discourses of enlightenment and development. The long-term involvement of the SPP and LRC in the Namaqualand Rural Areas represented a competence and continuity that no donor and few governments could provide.<sup>319</sup> Through intensive networking the Namaqualand land reform actors stayed in tune<sup>320</sup> and gave shape to the offer that *it is your land*. Movement of individuals between organisations and levels created links in the network.<sup>321</sup>

Reconstructing land through tenure reform has a listening and a speaking mode. The listening mode hears and channels claims for land 'upward', making *it is our land* audible and understandable. The SPP and LRC listened to residents in large community gatherings and despite cases of indifference or protest residents found them worth speaking to. One task for facilitators was to channel many conversations into a report and proposal that was true to the politics of six different places and yet convincing to the Minister.

Then there is the speaking mode. The SPP and LRC made sense of land policy by being the messengers, making it concrete, communicating what was possible. Based on listening, they could also speak to the state and perhaps give the local discourse of *our land* political traction. Through Trancraa consultations and workshopping SPP produced minutes and resolutions, for example on tourism (the 4X4 route) and the Bill on Minerals and Petroleum Resources 2002. Producing text, later epitomised by the 2003 reports on Trancraa, made the heterogenous *it is our land* claim *legible* to the state, although in my view it was not a distant and reductionist reading in the sense criticised by James Scott (1998). However, as in the case of Kaptein Witbooy's 1851 letter, they could also have conveyed messages to deaf ears, as I will suggest regarding a quest for public support.

Through listening and speaking, ways of seeing and forms of action were produced. The SPP and LRC also consulted and drafted land use regulations before handing them to municipalities for formal adoption and announcement. Here civil society organisations were not only seeing *for* the state but seeing and acting *like* a state. This was part of the interactive creativity characteristic of land reform in Namaqualand, weaving together government and civil society to create a complex set of relations where the responsibility for

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<sup>318</sup> In the financial year ending March 2001 international donations made about R22 million, 95% of the operating budget (LRC 2002a: 18-19. Fundraising Report).

<sup>319</sup> For example, the same SPP staff member was in Pella at the 1996 Act 9 hearings and the 2002 referendum.

<sup>320</sup> With modern technology, sending draft land use regulations between portable PCs and wireless networks. Trancraa could not have been carried out as it was without PCs and cell phones, the latter also used by residents to get members to TC meetings.

rights, and for continuity and change, is lodged.

### 18.3.3 LRC 2002: a new social contract or an opportunity for the state to bail out

Contrasts in the meaning of Trancraa's offer that *it is your land* were well captured by LRC lawyers. As noted in Chapter 8, Henk Smith called Trancraa 'a new social contract' for the Rural Areas residents: 'a slow and uneven movement away from a permit-based system to a system where there can be agreements to a broader kind of social contract with the rest of the community' (Henk Smith, LRC Workshop at PLAAS, April 2002). Trancraa could also take forward an old 'individualisation theme' and the history of 'betterment' and 'economic units' in the 1960s and 70s but he expected that 'Trancraa, with the social agreement in the communities, could end up being a better betterment scheme'. The process was, however, more 'open' than anticipated:

It looks like this social contract, this once-off moment of a negotiated agreement, is going to provide for longer-term places, institutions, institutional arrangements, where the rights-definition issues and management issues will continue, and it must happen in the various management institutions, ranging from the Meent Committees, the Transformation Committees. It will also have to be managed through ownership institutions. Trancraa provides for community ownership represented by the municipality or represented by a Communal Property Association or other community institution. That's probably where the big challenge lies, in how these institutions are going to continue to be a place where rules can be made and changed, and where certainty, or defining rights with more certainty, can be given. Trancraa was written in a relatively open-ended way and I don't think that the process of transformation was meant to be kind of open-ended or allow for that kind of flexibility of ongoing rights, but it looks like that's how it is going to be. (Henk Smith, Legal Resources Centre, presentation, Workshop at PLAAS, University of the Western Cape, 22 April 2002)

The non-prescriptive reform allowed space for community choice but raised a risk that creating 'rights' and 'certainty' would become the responsibility of the community rather than the subject of state guarantees. Both LRC lawyers stressed the vulnerability of member rights without state backing. Smith argued that 'Trancraa does not attempt, and does not begin to address appropriately, the institutional aspect of transformation ... institutions as more than just the system of rules [and] does not begin to address the administration issues once rights have been defined'. Kobus Pienaar suggested that the state could withdraw:

As the Act stands here, if just implemented as it is, it creates the opportunity for the state simply to bail out, to hand the land over and say to the group, '*You are on your own now*', very similar, as Henk points out, to the CPA set of arrangements, that the group then takes ownership, and what happens to the balancing of individual rights, how does the community and members have a say, how are the rights protected and given content in different sets of tenure arrangements and configurations? (Kobus Pienaar, LRC, Workshop at PLAAS, April 2002)

The phrase 'if just implemented as it is' captures the ambiguity of legal practice: a literal reading of Trancraa ('as it is') is seen as unfortunate because of the risk of state withdrawal.

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<sup>321</sup> A former SPP staff member became a member of parliament, and a Namaqualand researcher

Yet the Act does not have to be 'implemented as it is' but rather in a transformative practice. Thus, according to well-informed observer-participants, Trancraa could be 'a social contract', a 'better betterment' or 'an opportunity for the state simply to bail out'. That neatly captured the openness of law and of the offer or threat that *it is your land*.

#### 18.3.4 Civil society organisations: *It is your land?*

In Trancraa civil society organisations (the SPP and LRC) engaged in a complex politics of rights-making, which had many different dimensions. (1) The long-standing political role in land reform advocacy included a role in law drafting. (2) With Trancraa the SPP also found itself in the ambiguous position of working on contract 'for' the state in implementing a legal reform. The ideal of law-based governance combined with the 'service-provider' role can be 'de-politicising'. Civil society can also function as an 'anti-politics machine' (Ferguson 1994; Manji 1998). (3) The new municipal structure involved greater distance and tension between communities and local government who, as one SPP staff said, always watched and sometimes accused the SPP of siding with the other. (4) In Trancraa the SPP and LRC advocated the rights of residents, for example vis-à-vis the District municipality regarding tourism and vis-à-vis the state regarding minerals. This role increased particularly in connection with the 'Paprika Project' in Goodhouse, which SPP staff said took much of their time. The role was indirectly affected by national level changes in relations between civil society and the state which became more tense up to and during the time of my field research, for example around the forming of the Landless People's movement in 2001 and demonstrations in connection with the World Summit on Sustainable Development in 2002. The SPP got unexplained calls and visits by the Security Police in 2002. A staff member said: 'Who would have thought in 1994 that in 2002 land NGOs would be harassed by the Security Police?'

#### 18.3.5 The 2003 Trancraa reports to government

In 1999 the organisations in the Namaqualand network had proposed a set of amendments to Trancraa (LRC and SPP 1999). The motivation said '[t]he biggest flaw of the Act currently is that no provision is made for what happens after the transfer [has] occurred – this should be addressed as part of the terms and conditions that need to be met – currently the emphasis is merely on rules and not on institutions'. Although this critique lived on in the network (and contributed to my thinking), it was not institutionalised but remained merely a good idea). During Trancraa efforts aimed to give traction to a discourse of rights, Trancraa implementers formulated 'rules' to construct an institution of secure tenure. As they rediscovered the inadequacy of rules, they responded with more rules, for example in the Trancraa reports from 2003.

In 2003, after the 24-month transition phase was over, the SPP (officially) and the

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joined the DLA and was in charge of the formulation of Trancraa.

LRC reported to the government on Trancraa. The SPP presented a draft report in Springbok in May 2003 and was reportedly 'given a very rough ride for wanting to recommend the municipal option to the Minister in spite of the numerous votes in favour of CPAs' and forced to reconsider (R. Rohde, personal communication using another researcher as source, May 2003). In the revised final reports, submitted by September 2003, the 'Facilitator' presented a rich documentation, evaluated the process and made recommendations to the Minister to support her further deliberations and decisions.<sup>322</sup> The Steinkopf report played down the significance of the referendum. 'The results of the process were not really clear and significant with regard to the choice of entity for the ownership, management and control' and 'at least half of the community may become unhappy with the recommendation, regardless of the final choice'. Instead the authors explained criteria and reasons for taking a decision (SPP 2003: page i, Points a and c). The SPP reminded the Minister that the referenda were advisory and that she was not bound to follow them, although she 'should take the referendum result into consideration as a central factor' (SPP 2003: iii). The report stressed that the Minister must be convinced that the 'regulations/legislation or rules applicable to the entity of her choice makes adequate provision [*voldoende voorsiening*] for a balance and security of rights':

Thus, it is not only the rules of legislation that in a legal technical manner must be evaluated against the principles in article 3(2), but the rules of legislation must be practically implementable and the implementation must guarantee land tenure security in the long term. Land tenure security of the community and the individual users is thus really not an end goal in itself [*egter nie 'n einddoel op sigself nie*] but a means to economic and social welfare. (SPP 2003: ii)

Therefore, the authors explain, their recommendations deal not only with the rules prepared during the process but also measures regarding infrastructure, resources and future government. The Minister 'cannot just make a decision, for it must comply with the law, applicable government policy and the practical sustainability of the decision' (SPP 2003: ii). Then follow the main clauses of the recommendations, which one may regard as an authoritative evaluation of the Trancraa phase 2001–2 by key actors:

The Facilitator is, based on the evaluation, of the view that, whether the land goes to the municipality or a CPA, the transfer must be subject to the fulfilment of a number of conditions. *The main recommendation is that, regardless of the ownership, lasting administrative support for the benefit of the community must be made available.*

The Facilitator has, since the beginning of the first series of workshop, come to hold the view that the mere overview of 'advantages and disadvantages' of a CPA or a municipality cannot determine the relative weight of advantages versus disadvantages. The Facilitator has perceived that it was necessary to discuss the suitability of a CPA or a municipality not so much with respect to ownership but rather with respect to the options for land management for different types of land uses and the administration of different sets of land use rights. With the finalisation of the report, the Facilitator came to the realisation that the decisive factor [*deuslaggewend aspek*] was not the choice of entity, but rather the

<sup>322</sup> Reports were forwarded to the Minister and presented to communities and municipalities for orientation. I have used the Steinkopf report (SPP 2003), avoiding the one on Pella during write-up.

degree to which the conditions are going to be fulfilled.

*Consequently, the Facilitator does not recommend one or the other option, but recommends that in the light of Act 94, the Constitution and the law and in view of the goals of land reform, the transfer must comply with the conditions stipulated below, in the case the Minister decides to transfer the land to a CPA or in the case the Minister decides to transfer it to the municipality. (SPP 2003: ii-iii. Emphasis in original)*

Thus, here the SPP and LRC appear to play down the consultation but state a critical conclusion that none of the ownership alternatives are viable without state commitments.

The SPP and LRC reaffirmed the role of spokesperson and concerned advisor of government. Facilitators followed up earlier critiques and tried to achieve what they had missed during the formulation of the Act, the rejected 1999 amendments, and the 2001–2 process: public guarantees that were needed to institutionalise tenure security and support development. The follow-up relied on the formulation of rules or conditions for a transfer to either a CPA or a municipality. In the case of *transfer to a CPA*, the facilitator recommended that (1) the municipality must enter into an agreement with the CPA according to which the municipality will control and manage use rights in terms of municipal regulations and service delivery contracts with the Meent Committee and so on; (2) the Municipality and Meent Committee should apply to the government (DLA) for funding for planning, capacity-building, development and management of infrastructure; and (3) parties must make a CPA Constitution and regulations to protect individual and community rights and special title deed conditions so that land may only be alienated after considering members' rights. The SPP (2003: iv) concluded that they could only recommend a transfer of land if these conditions were fulfilled, if the municipality has accepted the rules and the Minister is prepared to provide support.

In the case of *transfer to a municipality* the major recommended conditions were that (1) the same rules must be followed, except that the residents should form a Residents' Association (*inwoners vereniging*) instead of a CPA; (2) rights and community interests must be written into the constitution of the Association, as in a CPA constitution; and (3) the association shall represent the residents, shall be consulted about development according to section 4 (of Trancraa) and shall receive support for capacity development. The SPP and LRC noted that Article 3(1)(c) giving residents 'reasonable preference in decisions about access to land' had caused sharp reactions and fear that non-residents could gain access to land. 'Such action would violate the principles and rules of the community and the title of born members' [*die beginsels van boorlingtitel*]. The final words of the summary evoked the politics of a history of imagining and abandoning tenure reform, realistically situating land tenure within the political relationship between government and citizen:

In the history of the Namaqualand Rural Areas new legislation and new institutions have time and again hesitated to make a new dispensation to amend the relations with and among land users. History shows that this cannot happen without a necessary readiness and allocation of resources on the part of the role players. The impact of the transformation process will in the long term depend on the capacity and political will of the role players.



The challenge of creating a robust land tenure system to support economic development depends just as much on the legal framework as on the sustained implementation action and implementation capacity of the role players [*net soveel afhanklik van die regsraamwerk as die volgehoue implementeringsaksies en implementeringskapasiteit van die rolspelers*]. (SPP 2003: v)

From its point in the network, the 'Facilitator[s]' tried to stipulate conditions, tried to wring institutions out of discourse or make rights real and promote tenure security and the land reform goals that Trancraa did not mention. The report represented an ambiguous re-politicisation and return to the struggle that had been sidelined in the transition phase. It held that factors other than rules matter: political will, allocation of resources, capacity and relations among actors. However, re-politicisation only reached a certain point, namely formulating higher level rules that the Minister ought follow if and when transferring land. Authors did not reassert fundamental rights guaranteed by the Constitution but mobilised the available legal and political resources in Trancraa and the CPA Act, in a new attempt to bake the slim legal rights of Trancraa into a larger pie of responsive public power. Facilitators were nevertheless addressing key elements in a tenure reform that seeks to create institutional mechanisms between human rights and land-related human capabilities.

#### 18.4 'Transformation', what 'transformation'?

##### 18.4.1 New laws and underlying hierarchies of power

Tenure reform ought not to be separated from the power relations and practices of the divided landscape. One can start from the existing land construct and see how rights can be changed within it, or start with human and constitutional rights and see what changes they require. Trancraa did the first although in Namaqualand it is difficult to see how the state and individuals can fulfil their human rights and obligations within the current distribution of power and resources. Johan van der Walt has argued:

The main question is whether the land reform programme succeeds in breaking away from or undermining the hierarchies of power that were inherent in traditional common-law property relationships and, particularly, in the politically sanctioned and statutorily entrenched system of apartheid land law. ... Land reform is only partially successful in this regard, since many of the new laws still uphold or entrench the underlying hierarchies of power that characterized apartheid land law. (Van der Walt 1999: Abstract) (I used an unpublished version)

'Transformation of Certain Rural Areas Act' implies that tenure reform should 'transform' places by changing them and integrating them into the wider society. Land reform as 'systematic transformation' was expressed, among others, in the RDP from 1994, the 1997 White Paper and by the Director-General of the DLA (Mayende 2001: 2). The 'Namaqualand land reform network' had made progress towards that goal in the first eight years after the political revolution. However, Trancraa dealt only with the state-claimed land defined through the past and was geared to the internal distribution and protection of rights rather than to

extending transformative land reform, for example by securing the tenure on 'new farms' or providing development support. *Trancraa* – the Act – reproduced a classical division of civil-political from economic rights rather than a 'transformative constitutionalism' (Klare 1998). *Trancraa* – the process – transcended the Act through the efforts by residents and facilitators to promote land rights protection and development but it remained limited with regard to (i) the exclusion of the new farms and state farms from the process; (ii) limited state attention to entitlements such as water rights and small-scale mining permits; (iii) vague tenure options due to uncertainty of public support; (iv) lack of confrontation between right-holders and the state as landowner and holder of public resources and power.<sup>323</sup> The *Trancraa* process did not point firmly towards any secure alternatives to the status quo. Residents rejected the privatisation option (which got less than one percent of the votes in the referenda), because of lack of land and their concerns about justice; municipal ownership appeared more like a decentralisation of state functions and community ownership through a CPA appeared uncertain: they were 'six of one and half a dozen of the other' (LRC 2002c). So, during the time of my study, *Trancraa* did not appear part of a directed transformation of society in Namaqualand to a situation where citizens have obtained redress for the effects of past discrimination and enjoy conditions of equal access to and secure tenure of land (Constitution, Chapter 2, Bill of Rights, 25.5–6).

#### 18.4.2 Policy discourse and neoliberal negotiation

Issues, events and things can be 'framed' within a variety of discourses, and there may be a struggle over which discourse will dominate (Neumann 2001: 178). I suggest that actors have framed land tenure within three major policy discourses: 'authoritarian governance', 'rights-based reconstruction', and 'markets' (as reflected in the development and debate over land policy (Chapters 7 and 8). First was the modern discourse of authoritarian state governance where land tenure was integral to the construction of a separate community. Secondly, actors used rights discourses created during the past anti-apartheid struggles, post-1994 land policy and continued civil society advocacy to challenge market discourse as the main alternative to authoritarian state governance. Thirdly, discourses of competition and market integration have challenged the system of state-controlled 'communal' tenure since at least the time of Mellvill (1890). The White Paper on Land Reform (1991) advocated market-based integration. Neoliberal economic policy challenges practices of public responsibility for social and economic rights (Stiglitz 2002; Pieterse 2003).<sup>324</sup> Chapter 6 noted a contradiction

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<sup>323</sup> Further symbolised by the state's slow attention to procedural steps (such as the appointment of the SPP as facilitator in October 2002, ten months into the expected 18-month transition phase).

<sup>324</sup> This is an adequate characterisation of the phenomenon: 'The process of economic globalisation has come to be driven by the political ideology of neo-liberalism, which is in turn founded on capitalist premises of liberal consumerism, market flexibility, corporate autonomy and optimal competition. Through economic globalisation, neo-liberal culture impacts on domestic legal systems and prescribes a particular attitude towards the protection of civil liberties, the regulation of internal markets, state control over public enterprises and state-sponsored public "welfare" spending' (Pieterse 2003: 4).

between the negotiated Constitution and the 'non-negotiable' macro-economic policy GEAR both from 1996 (Marais 2001: 162). A discourse of market-based development remains central in land policy. Trancraa showed the state oscillating between rights discourse at high policy level and a practice more informed by market discourse and cost-saving. A South African researcher commented that 'communal land is no longer core business in the corporate model of governance' adopted by the South African state (Steve Robins, personal communication, December 2002). The state had limited material incentive to promote secure tenure in Namaqualand Rural Areas. It could save money by limiting its responsibilities for infrastructure and management, although the SPP reported that public funding had already been phased out from 1997.<sup>325</sup> DLA officials did not articulate a neoliberal policy regarding land tenure,<sup>326</sup> and during Trancraa only a few local government leaders did. The policy was rather communicated through limited public support for land development and for the implementation of Trancraa.<sup>327</sup> 'There is no money' or 'everything must be paid for' were commonly heard phrases. The neoliberal was present as a silence about public responsibility. State contributions to the extensively debated future options remained obscure. Asked about the 'uncertainty' of future institutional support for a new landowner, in April 2002 SPP's main facilitator in Pella replied: 'That is the only thing that *is* for certain: There is *not* going to be any support.'<sup>328</sup> That became a turning point in my understanding of Trancraa from 'handing over land' to 'bailing out'.

Trancraa was a tension-ridden tango between civil society and the state. The SPP and LRC were also instrumental in maintaining a discourse of 'rights', 'choice' and locally generated change that appeared increasingly illusory under neoliberal public poverty. It could be seen as a 'democratisation of disempowerment' (Aké 1995), a process without substantive change with regard to economic capacity or livelihood security. Thus it illustrates a controversial role of civil society organisations under neoliberal economic policies and decentralisation. In a different context this stark assessment was made:

NGOs give the impression that they are filling the vacuum created by a retreating state. And they are, but in a materially inconsequential way. Their real contribution is that they defuse political anger and dole out as aid or benevolence what people ought to have by right. ... NGOs have become a sort of buffer between the *sarkar* [state] and the *public*. Between Empire and its subjects. They have become the arbitrators, the interpreters, the facilitators of the discourse. They play out the role of the 'reasonable man' in an unfair, unreasonable

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<sup>325</sup> 'The more the amount of state support for maintenance and administration of the land used by the Act 9 communities went down, the more the management has regressed' (SPP 2003: 8, 27).

<sup>326</sup> On the contrary, government officials described tenure reform as integral to a major socio-economic transformation based on public support (Mayende 2001: 2).

<sup>327</sup> I estimated that the Trancraa consultation in 2001-2002 cost R3 million or R100 per resident, or about R0.25 per hectare (about 0.25% of the value it was traded at in land redistribution). For comparison, the R1.6 million public investment in refurbishment of a guest house in Pella was about R400 per resident of Pella.

<sup>328</sup> The gap between state commitments and individual rights put pressure on implementers. I think it was not accidental that two central implementers left their jobs for respectively the SPP and the DLA after seeing the Trancraa consultation through to the end. The SPP facilitator quoted above said that she had lost faith in collective projects and believed one should try to help individuals.

war. (Roy 2004: 43)

Such a critique is relevant but inaccurate and exaggerated regarding the Namaqualand land reform network during Trancraa. Civil society organisations worked on a basis of long involvement, were not driven by shifting and external donor priorities and contributed to a new governance regime with due respect for democratic local government. Civil society organisations put the offer *it is your land* into practice and brought the Act into a collective debate and awareness, a basic condition of democratic change. Yet, the larger 'war' may be unfair and unreasonable. It was not clear that substantive change was within reach. A strong reliance on non-state actors can be consistent with the 'neoliberal construction of the social' documented in natural resource management elsewhere (Higgins and Lockie 2002, considering land management in Australia).

Powelson (1988: x) holds that land reform cannot become abusive 'where there is no "reformer" and where land reform occurs instead by negotiation among the many parties concerned'. The role of negotiability in tenure practice remains central in academic debate (e.g. Cousins 2002; Peters 2002b). Trancraa does in some respects 'legislate negotiability', because it is flexible about process and tenure options. It guides a transition, where the Transformation Committee could be a temporary arena for community, NGO, state, political leaders and enterprising individuals to negotiate rights. However, the process brought out a contradiction in Powelson's attractive idea: in practice 'no reformer', the weak presence of the state in the process, rather appeared to imply 'no negotiation' or insubstantial negotiation. The mandate of the Trancraa Committees was limited – to consult, study and report – so the committees became arenas for debate rather than negotiation: the central state was largely absent, as were the holders of private land and capital. The idea of a new 'social contract' was not, in my view, achieved in this stage of Trancraa, although the 2003 Trancraa reports did suggest rules for the relationship between government and a future owner (18.3.5). Rights are power relations, but neither local government nor civil society actors were in a position to negotiate new rights. In Trancraa there was a contradiction between the central state's minimalist *it is your land*, which meant tenure reform as a procedure for state withdrawal, and the residents' *it is our land*, which was a claim for redistribution, development support and justice.

*2001, 2002, 2003, 2004, 2005...*

Tenure reform in the late apartheid era involved limited consultation and considerable action; in the democratic era (1995–2005) tenure reform involved much consultation and limited action. By 2005, at the time of writing, the government had not yet taken steps to transfer land and neither had it opted for a public relations stunt of 'transferring' large areas of land and getting rid of a responsibility. This delay may represent concern that any transfer should be well planned and consistent with the action eventually taken in the 'former homelands'

under the Communal Land Rights Act (CLRA) 2004, or it may represent lack of concern. The DLA writes in its Strategic Plan 2005–2010 that land affected by Trancraa will be transferred ‘should the Minister endorse the recommendations from the communities’ (DLA 2005: 24). So the message is changed from *it is your land* to *it may be your land*, one day. Realising land-related human rights through legal reform takes time: assuming that land is transferred to Namaqualand communities or municipalities in 2006 it will have taken about 12 years from the introduction of democracy for the tenure reform to take effect: two years to discuss (1995–6), two years to consult and draft (1997–8), two years to put in place other local government reforms (1999–00), two years to inform, plan and determine residents’ preferences (2001–2) and a year (2003) to document, analyse and report these, and two years (2004–05) for the state to deliberate and decide. Yet, it may still be a *fast track approach*, as Henk Smith said in 2002, compared to tenure reform progress in other parts of South Africa and elsewhere in the world.



## 19. SEEING THE TRANCRAA CASE IN CONTEXT

### 19.1 Communal Land Rights Act 2004 and human rights

#### 19.1.1 The Communal Land Rights Bills 2002 and 2003

'Divide and rule was a central colonial and apartheid strategy, and the fragmentation into different categories of state-held, 'communal' lands was key to it. In the 'post-apartheid' era, communal land tenure reform continued to be structured according to this principle. Therefore Trancraa, which I see as central to understanding shifts and tensions in the commitment to human rights that affect land tenure, was indeed another story about 'certain rural areas'. I cautiously place Trancraa within the context of tenure reform policy for the major state-claimed lands, the 'former homelands/Bantustans' where actors brought human rights to the fore of the debate.

A draft Land Rights Bill was shelved by the Minister of Agriculture, and drafting of a new bill set in motion. Tenure reform was debated at the National Land Tenure Conference in 2001 (Chapter 8). Here, the emphasis on the role of 'traditional African communities' and their leadership institutions figured prominently (for example in the intervention by P. Holomisa). In October 2002 a Communal Land Rights Bill (CLRB) was made public (RSA 2002). The CLRB had a very wide scope, aiming to provide for 'an enabling legal environment for communities or individual households or individual families or individual persons to obtain legally secure tenure'; protect against deprivation of land rights; transfer of communal land to communities; awarding of redress; legal recognition of 'customary and other communal land tenure systems'; 'further democratisation and support in respect of the functioning of the institution of traditional leadership and other community-based institutions or structures which administer communal land'; land rights investigations, and so on. The CLRB was characterised by tensions between different rights discourses. The Preamble stressed 'the institution of traditional leadership' which 'played an important role in channelling the resistance to colonial dispossession of land and upholding the dignity and cohesion of the African people and in retaining access to parts of their land'. Therefore, 'traditional leadership institutions and other community-based institutions should continue to play a meaningful and key role in the administration of communal land subject to the provisions of this Act and any other applicable law' (RSA 2002: Preamble). On the other hand, it also stated that the 'inherited system of land administration and natural resource management in these areas is derived from past racially discriminatory laws and practices' and that 'some existing systems of land tenure rights violate fundamental human rights guaranteed in the Constitution, in particular, the rights of women to benefit equally from the land and to participate in all democratic decision-making processes' (RSA 2002: Preamble). It argued that the Communal Land Rights Act, Act 11 of 2004 (CLRA) should provide for the

protection of human rights 'especially gender equality in respect of the ownership, allocation, use of, or access to land', and the right to choose a tenure system, community rules and administrative structures and to participate in decision-making. A provision banned unfair discrimination by a customary or communal tenure system (Chapter II, Section 2.h).

The 2002 Bill emphasised the transfer of title deeds to communities through an intricate process (Claassens 2003: 2) described in 19 sub-sections. These stipulated that when the DLA approves and registers rules, the community could become a 'juristic person' that can acquire rights and obligations and transact with property (Section 4). Members were entitled to security of tenure (Section 5.1 and 6.1), non-discrimination (Section 7.2) and consultation, majority decision-making and free expression of views (Section 7.3). Community rules should respect equality, fair access to the property, and accountability and transparency (Section 31). After the approval of rules, a community could appoint an 'administrative structure' to represent it in the governance of land tenure. Here, up to 25% of the members could be 'traditional leaders', but would have no veto powers (Section 33.1–2). The administrative structure would have the powers to manage land, allocate land to households and individuals, register the communal land in the name of the community and the holders of rights, and further aspects of leading the controlling and changing the tenure system. The Minister could establish Land Rights Boards (Chapter VIII) consisting of government, community and traditional leader representatives to advise the Minister on land tenure and related matters. The Minister should provide 'comparable redress' in the form of land, development assistance or services to communities or households whose tenure rights could not be made legally secure (Chapter IV, Section 9). Major state duties were thus to oversee the implementation of the Act, provide resources for land tenure awards, support administrative structures and facilitate access to the court system (Chapter IX).

Aninka Claassens (2003) argues that the Bill could entrench past discrimination and worsen the position of women because converting existing permits, generally in the name of men, to titles could weaken the rights of other household members. The ban on discriminatory rules and practices would not apply if community rules simply avoided the issue of gender. She argues that measures to protect and assert women's land rights should include minimum representation on administrative structures and the right to attend and speak at community meetings while the lack of accessible mechanisms for continued support and enforcement of rights could harm vulnerable groups (Claassens 2003: 8-9). Claassens also points out that at a rate of a hundred transfers per year it would take two hundred years for the Department of Land Affairs to complete the transfers to an estimated 20 000 rural communities who would meanwhile continue to live in 'the current land administration limbo'.

The Land Rights Bill 2002 led to renewed public debates, including protests from 'traditional leaders' who were angered by the limited participation they had been allowed in administrative structures (Moore and Deane 2003). The DLA arranged 50 consultation



workshops during 2002 and 2003, apparently primarily with organisations of 'traditional leaders' but also some national departments and communities (DLA 2003a: 4-6).

In October 2003 the Cabinet adopted a changed version of the CLRB (RSA 2003a; Oxfam 2003). The 'Preamble' from the 2002 version had been removed, so this Bill no longer referred to human rights, although a new memorandum on the objectives of the Bill referred to the 'imbalance in the enjoyment of the fundamental human and constitutional rights' caused by past laws and practices (DLA 2003a: 1). Late changes ahead of and during the treatment by the Cabinet gave a central role to 'traditional councils' proposed under a bill regarding traditional leaders (passed into law as the Traditional Leadership and Governance Framework Act, Act 41 of 2003, TLGFA). A civil society comment held that 'chiefs are given unprecedented powers over communal land' (Oxfam 2003). Heinz Klug, legal scholar and former chair of ANC's land committee, said that 'women won the struggle about the Constitution, now the chiefs have won the struggle about the land' (Personal communication, December 2003). According to the CLRB, land governance must be performed by an 'administration committee' (Section 22). The 'land administration committees' must have women members (Sections 23.3 and 27.d.i). A 'land administration committee' may not include persons holding traditional leadership positions and at least one third of the members must be women. However, the CLRB removed community choice in cases where the TLGFA applied.<sup>329</sup> Here 'traditional local councils' shall govern land. 'Traditional councils' must have 40% elected members while 60% 'must comprise traditional leaders and members of the traditional community selected by the principal traditional leaders concerned in terms of custom'. One third of the members must be women (Section 25.3). The state would finance the restoration of local leadership institutions.<sup>330</sup> According to the TLGFA, 'a community may address leaders according to tradition but this does not confer any status, role or function other than that conferred by law' (Section 8.3.). Thus legislation claims to be the source of the power and legitimacy of 'traditional leaders'. The TLGFA holds that 'The state must respect, protect and promote the institution of traditional leadership in accordance with the dictates of democracy in South Africa' and provides that leadership institutions must be transformed in harmony with the Bill of Rights, 'so that gender equality may be progressively realised'. There is thus an interesting use and change of typical human rights terminology. Problematic aspects appear to be that it is an 'institution' that is to be respected, protected and promoted and that the right to non-discrimination is made subject to progressive realisation. Presenting and defending the Bill, a minister stressed that it showed that 'ours is a society which is in a state of flux and change' and that it pursues 'the two interrelated

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<sup>329</sup> That is, in cases where a Premier of a province has recognised a 'traditional community' in consultation with the provincial house of traditional leaders, the community and, if applicable, a king or queen under whose authority the community falls.

objectives of transforming the institution of traditional leadership and to prompt it to place the existential needs of the people at the centre of concern' (Mufamadi 2003).

#### 19.1.2 Advocating human rights in land tenure reform

The 2003 CLRБ adopted by the Cabinet was debated in submissions and hearings in November 2003. Nineteen submissions to the Portfolio Committee for Land and Agriculture included eight from communities, two from women's land rights groups, three from land NGOs, and others from the Programme for Land and Agrarian Studies (PLAAS) and the National Land Committee (RSA 2003a; PLAAS/NLC 2003; Commission on Gender Equality 2003; Waal 2003). Legal opinions for the Legal Resources Centre (LRC) and the South African Human Rights Commission (drafted by Gilbert Marcus) and for the Commission for Gender Equality (drafted by Geoff Budlender) regarded the CLRБ as possibly inconsistent with the Constitution, which is the major normative reference, although the submission from the Commission on Gender Equality (CGE) also refers to international law (CESCR, CPR and CEDAW 2.7). Major issues raised by the submissions were the lack of clear definition of rights to tenure security, failure to protect and promote women's rights, extensive reliance on ministerial discretion and neglect of the right to tenure redress. The LRC submission argued that the Bill failed to give effect to the constitutional right to secure tenure, to determine the extent of the right and to give constitutionally consistent guidance to decision-makers, officials with delegated power: '[T]he Bill is in the first instance inconsistent with the Constitution because it seeks to transform a constitutionally guaranteed right into a discretionary benefit, the granting of which is entirely subject to Ministerial discretion' (LRC/SAHRC: 2003: 9).

The submission by the CGE found that the Bill saw land rights as deriving from discriminatory customary or statutory law rather than actual occupation and use (Commission on Gender Equality 2003: 10) and that allocation to women on equal terms was discretionary and without criteria. The CGE did not support the composition and powers of traditional councils in land administration (Commission on Gender Equality 2003: 16) and found it likely that the Bill would entrench and aggravate inequality between women and men with regard to land rights (Commission on Gender Equality 2003: 15). The submission added that the Bill did not address 'the double discrimination which African women suffer', that they have a constitutional right to tenure which is legally secure but 'it appears that the Bill does not provide African women with legally secure tenure or comparable redress' (Commission on Gender Equality 2003: 30-31).

The PLAAS/NLC (2003) submission asserted that 'traditional councils' would be imposed upon rural people who would have no say in decisions about land rights, which

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<sup>330</sup> Envisaged at R33 million per year for establishing Local Houses of Traditional Leaders (not including running costs), R9 million per year for a Commission on Traditional Leadership Disputes and Claims and R61 million for the payment of salaries to an increased number of headmen (RSA 2003b).

could lead to abuse by leaders through the appropriation of community assets, arbitrary restrictions or eviction of members. The power of traditional authorities to allocate land was strengthened and the ban on discrimination in Section 7.2 of the 2002 Bill was removed. A land administration committee had the responsibility for ensuring that 'the allocation ... of new order rights to persons, including women, the disabled and the youth [is] in accordance with the law' (Section 24.3.a.1). PLAAS/NLC claimed that 'nowhere does the Bill provide that women must be allocated land on the same basis as men' (PLAAS/NLC 2003: 9). PLAAS/NLC argued that the relationship between human rights and customary law is evolving, as seen in diverse and changing practices of allocating land to women and children.

The state needs to encourage this process of change, and intervene where human rights are abused under customary systems or in communal areas. Tenure systems are a key area of interface between custom and the rights set out in the Bill of Rights. Yet this draft of the bill sets no human rights standards or requirements with regard to land administration, nor does it provide for accessible officials to support vulnerable rights holders, or to provide recourse where rights are abrogated. (PLAAS/NLC 2003: 6)

The revised Bill (Section 12) provided for comparable redress but PLAAS/NLC (2003) found that the provision did not specify the right and gave no criteria to guide the Minister in awarding redress and therefore no basis for challenging decisions. The Bill relied on ministerial discretion (Sections 18.3–4) rather than defined criteria: 'The Constitution requires an Act of Parliament to determine the extent of the right to tenure security, and the extent of the right to comparable redress. It does not require an Act of Parliament to authorise the Minister to determine (as he or she sees fit) the extent of rights in the Bill of Rights. On this basis alone the Bill is probably unconstitutional' (PLAAS/NLC 2003: 14). PLAAS/NLC concluded that the CLRB was a special measure for one race group and could therefore consolidate apartheid boundaries instead of helping people expand into the rest of South Africa. Researchers and civil society organisations who had been urging land tenure reform now suggested caution: 'We propose that the Bill be shelved and that a Commission be established to investigate the problems in communal areas, and establish the views of rural people about land rights and tenure reform' (PLAAS/NLC 2003: 20).

Towards the end of the first ten-year period of democratic rule, critics of the 2003 CLRB quoted Govan Mbeki's terse comment that 'The more that policy changes in South Africa, the more it is the same' (Mbeki 1964: 23; Cousins and Claassens 2003). However, parliament adopted the CLRB after amendments by a parliamentary portfolio committee. It was signed into law by President Thabo Mbeki who disregarded a dramatic press statement by civil society organisations:

The process and the content of the Bill show a cynical disregard for the land rights of rural people, and their right to make choices about laws that affect them, and about who administers their land rights. The timing shows that what is at issue is a pre-election political deal, and not the land rights of rural people. A range of rural communities, human rights organisations and rural non-governmental organisations have begun preparing a

constitutional challenge both to the procedure followed and the content of the Bill. It is a sad day that it has come to this. Issues of rural land rights should be decided and resolved through open and thorough political debate, not through the courts. It is ironic that as we celebrate ten years of democracy, so this bill heralds the end of democracy for 15 million rural South Africans. (Land organisations and research institutions 2004)

### 19.1.3 Official viewpoints

While some saw the CLRA (RSA 2004) as heralding the end of democracy, others saw it as heralding the end of colonialism. It was welcomed by a 'Tenure Newsletter' from the Department of Land Affairs (2004b). The front page of this newsletter announces that there will be 'no vulnerability in land rights in the transitional period'. The editor maintains that the CLRA will 'improve possibilities for better economic utilization of the communal land and the improvement of the quality of the rural folk' (3). In an overview of recent history, the Director of the Directorate for Tenure Reform Implementation Systems, Siphso Sibanda, argues that the 1999 draft Land Rights Bill was rejected because the role of traditional leadership became 'hidden within the accredited democratic structures that had to be created across the rural landscape', which had prompted a view that the 'intention of the June 3, 1999 Land Rights Bill was to smash the institution of traditional leadership' (Sibanda 2004: 8). Sibanda further holds that Minister of Agriculture Thoko Didiza regarded the 1999 Bill as 'a continuation of the model adopted by the apartheid government. It was the continuation of the bifurcated state', maintaining state control over land while only the privileged had access to private ownership, 'Hence the need for the State to divert itself of the ownership of communal land'. He acknowledges the risks of conflicts but says that transfer of land is necessary 'to deal with the colonial anomalies in the distribution and ownership of land along racial lines' (Sibanda 2004: 9).

The Newsletter sees the CLRA as a historical turning point in the transformation of society. Sibanda writes: 'On the 14th July 2004, the democratic and constitutional State buried "the heart of apartheid and colonialism"'. He quotes the Deputy Minister for Agriculture and Land Affairs who had said that 'the new order land rights can now be born'. An editorial comment (2004a: 12) entitled 'End of colonial era' stresses that the CLRA seeks to address the legacy of inequality, including 'overcrowding', 'underdevelopment', lack of secure tenure, gender inequalities, lack of accountable governance and chaotic land management, and redress. It holds that integrating the tenure reform with other rural development 'will undoubtedly create an enabling environment for turning the tide on 300 years of abject poverty and underdevelopment in communal areas' (13). The envisaged implementation programme will include infrastructure investments and 'for the first time both the internal and external investment will bring about profound socio-economic development of the communal areas by creating wealth and employment opportunities', which in turn 'will no doubt have a positive effect in curbing the rural-urban drift'. Titles to land and housing plots will enable

people to access financial institutions and thus invest in housing and livelihood activities. The CLRA is seen as the central measure for 'development' as economic modernisation: 'The investments in infrastructure such as roads, extension support, marketing and finance will contribute towards agrarian transformation and economic take-off and the integration of communal areas into mainstream economic activity in South Africa. As a consequence of such developments, people will be able to pay for services rendered by municipalities' (DLA 2004a: 13). Thus the ambitious tenure reform goals expressed in earlier policies, from the White Paper 1991 to the RDP 1994 and the White Paper of 1997 and the Land Tenure Conference 2001, have been maintained, even sharpened.

The criticism regarding women's rights is addressed in several sections of the Newsletter. An information box holds that 'for the first time in history, women are recognised in that the CLRA gives effect to a woman's constitutional entitlement to security of tenure or comparable redress'. The editorial holds that the CLRA takes a 'revolutionary posture': 'women's rights in or to land or interests in land are not only legally secured, but they are also respected, promoted, protected and fulfilled' (DLA 2004a: 6 and 13). The DLA advocates an 'eclectic approach to institutional development' that 'strikes a balance between the African norms and traditions and the democratic ethos and practice' (DLA 2004a: 13). Rather than 'the end of democracy for 15 million rural South Africans' (Land organisations and research institutions 2004), a well informed 'letter to the editor' (Anon. 2004) argues that:

[The CLRA] creates an enabling environment for the restoration of the traditional leaders' legitimacy and their participation in a democratised system of land administration in communal areas within a constitutional and democratic milieu ... for the first time a community has the right to exercise its discretion to choose an institution, structure or a body of persons other than the traditional leadership to administer its communal land. ... The African people in communal areas of South Africa within the framework provided by the Constitution and the CLRA will now be the authors of their own history and their own liberators. (Anon. 2004: 17–18)

#### 19.1.4 Human rights and tenure reform: Trancraa and the CLRA

The various comments quoted above suggest land tenure is a human rights issue deep political and historical connotations and is central in the task of constructing a new social order consistent with the Constitution. From the Black Land Act of 1913, to the White Paper 1991 and this CLRA 2004, land law has been presented as a historical turning point. To address the human rights of land tenure is to explore, as contrasting constructions of history, values and society as different as those of the preceding sections. The public democratic struggle related to the CLRA balances my picture of the low key 'pragmatism' inherent in Trancraa, which is obviously an economically and politically much less important legislation, except for those affected. During my research on Trancraa in 2001 and 2002 I saw tensions between government and civil society as mainly concerned with inadequate resources for land reform. Now, in the opposition to the CLRB it was about fundamental principles. Human rights were used to interrogate the democratic government's land policy.

Trancraa was a different attempt at giving effect to the constitutional right to tenure security. It emphasised consultation and choice, though with a bias towards new municipalities. It had many of the weaknesses that the CLRB was later criticised for, particularly leaving out the right to redress, paying no attention to the rights of women and reliance on the discretionary power of the Minister. In the 1999 proposed amendments, the Namaqualand network sought to include the notion of 'sustainable development' but did not challenge Trancraa on any human rights issues. To understand the difference in government policy and civil society response one must also take into account power relations, interests and actor-networks beyond what I done (particularly regarding the CLRA). However, I believe that the closer relations in the 'Namaqualand land reform network' were important, including the movement of staff (a former land researcher/SPP staff member in charge of law drafting in the DLA; a former SPP staff member in parliament). Another product of this network was greater trust in the government and an expectation of agreement on what tenure reform required. More importantly the network was maintained through very close cooperation and communication, particularly between the SPP and LRC

In their justification of Trancraa (Chapter 8), the Minister and the SPP referred to the Constitution to challenge past administrative practices (such as 'putting across the line', or expelling from the areas, and non-democratic governance). They saw Namaqualand communities as interested in and supportive of the Constitutional values and rights. This may have reflected an expectation that the Constitutional values and rights were an implicit, agreed basis to which there was no (local) institutionalised resistance. However, this was only true if one disregards male-biased rural relations and land governance (as the Act did) and if one disconnects tenure reform from the problem of land scarcity and skewed distribution (as the Act did). In my view the Trancraa Act was too weak in articulating constitutional rights. Trancraa was therefore no powerful normative reference for the intensified struggle over human rights and the (draft) Communal Land Rights Bills and Act from 1999 onwards.

The longer and tenser process around the CLRA culminated in government stating that 'African culture' is the antagonistic to the Constitution and human rights, a viewpoint running through the Tenure Newsletter by the DLA (2004b). The government's duty is therefore to negotiate a compromise between the constitution and 'African culture'. As an anonymous but well-informed commentary put it, 'The CLRA strikes a balance between the African norms and traditions and the Constitutional and democratic values and principles'. The 'African culture' is an ahistorical and autonomous source of value and legitimacy, untainted by the history of authoritarian governance. Because the antithetical African culture is essentialised and ahistorical, it is a difficult to understand how the process of change and progressive realisation of the constitutional vision can happen.

Thus, from a human rights perspective, the positive aspect of the process around the

Communal Land Rights Bill and Act was the mobilisation and greater focus on fundamental rights at stake in land tenure reform. A negative aspect was the crude and somewhat derogatory construction of African culture as undemocratic and the interests of individual men and women as deviating systematically from the Constitution and human rights. However, government and politicians presented themselves as centrally placed brokers of this conflict between human rights and social institutions. Trancraa was free of such a negative construction of rural communities but also lacked a politicised government commitment to human rights. I have shown that implementation of tenure reform gives great scope for further advocacy or marginalisation of rights. In the implementation of the CLRA which is to take place at pilot level from 2006 much will depend on the struggle for public support.

Albie Sachs had warned against '[f]ederalism [as] a way of depriving majority rule in South Africa of any meaning, by drawing boundaries around race and ethnicity' (Sachs 1990a: 152). However, now the CLRA will govern some areas through 'traditional councils', where they apply, and through democratic Land Administration Committees in others, while in the Certain Rural Areas of Trancraa CPAs or municipalities may govern. In my view, these developments made the ethno-political character of Trancraa more pronounced. It is uncertain whether Trancraa will become the intended bridge to a situation governed by a law of general application, for none apparently exists regarding land tenure in the state-claimed lands of South Africa.

The CLRA appears to reaffirm the practice of drawing normative lines around 'certain rural areas' – here used in a wider sense than those addressed by Trancraa – excluding some from the full protection and support of the state. I think this becomes more powerful in combination with neoliberal economic policies that may abrogate state responsibility for human rights. Actors advocating neoliberal governance and discourse are interested in drawing narrow boundaries of government responsibility as well as protective lines around the corporate sector. Thus, the drawing of lines around the sovereign nation, around geographical areas within, and around groups and sectors affects the politics of land tenure and challenges human rights perspectives. In my understanding 'tenure reform is the mother of South Africa's land reform programs' (Sibanda 2001: 53) because it is here that the minimum content of state commitment to the individual is established. Once lines are drawn around institutions as autonomous spheres, the space for rights violators is much expanded. If a chief can be *baas*, then any landowner can.

Cornwall and Nyamu-Musembi (2004) note that recent rights-based policy debates have often taken an a-historical perspective, for example overlooking the place of rights in anti-colonial struggles. Drawing on the work of Feroze Manji (1998), they see a problematic transition from popular struggles to state-controlled and depoliticised legal reforms and development interventions (Cornwall and Nyamu-Musembi 2004: 1421). The CLRA 2004

apparently underlines the weak state emphasis on human rights in Trancraa. In both cases the state was under considerable pressure from various civil society groups, respectively representatives of 'traditional leadership' institutions that were generally stronger in the former homelands/Bantustans than in Namaqualand versus the civil society land organisations who took were drawing on the rights tradition of the anti-apartheid struggle.

In Namaqualand, the South African state faced no significant opposition to a developmental tenure reform, and had considerable local support and competent civil society helpers. State and civil society actors set the priorities for the Act, independent of 'donors' or other outsiders. Trancraa was implemented in a state-regulated situation with reason to expect state responsibility for rather than a careless promotion of central constitutional commitments to redress, gender and racial equality and social and economic rights.

## 19.2 Rights, land tenure and development

### 19.2.1 Rights scepticism – another southern African experience

Concerned with rural livelihoods and poverty, the SLSA Team<sup>331</sup> (2003: 2) argues that in southern Africa rights are realised through local negotiations and institutional contexts. 'A rights-based approach for sustainable livelihoods must therefore concentrate on institutional mechanisms for gaining access to resources, rather than only on establishing universalised legalistic rights frameworks'. They agree that universal rights have been useful for rights struggles, but that legal frameworks 'often obscure the multiple meanings in the ways in which rights are conceived within local discourses' (SLSA team 2003: 6). In many cases legal rights, such as in the South African constitution, have not become effective, particularly for the poor. In the Team's view, the emphasis on universal and individualist notions of rights leads to neglect of 'locally rooted discourses' where rights often derive from group affiliation at various levels. The study takes a 'normative stance on poverty and livelihoods' and asks whether rights-based approaches can contribute to addressing those (SLSA Team 2003: 21). They see a dilemma in that while a weak state may leave citizens vulnerable to traditional authorities, companies or officials, a strong state may 'undermine the flexibility of existing plural systems'. In some respects the study confirms a concern with lack of, even reduced, state capacity under neoliberal economic reforms:

With a weak, distant or incapacitated state, limited access to legal redress, poor organisational and mobilisation capacity, most people living in our study areas benefit little from these new provisions in tangible terms that transform their livelihoods. Given the types of complexities highlighted through the SLSA work, a simplistic promotion of 'rights-based approaches' – currently fashionable among donors as part of international good governance' and 'participation' agendas – premised on often naïve, ahistorical understandings of local settings, look doomed to failure. ... Currently in rural southern Africa, the prospect of a rights-based transformation of development practice seems remote

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<sup>331</sup> 'Sustainable Livelihoods in Southern Africa', a research programme involving researchers from Mozambique, South Africa, the UK and Zimbabwe.



in the extreme. The retreat of the state through neoliberal economic reform and deconcentration, or its effective collapse, has fundamentally undermined the state's developmental capacity and responsiveness. The same donors who are now advocating a rights-based approach have been party to these changes, and will need to reconsider their strategy if the rhetorical claims of supporting rights and eliminating poverty are to have any impact on poor people's livelihoods. (SLSA team 2003: 21-22, 23)

The SLSA study emphasised a weak state but at the same time the frequent inappropriateness of its presence through legalist measures. I agree that we cannot know in advance how rights are packaged in discourse, power relations and practice. The SLSA Team confirmed the complexity of changing the specific entitlements that link land resources and human capabilities. The Team argued that 'a broader definition of rights, based on people's own conceptions, is therefore key, and this must incorporate cultural, religious and ethnic dimensions, as well as material needs' (SLSA Team 2003: 22-23). In the 'rights critique' it may be useful to distinguish between arguments that refer to (1) the capacity of states; (2) the means chosen to promote rights, and how they (fail to) articulate with local practices and values; (3) the variable capacity of actors to use rights discourses; (4) whether rights are linked to a transformative political agenda; and (5) the normative validity of universal rights. Therefore, despite the empirical conformity between my study and the SLSA Team's, I see a need to distinguish between 'rights' as normative references and the 'approaches' adopted in the name of rights. A land reform colleague was wary of the rights-based approach to land issues: 'Rights is the only thing we have enough of in South Africa' (Edward Lahiff, personal communication, 2005). I stress that while texts contain reminders of commitments, rights are also institutionalised relationships between citizens and public power. In that sense, there are not enough rights in South Africa. Common for the SLSA study, my work and other studies is that the implementation of rights-based approaches is socially complex and contested, making the evaluation of the role of different actors, practices and discourses so challenging. A study of recent forest legislation and policy in Thailand documents the role of civil society organisations in negotiating rights in public spheres and local contexts, emphasising as central factor the power of communities to affect the state and commercial actors that marginalised rural livelihoods (Johnson and Forsyth 2002).

### 19.2.2 The 'formalisation agenda'

Though Trancraa advocates sought to address a particular socio-political situation in parts of South Africa one may learn from strengths and weaknesses in the Trancraa approach to consider and perhaps enrich the 'formalisation agenda' promoted in the work of Hernando de Soto (2000) (Section 1.2.2). In my view, de Soto's reading of bell jar capitalism is relevant for South Africa. The emphasis on removing bureaucratic barriers and illegitimate political control over individual enterprises (e.g. de Soto 2002a: 357) is important and relevant in Namaqualand. The strengths are that Trancraa grew out of a well-established relationship

between communities, advocacy organisations and government, and came in addition to distribution programmes by the same actors. It stressed state responsibility for protecting land rights. It involved a prolonged consultation and paid serious attention to information and chances to voice concerns. The major negative lesson for formalisation programmes is that even with this rooted and closely networked involvement, it is exceedingly difficult to change the context and causes of social and economic marginalisation. 'Title' is no more than a symbol of ownership (Bromley 2005). I see the Trancraa case study as confirming that 'once-off' formalisations of property rights 'need to give way to a more nuanced, incremental and integrated development approach [that] would seek to extend infrastructure, services and opportunity – linked to legal recognition of diverse tenure forms' (Cousins et al. 2005: 5). I see the 'formalisation' approach as potentially weak on three accounts that are all brought out in the Namaqualand cases: it is often based on axiomatic assumptions about the inadequacy of existing institutions and a problematic claim that the state is the source and ultimate guarantor of land rights and associated with large promises of economic development while leaving major factors unaddressed. However, I still find that the emphasis on the legal guarantee of certain tenure regime is indispensably linked to human rights. Indeed, it is to human rights that states are committed, not to any specific operational arrangement. In a critique of 'formalisation' one could perhaps see the glass as a quarter full rather than almost empty. In Trancraa it was half-full, owing to information and advocacy by experienced actors and at least some prior emphasis on land redistribution. However, even given the progressive constitution and other political commitments to transformation in South Africa, and even with the diverse democratic process, ten years of tenure reform has not actually changed any practice, distribution of benefits or constraints. Trancraa therefore epitomises a rooted and quite effectively implemented process that nevertheless does not convince that legal reform is a key to changing the power relations that caused and uphold the unequal distribution of legal rights. The water may run away on dry ground, like the incessantly pumping windmill on the Eyties redistribution farm at Pella in 2002. In my view, using human rights to evaluate and address land tenure provides a normative key to avoiding the pitfalls of a narrowly legal or economic programme. Human rights fill no glass, but show the outline of it. As I have attempted to show, it takes political struggle and strategising to fill it, to realise the promise of rights. In a comment to the high-level commission on 'The legal empowerment of the poor' proposed by Norway and now hosted within the UNDP, Selma Santos from the Movement of Landless Rural Workers, Brazil, said: 'What we primarily need in Brazil is land reform, democratisation of land and earnings, where peasants and civil society participate in deciding on how it shall be carried out. Land questions must also be seen in a human rights perspective, considering environmental concerns and the right to produce one's own food' (Aspelund 2005).

### 19.2.3 Globalising rights or wrongs?

Trancraa was passed in the symbolic year 1998: 50 years after the adoption of the Universal Declaration of Human Rights and the first election victory of the National Party in South Africa. Midway between these years (1973) apartheid was declared a 'crime against humanity' by the United Nations. Also in 1998, the former colonial power, the United Kingdom, adopted a Human Rights Act, presented by government as 'bringing rights home' but criticised, among other things, for protecting existing property rights without providing for positive rights for the homeless: 'Social and economic rights are nowhere to be seen in the new liberal order: only a select few rights have been "brought home" in the Not-Very-Many Human Rights-Act of 1998' (Tomkins 2001: 10). In this context, South Africa's Constitution and Bill of Rights is an important global inspiration for rights struggles. Asbjørn Eide has argued that the major reason why process of globalisation has become conflictual is that 'the major actors in the process to globalise the markets have failed to respect and ensure economic and social rights' and that economic policies have made it increasingly difficult for states to realise rights (2005: 3).

My research took place during years when terrorism and wars 'against terrorism' accentuated the militarist dimension to the previous disregard for social and economic rights, which is increasingly seen as a state-led part of an escalation of global lawlessness (Sands 2005). Wole Soyinka (2004: xiii) writes that 'one is tempted to declare simply that the world has now entered an irreversible state of global anomie'. There have always been challenges to the historically recent and rather marginal tradition of human rights. They are created at certain points in time, through certain struggles, with certain empowering and disempowering connections and consequences. Supporters of ideologies of superiority such as racism, castism or economic elitism have never accepted human rights ideals. Cornwall and Nyamu-Musembi (2004) stress that rich governments rejected legal commitments to international reforms and development support in connection with debates over the Right to Development in the 1980s; and continue to do so despite the various efforts to promote rights-based approaches to development.

One can maintain that the moral power of human rights survives; that we must stand together as citizens and civil society. Arundhati Roy writes that 'when we speak of public power in the age of Empire ... the only thing that is worth discussing seriously is the power of the dissenting public' (Roy 2004: 26). The human rights struggle is about networking and making 'connections', such as during Trancraa in Namaqualand. States Parties to The Covenant on Economic, Social and Cultural Rights have an obligation of 'developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources' (ESCR, 11.2a). International responsibility is heightened by global involvement in shaping and benefiting from the South African economy, creating co-responsibility for the historical and current marginalisation. In general there was no

international involvement in the reform process studied, though indirectly there was international funding for the LRC and other international support for policy processes and studies. Yet with Trancraa the obligations imposed by human rights were often pushed downwards: from leading nations who were deeply involved in creating the modern South Africa, to the contemporary South African state, to civil society organisations and a few state offices, and from these to individual staff and community members. It was a trickle-down of 'unfunded mandates', causing a gap between mandates and capacity, a laudable political process promising limited material impact. There was no systematic implementation of human rights in this case but a 'long network' (Latour 1993: 117) and social struggle (Baxi 2002) with fought-for connections between human rights, democratic practices and human capabilities. We reconstitute 'land tenure as a human rights issue' through such networks and struggles but legally, politically and materially human rights also require the continued, vigilant participation of democratic, public power in guaranteeing basic conditions for all, not least of which is access to life-sustaining resources.

Humans often organise and justify the unequal distribution of power, wealth and poverty through theories of inferior rights or rightslessness. To be realised in practice such theories often depend on either social hierarchies or patterns of geographical segregation. Plaatje wrote that the Black Land Act of 1913 aimed to herd the majority into camps (1916: 435-436). Giorgio Agamben pays special attention to 'camps', places where everything is permitted (Agamben 1998: Part 3). Apartheid's legal zones of otherness may look like camps but the actors and rules in these Rural Areas did not permit everything. John Sharp comments that in the Namaqualand Rural Areas social reproduction was 'as much about the maintenance of socially-accepted standards of humanity and dignity as it is about straightforward survival' and that community membership agriculture 'provided a shield against the degradation of impoverishment' (Sharp 1984: 18). Some individuals in Pella expressed an idea of integrity of the individual, beyond which no one should be allowed to transgress: the right to residence, water to drink, and to livelihood through for example stock farming or the collection of minerals. They did not always succeed in protecting life but they did prevent the Rural Areas from becoming camps where everything was permitted; from the inception of the modern areas through the Tickets of Occupation and the long history of government trusteeship notions of protection were an element of public discourse; a resident said that the church fought for improved housing when the government wanted more mine workers and displaced individuals to settle in Pella from the 1950s onwards. Nevertheless, residents were vulnerable to changes in policy and power constellations, as when the state implemented the Economic Units programme with little concern for livelihood rights of vulnerable groups. A risk in the current situation is that the central state 'bails out' while market based change removes barriers that to some extent protected subsistence and human dignity. However, the challenge is to move beyond the stage where protection is in

the hands of outsiders in a paternalist system, which was from the outset a motivation with Trancraa. J.M. Coetzee's 'Michael K.' said: 'Perhaps the truth is that it is enough to be out of the camps, out of all of the camps at the same time. Perhaps that is enough of an achievement, for the time being. How many people are there left who are neither locked up nor standing guard at the gate? I have escaped the camps; perhaps, if I lie low, I will escape the charity too' (Coetzee 1983: 182). However, this is the voice of an individual persecuted by poverty, and we ought to aim for higher, ought to collectively reject camp building, or any construction of 'certain areas' for 'certain people' where, for arbitrary reasons, some individuals are construed as being less worthy of concern and respect.

### 19.3 On firm ground? Critical comments on the approach chosen

I addressed land tenure as a human rights issue through a case study of a special socio-political situation and process. Some methodological limitations were (1) studying a national policy tenure reform primarily through using written documents; (2) focusing on a short time span of implementation (October 2001 to December 2002) in Namaqualand and primarily two sites and (3) primarily using official meetings, supplemented by interviews with selected households and leaders. I used limited secondary data and no quantitative data of my own. This was partly a prior choice and partly because, under time constraints, I prioritised material on policy, process and commentary. My experience was based on repeated short visits to places and participation in process; what I called 'dips in the river'. These provided a fair amount of evidence in the form of notes and recordings, though only a small selection was used. I have relied much on materials produced by the SPP and LRC as well as meetings and discussions with their staff. Only a selection of written documents were reviewed, however: SPP reports in 2003 provide a rich documentation regarding work carried out under Trancraa in Namaqualand, with regard to information, surveying of rights, regulations and so on (for example, the Steinkopf report (SPP 2003) has fifty appendices).

I studied multiple policy levels, which I find relevant for studies of rights in development. The eclectic theoretical approach has the weakness of reducing conceptual and empirical depth but may perhaps be justified given the broad goal of exploring 'land tenure as a human rights issue' through a case study. I find that the reading of human rights is normatively relevant to the case studied. The capability approach was used to describe entitlement and endowment conversions, and the concepts of discourse, institutions and power to examine the process between legal rights and human capabilities. I have shown some aspects of how practice, discourse and contested institution-making connect, or fail to connect, human rights with the real expansion of human capabilities.

In his study of how actors constructed the history and society of Lesotho to promote certain development interventions, Ferguson (1994: xv-xvi) wrote that he studied discourse as a conceptual apparatus 'that does something'. To show what it does is neither to critique

nor to refute it: to vivisect a frog is a 'cold-blooded operation' that does not call for judgement of correction, only knowledge of physiology and skills in surgery. The metaphor of 'vivisecting a frog' points to the ideal of disinterested interest. I felt more implicated in the processes and places I studied than Ferguson's metaphor of research implies, less distanced and more inclined to moralise. I agree with Neumann (2001: 15) that there is no external position from which to analyse social life without being implicated. My interpretation is normative, in particular based on my understanding of human rights, which appear to me the most appropriate normative basis for responding to various crises in national governance, international development cooperation and global justice. Yet rights discourse was also part of the reality I tried to study and analyse and we do not see the water we swim in. For me the South African revolution and rights discourses and real-world applications of human rights, important sources of inspiration and the study gave me a chance to live under a secular, human rights-based constitution, which I can nowhere claim as of right.

I do not assert a supra-historical validity for human rights but have used a constructionist perspective according to which human rights are made and remade at different levels of political and social life, for example emphasising a history of the South African rights struggle culminating in the introduction of democracy, leading to new struggles over rights when formulating land policy and land legislation. Research is part of the social dialogue through which we remember and re-commit to rights and rights-based practice.

I recall a young ANC leader's (m) challenge in Pella in 2001 (Chapter 4) when he said that foreign students often visit South Africa and then return to their countries to write accounts that portray South Africa negatively. I have endeavoured to give a balanced account of the reform process. However, questions of fairness may still be raised concerning my relation with residents, organisations and government. One of my goals was to get a degree, as Pella residents observed: '*Hy will sy doktorsgraad kry, but he will report back to us*'. In practice the most important involvement was that of discussing with actors. My limited reporting consisted of a public meeting in Komaggas and a failed one in Pella, and final discussion meetings with the key actors involved. During the research I wrote a short report on the process and a certain field issue for the Pella TC and the SPP and a few policy related documents (including Wisborg and Rohde 2003; Wisborg and Rohde 2005).

Nussbaum (2000: xv) warns against 'abstract theorizing' without a 'vivid perception of concrete circumstances'. I chose to study rights, policy discourse and local negotiations in relation to tenure reform. Sometimes the approach appeared to bring me to important practices and power relations of power, particularly leaning from how community members explored land use practice; at other times I believe I failed to connect to my experience of talking with farmers and other residents, and through that their experiences of moving on the land, of fruits of the land as well as hardship: of tired bodies yet a stubborn will to laugh, talk and go to the pastures in the mountains if the rain did not come. A retired smallholder (60)

said that people in Pella were 'struggling, impoverished and hungry, and things are just getting worse'. Looking over the arid ground she said that she saw no improvements: 'if the government cared, it would make improvements' (Interview, Rooiklippe, Pella Oct 2002). Her words interpreted the situation in which they were spoken: an arid landscape, 40 goats in search of grazing, adult children and only her pension to live on. She challenged the discourse of progress, as represented in the welcome board which read: 'Pella: Forwards ever, backwards never'.

A former leader in the National Land Committee argued that we should 'let black voices speak for the voiceless' and that in social movements in South Africa 'historically dominant voices – primarily white left intellectuals – have been the mediators of the identity and aspirations of the poor of the country. In a sense we are witnessing the re-inscription of racial domination in the service of the "greater good" – to hold back the neoliberal attack on black bodies' (Mngxitama 2004). He advocated a 'progressive race narrative that is able to challenge the neoliberal war on the poor without abandoning the need for blacks to be the authors of their own destiny. It is for the historically dominant bodies to learn to listen, empathise and follow, without crowding out the voices of the marginalized. To do otherwise is to turn solidarity into imperialism' (Mngxitama 2004). As a similar critique I note that at various points the fact that I am male constrained my research. For example, it was only after the strong challenges of the CLRB in 2003 that I asked why the Trancraa Act and civil society that promoted it had not paid similar, detailed attention to gender and land rights.

I said initially that I was sceptical of using a PhD project to 'give voice' but still chose a method of 'recording', reproducing and reflecting on the words of individuals who had been disadvantaged under apartheid, thus 'black voices'. I do not see that I thereby 'abandon the need for blacks to be authors of their own destiny' although I agree that my work can be seen to 'crowd out the voices of the marginalised'. I recorded a few voices in some detail but re-inscribed voices, and what I learnt from them, in this thesis, which is by and large not accessible to speakers. I had to hope that voices in the Trancraa process were listened to in the renewed democratic processes of South Africa but also that the understanding I achieved, and could take responsibility for, proved personally and socially relevant.

Through Trancraa the government facilitated social justice conversations between civil society organisations and citizens. Anders Johansen (2003) has claimed that writing may be a continuation of everyday life conversations to explore it. I saw my work as a continuation of conversations about land and social justice. Human rights defend the possibility of social conversation but require institutionalised action as well. It is valuable to remember how, during Trancraa, SPP staff members, land lawyers from the LRC, DLA bureaucrats, and individuals and leaders in Pella and Komaggas voiced and defended rights. In 1996, two years after a major revolution, in the midst of social pressures and an ambitious programme of reconstruction, government and non-government officials went around to the

towns of the Namaqualand Rural Areas asking residents about their views on legal reform and recorded the words spoken: 'Everything has been recorded and noted down', the consultants said to Pella residents during the Act 9 consultations in 1996. They will bear witness to your request (that the Minister must visit, more land be granted). Reading transcripts in 2004 and 2005, eight years after these words, threw light on what happened in 2001 and 2002, as when Mr Grace in Komaggas said in 1996 that he was worried because, 'we are only a committee that are here', and warned: 'do not think that it is your land, *it is our land – dis onse grond* – that is only coming back to us'.

A Pella pensioner said that 'land, to us, means that which was lost', what their grandfathers told them about. A small farmer couple in Komaggas said that land was passed down through generations, the 'rights of the fathers', and 'mothers' rights too': 'we have had this land for generations, so what is the problem, why are they coming to boss us around?' A poor Pella resident got a job as a herder from one of the influential, and larger, Pella farmers. He had food, R200 a month, a *veepos* to stay at, and was the owner of four lambs. The same wealthier farmer who employed him spoke eloquently about land as a basis of livelihoods, political participation association and freedom and therefore a human rights issue. That spoke about social justice issues yet to be addressed: access to the old and new *meent*, labour relations and gender. A Pella stock farmer said very firmly that there should be new legislation, and that the legislation should provide for investments and maintenance of infrastructure on the land, and nothing else. A woman with ten goats at Annakoppe protested against big farmers bullying the small ones, saying: 'We all have rights here'. She insisted on being part of a community of equals, at least with respect to the claim that *it is our land*.



## 20. LAND TENURE IS A HUMAN RIGHTS ISSUE: CONCLUSIONS

### 20.1 Approach

The goal of this study was to contribute to the theoretical and empirical understanding of land tenure as a human rights issue. Sub-goals were (i) to review human rights that affect land tenure; (ii) to develop a theoretical approach to the interface between human rights, legal reform and land-based human capabilities; (iii) to analyse how the issue is reconstituted in recent South African land tenure policy and (iv) to document and analyse the interaction between human rights and tenure in a legal reform process. I pursued these goals by reviewing human rights statements and South African land tenure policy, and by studying the processes of debating and implementing the Transformation of Certain Rural Areas Act, Act 94 of 1998 (Trancraa) in 2001–2002 in Namaqualand, Northern Cape Province, South Africa.

Based on a reading of selected international conventions (Chapter 2), I suggested that land tenure is a human rights issue with respect to five major concerns: (1) access to land; (2) equal protection of rights and interests; (3) fair and democratic process; (4) public support; and (5) international cooperation for development. In Chapter 2 (Table 1, section 2.2.7) I suggested eleven rights that constitute land tenure as a human rights issue: to redress, to livelihoods, to work under fair, to hold property and enjoy equal protection of it, to home, security and freedom of movement, to democratic governance, to gender equality and racial equality, to livelihood, to cultural freedoms and to national and international support to safeguard these rights. All actors involved in land tenure reform, and primarily states, have the duty to respect, protect and contribute to fulfilling human rights, and tenure security is one dimension of an institutional order that respects, protects and fulfils human rights. A distinction between human rights as moral and legal norms and operational institutional arrangements (such as property rights, markets or governance institutions) is thus central. At a general level one may see a two way causal link between human rights and secure land tenure: having secure access to land contributes fulfilling various human rights (livelihood, food and health); conversely and order that protects human rights (to democratic participation and gender equality, for example) removes major threats to tenure security. Besides such possible causal relations, human rights are of course moral and legal norms that change the way we evaluate land tenure and the causal relations, social situations and individual lives that it is part of. To explore the articulation of human rights with land tenure, I combined theoretical concepts of capabilities, institutions and discourse (Chapter 3). The capability approach is a complementary normative perspective on what people can actually do and be, and which has been used in empirical analysis of land use. Discourse, agency and entitlements are key words in understanding processes that may link or sever a legal reform intervention on the one hand and land-based human capabilities on the other.

The main empirical part is a single qualitative case study of a stage of a land tenure

reform (Trancraa) in Namaqualand, Northern Cape Province, South Africa, implemented from January 2001 to January 2003 in six Rural Areas that cover 1.4 million hectares (or 14 000 km<sup>2</sup>, about 30 % of the district) and have a population of about 30 000. I followed the reform in two study sites (Pella and Komaggas) from September 2001 to December 2002, participating in meetings and interviewing residents, leaders and regional and national policy makers.

## 20.2 Context

In South Africa, the distribution of land rights is a manifestation and cause of human rights violations, primarily due to racially discriminatory political and economic exclusion from land and tenure institutions, and gender discrimination (Chapter 5). In South Africa the historical construction of a state-backed tenure system controlled by land owners, state offices and remoulded indigenous authorities caused many individuals to experience inferior and insecure access to resources (Hendricks 1990; Ntsebeza 1999), which in turn caused poverty and vulnerability. However, resistance movements have fought for rights to land, as expressed in some key texts from Solomon Plaatje's (1916) notion of defending the 'bare human rights of living on the land', via ANC's input to the Atlantic Charter (1943), the Federation of South African Women charters (1954–5), the Freedom Charter (1955) and land charters of the 1990s. In the struggle for land, dispossessed South Africans employed 'rights' as well as terms that articulated the harmed capabilities due to landlessness, such as Chief Meligqili's speech as remembered by Mandela (1994: 33–4). The rural people's charter 1994 listed capability failures and the term 'rights' only appeared in the 2001 charter.

In the 1990s the anti-apartheid movement, the ANC and, from 1994, the democratically elected government sought to respond to this struggle through adopting land reform policies (Chapters 6–8). A shift in land policy is illustrated by the White Paper on Land Reform from 1991 (De Klerk government) and the White Paper on South African Land Policy from 1997 (Mandela government), which was based on the Constitutional land reform mandate and focused on social justice, gender equality and sustainable development. Here official policy is rooted in a thorough reading of poverty and land-based human capabilities, perhaps for the first time. Land reform has been addressed through prolific legislation and programmes within restitution, redistribution and tenure reform, but most observers agree that it has been hampered by small resource allocations (until the time of study below one third of a percent of national budgets) and low administrative capacity (Chapter 7). The heritage of inequality and capability deprivations for the majority has been exacerbated through the large increase in unemployment and a dramatic rise of HIV/AIDS during the 1990s (Chapter 6).

The Transformation of Certain Rural Areas Act, Act 94 of 1998 was the first tenure reform for state-claimed communal lands. It addresses a special category of 23 areas administered under the Rural Areas Act 9 of 1987 and covers some 1.8 million hectares of

land with a population of around 70 000. Trancraa was drafted by a national committee and provincial sub-committees and consulted the communities concerned. It was drafted in the context of the 1997 White Paper with its emphasis on protecting land rights and giving communities a choice regarding their future tenure system. Major concerns underlying Trancraa were that state trusteeship involved a centralised, paternalist control; that individuals and families had insecure rights to plots within the areas and that the Rural Areas Act 9, 1987, was inconsistent with the new constitutional Bill of Rights and ought to be replaced with legislation of general application (DLA 1998a).

The brief Act shall give effect to the constitutional obligation to provide tenure security for all citizens (Bill of Rights, Art. 25.6). It provides for a process to return state-claimed land to residents or representative local institutions, naming the alternatives of a municipality, a Communal Property Association (CPA) or other body or person approved by the Minister (of Agriculture and Land Affairs). Trancraa emphasised the role of municipalities both in the implementation of tenure reform and in future governance. The main formulation of citizens rights is in Section 4, which specified the principles of accountable local government, should municipalities become the holders of land. However, Trancraa is silent on (i) the task of tenure reform as seen within the transformative vision of the constitution; (ii) the Constitutional guarantee of redress to those whose rights could not be secured; and (iii) rights to gender and racial equality. It did not protect residents' preferential access to mineral rights, and it created uncertainty about the residents' exclusive right of access to land, for example for grazing. It did not address scarcity of land, capital, skills or the public capacity to promote tenure security. In the context of the human rights based Constitution and White Paper on South African Land Policy (1997), Trancraa therefore appeared to neglect several important fundamental rights.

While Trancraa was passed in 1998, tenure reform in 'former homelands/Bantustan areas' (with a population of some 12 to 15 million inhabitants on 13% of total land area) has been the most protracted and contested aspect of land reform. A draft CLRB was shelved in 1999, a new one consulted in the national Land Tenure Conference in 2001 and another published in August 2002, which was adopted (again in revised form) by the Cabinet in October 2003 and passed into law as the CLRA of 2004. Here a social conflict over hereditary institutions of leadership and in many cases gender-discriminatory land tenure led the Commission on Gender Equality and the Human Rights Commission and a range of civil society organisations to bring the human rights guaranteed in the Constitution more firmly into the tenure reform debate in than in the case of Trancraa.

### 20.3 Case

A case study of land tenure reform in the arid to semi-arid district of Namaqualand was used to explore more local efforts and processes in the construction of land tenure as a human

rights issue. During colonial dispossession of indigenous holders of the land by European governments and settlers, six Rural Areas were created as mission station lands where dispossessed or marginalised groups sought protection. The state-guaranteed tenure arrangement increasingly delinked land rights from democratic governance and racial equality. In Pella's history tenure was part of a matrix of discourse, power and practices by settlers, residents, missionaries and the state and dominated by church governance from the 1870s to 1970s. Government and commercial actors extracted key resources of minerals and water, while residents had to maintain their livelihoods as workers and stock farmers. After taking over governance in 1974 the government tried to impose reforms in tenure and land use, along with forced carrying capacity planning and destocking against local protests (Klinghardt 1982).

Today the Namaqualand Rural Areas make up about 14 000 km<sup>2</sup> or 30% of the area, while farmers with private title hold about 50%, mining companies about 10% and conservation about 8% (DoA 2001). An economic recession due to the closing of the mines has resulted in low employment levels and disparities in incomes. An estimated one third of households engage in farming (DoA 2001), primarily through keeping livestock. Other land uses are firewood collection, small-scale mining and tourism. A national programme of land redistribution has increased the Rural Areas by about 25% from 1996 to 2000. Redistribution is the outcome of a decade-long cooperation within a 'Namaqualand land reform network' of rural communities, the land NGO Surplus People Project (SPP), the Legal Resources Centre (LRC), and the Department of Land Affairs (DLA), and created a basis for a more credible tenure reform (which did not in itself address the skewed land distribution). However, the land holding per household involved in livestock production is still less than ten percent of that of surrounding private farms. Given the right to redress, livelihood and equality, the claims for more land by poor residents of Namaqualand towns and rural regions are justified.

Trancraa's prescribed 18-month transitional phase (later extended to 24) was implemented by the SPP, Transformation Committees (TC) of nominated residents, the municipalities, the LRC and the DLA from January 2001 (having awaited the demarcation of new municipal boundaries and the local government elections in December 2000). The process involved tenure studies, consultation and advocacy and culminated in the advisory referenda over municipal or Communal Property Association (CPA) ownership of land (from November 2002 to January 2003). The facilitators placed strong emphasis on promulgating a framework of rules to protect land rights and provide for sustainable resource management. Large community meetings, sometimes with lawyers, involved presentations, group work and plenary discussion and contributed to a diverse and thorough consultation.

Field research was restricted to two of the smaller areas, Pella and Komaggas. In Pella the TC supported by the SPP and political leaders, conducted a tense and thorough information and consultation campaign, including defending land rights in specific cases of

tourism and irrigation development. In Pella, women were visible and active in the TC and community meetings, as they were more generally in political leadership. In Pella the TC and the SPP explored options for land-based development and analysed power, land, water rights and other dimensions of the land construct, thereby revealing ways in which change might be possible: participation in tourism governance, public support for irrigation development, and support for small-scale mining. The TC did not address social differentiation and competition and, despite the attention to development issues, Trancraa did not involve direct support for vulnerable groups such as women farmers and herders. This was one area in which a human rights based approach could have made a difference, if backed by government. In Pella respondents accused local government of discrimination against non-ANC members in the allocation of public benefits such as housing and public employment affected Trancraa, particularly after ANC leaders took a public stance in favour of municipal ownership in mid-2002. While residents had been informed that redistribution lands could be transferred to the entity of people's choice, shortly before the referenda in 2002, political leaders at municipal level decided to hold new farms outside the referenda. The process culminated in the charged referendum on 7 December 2002 where 57% voted for a CPA and 42% for municipal ownership of land. The young vice-chairman of the Pella ANC said in his speech that 'the result was surprising, but the people have spoken and the process was free and fair'.

In Komaggas a history of community conflict and protest affected Trancraa. A Residents' Association (*Komaggas Inwonersvereniging*, KIV) opposed Trancraa, arguing that the Act mistakenly assumed that Komaggas land belonged to the State. KIV leaders asserted a private group title to the area granted to residents in the mid-19<sup>th</sup> century. The KIV had previously launched a claim to the historical Komaggas land extending to the Atlantic Coast. No 'transfer' was therefore required. Instead, KIV leaders and a few interviewed members linked Trancraa to municipal attempts to increase control over land, for example those aimed at increasing the extraction of fees and taxes. The KIV rejected the provision in the Act that divided Komaggas into 'land in the remainder' and 'town' area (which excluded the 'town' from any transfer of land). It rejected the surveying of residential and farm plots, arguing that this contradicted the group title and would inevitably lead to 'privatisation'. Those in favour of Trancraa, mainly supporters of the ANC, believed the Act gave residents an opportunity to strengthen rights to land and to participate in a wider process of transformation. Efforts to resolve the conflict proved futile. In August 2002 the only two active members of the TC informed the municipality that they had failed to implement Trancraa, after which the case was forwarded to the Minister of Agriculture and Land Affairs. Komaggas represents a breakdown in relationships between a community organisation and the municipality, reflecting a history of conflict, resistance to both state control and privatisation of land, and fear of losing autonomy in a new ANC-led municipality.

Thus Trancraa departed from the past history of tenure reform by involving democratic consultation and elected municipal councillors played a key role in implementing Trancraa. However, although the attitudes and involvement of councillors varied, the process revealed some distrust between residents and the new municipalities. From 2002 ANC leaders at local and district level advocated municipal ownership of land. Some leaders suggested that only municipal ownership could prevent the loss of land due to anticipated financial mismanagement, and thereby ensure access to land for vulnerable groups. Others warned residents that CPAs would be treated as private farms and thus be liable to pay property tax, rather than to receive development support. There was an unresolved tension between the local ANC campaign for local government ownership of land and a discourse of market-based development. Community referenda were held in five of the six areas, except Kommagag, from November 2002 to January 2003. The results showed a majority for CPA ownership in four of the five areas, on average 58% for a CPA versus 39% for municipal ownership.

## 20.4 Connections

### *Human rights and capabilities*

The case study of the Trancraa process in Pella and Komaggas illustrates the diverse normative and empirical interactions between land tenure (as operational rights or entitlements) and human rights (as universal norms). Respecting, protecting and fulfilling human rights could likely have removed some sources of tenure uncertainty in past authoritarian governance; tenure security may promote certain human rights to redress for historical discrimination and to livelihood, food and work, real gender and racial equality and democratic participation; these rights therefore strengthen the normative case for land reform in contexts with landlessness or tenure insecurity.

Trancraa (the Act) promoted human rights by a selective emphasis on non-discrimination, emphasis on protecting and balancing the land rights of residents, and on the accountability of local government. The government made available resources for meetings, communication, transport, surveying of land and so on. However, the Act did not refer to economic, social and cultural rights or the Constitutional right to 'comparable redress' for those whose tenure could not be secured, and did not address the unequal land distribution. In this respect it is vulnerable to critiques directed against past tenure reforms (Letsoalo 1987). The rather weak articulation of human rights in Trancraa does not prove that human rights were unimportant, since they have affected and affect the anti-apartheid struggle and democratic change in numerous ways, including the civil society promotion of land reform.

The Trancraa process involved consultation of residents and enabled elected committees and municipal councillors to play a key role in tenure reform, which in a valuable way brought out some popular demands and scepticism about the reform, changes in

governance and the tenure options. The civil society implementers in particular promoted rights to information, participation and protection of land rights, for example with the Pella TC in irrigation and tourism development, where lack of participation in governance and poor access to information had negatively affected residents in the past. This demonstrated interaction among political and economic human rights in land tenure practice, although to be effective in promoting social and economic rights a range of additional resources were needed, including a supportive state, a listener with both ears and arms. The interaction among political and economic human rights was not addressed during the Komaggas case of conflict, although some residents and leaders argued that they were defending community land rights against privatisation, so that from their point of view resistance to Trancraa made such a connection.

New or clarified statutory rights to land should promote land uses that support human well-being, which may be analysed as a process of expanding social and economic entitlements that support human capabilities (Sen 1999; Nussbaum 2000; Shanmugaratnam 2001). I considered a perspective that integrates rights realisation and capability expansion. In this perspective, human rights are legal norms designed to safeguard universal and inherent human capabilities (such as for life, reasoning and social and political participation). By creating diverse official and non-official institutional arrangements, actors may strengthen individual entitlements that support the expansion of human capabilities. Secure land tenure may be seen as operationally a set of entitlements that give command over land endowments and support capabilities; however, many other entitlements, such as access to capital and information, also play a role, and this is particularly the case in a situation of deep inequality as the one studied. These other entitlements may often affect individual and group ability to secure their land rights, which is why residents were so acutely aware that failure to operate commercially could threaten their land rights. The Pella irrigation development effort was deeply affected by the suspicion created by past exclusion from information and political participation. A challenge to the human rights assessment is that it must address the empirical interdependence of these diverse entitlements. A successful project would simultaneously respond to these different threatened capabilities and human rights. The RDP 1994, the White Paper (DLA 1997b) and official statements at the 2001 land tenure conference (Mayende 2001; Sibanda 2001). Expressed a high-level South African policy commitment to integrating tenure reform with comprehensive social and economic development. It appears very important and the shortcomings in realising it in this stage of Trancraa problematic, although Trancraa's limited mandate and time frame must be borne in mind. Democratic rights were constrained by the composite construct of land and power relations that has been created through centuries. The idea of tenure 'choice' (voting for a CPA, municipality or other options) was made to sound hollow by the fact that the referenda were only advisory and because the alternative ownership options lacked public guarantees

of support. The SPP, supported by the LRC concluded in the final Trancraa reports that tenure reform would be futile if the government did not guarantee support for new property institutions (e.g. SPP 2003). In that respect this stage of Trancraa expressed a great deal of uncertainty about the public commitments to democratic and rights-promoting tenure institutions and practices.

Nussbaum suggests encourages governments to make 'central human capabilities' the subject of constitutional guarantees (2000: 70–71, 104), whereas Sen instead stresses open-ended political processes and choices to identify and realise capabilities, because freedom is inherent to the concept (Sen 1999: 78-79). Both of these concerns appear important. However, at an abstract level, my reflection on the case leads me to suggest that human rights do suggest a balanced response to this dilemma. We do not have to start anew in each local context and political process, nor do we need a new round of constitutional protection. Human rights – and the South African Constitution – have identified capabilities that should be the prime subject of public concern. Human rights also leave space for policy formulation and appropriate local practice, as the study shows, very ample space. Because the human rights at stake are so many, and the causal factors and processes so complex, codified rights cannot determine any clear-cut institutional design. Therefore, I do not see the risk of an arbitrary, constraining framework so much as a risk that human rights remain irrelevant due to the social, political and strategic work required to create the connections between rights, via social and environmental processes and achieved capabilities. So the question is rather if human rights can 'get traction', be institutionalised. Human rights stress the collective commitment to a process that honours political rights and to outcomes in terms of other capabilities, notably livelihoods and achieved equality. I think land distribution had in a limited sense promoted economic rights of Namaqualand Rural Areas residents and was now complemented by the politically oriented process of Trancraa. However, the Trancraa case illustrates how this open-ended political process, of debate rather than negotiation, may inadequately address constraints and therefore preserve the status quo. In this sense the transformative promise remained unrealised. Emphasis on human rights could normatively have strengthened the commitment to goals and principles of land reform. However, in the context of the human rights based Constitution, legal codification and political support are not adequate. Therefore it is such rooted work as that of the Transformation Committees and the SPP and LRC that makes the connections and draw attention to possibilities for further intervention to promote rights, such as assisting communities in better and more equal access to markets for livestock products and or ensuring continued *regstellende aksie* though granting water rights.

#### *Tenure reform, discourses and themes*

The tenure reform process was driven by a civil society–government alliance, which I have called the 'Namaqualand land reform network'. Movement of individuals between the SPP,



DLA and LRC confirmed the networking. One may see the state as hiring a facilitator to realise a rights-based reform or one may see organisations in the network trying to hold the state accountable, even to assist in the construction of a new, democratic local state that could govern land. I think the latter interpretation is more relevant. Civil society organisations were 'seeing for the state' by leading the tenure studies, the debates and the social interpretation and they were 'being like a state' in for example communication to residents and promulgation of public regulations. My study identified this horizontal networking as the major process of constructing land tenure policy, the one that connects or fails to connect rights-based policy with the lives of land users. Seen in the short term of the study, the facilitation did not appear to connect these to a political mobilisation for public support and accountability, the weakest point of Trancraa as rights-based change.

Two themes, *it is your land* (by the state) and *it is our land* (by residents) showed the tension, change and diversity of discourse about Trancraa. During the process the apparent match of the two themes was supplemented by some tension and disappointments. Residents' *it is our land* was informed by the history of local governance and resistance and in some cases newly available rights discourses. It involved a claim for justice and development support, drawing on both local histories and the land reform policies of the mid-1990s. The discourse of community ownership and control of land was strong in both study sites; it was particularly strong in the Komaggas protests against the alleged alliance of municipality, ANC and SPP, which was seen to introduce a new governance regime. In Pella it was expressed in the widespread insistence that individual and family use rights should remain secondary to community ownership of land.

During Trancraa land tenure was thus reconstituted as a human rights issue in struggles for control over the land, for state support and accountable governance. The two themes of *it is our land* and *it is your land* suggest the constructive and process character of tenure reform. I suggested that the themes reflect different policy discourses that revolve around (i) market-based development, (ii) rights-based social transformation and (iii) authoritarian governance linked to discourses of community and of external control through law and regulations. The state's *it is your land* became increasingly informed by neo-liberal economic policy, giving rise to a minimalist offer of land, but not of tenure security. 'Getting rid of the land' was a phrase surprisingly often heard, both to characterise the government's attitude and that of mining companies selling land. At the same time, the dualist land system and skewed distribution of capital and organisational capacity made it difficult to institutionalise a neo-liberal discourse of actor-driven market integration. There was limited articulation between national policy and local reality. In the absence of a transformative policy, political leaders and occasionally civil society organisations could extend an authoritarian discourse, for example emphasising regulations to control land use in communal areas and neglecting political mobilisation. Some local government leaders

argued that residents were immature and needed continued protection. For some residents the themes finally merged in an acceptance of the status quo. Some farmers eventually said 'why not just leave it as it is', the SPP reported from Steinkopf in late 2002. The protest by a section of the Komaggas community also reflected a perceived incompatibility of the state's offer and the residents' claim for *our land*. It was, however, not only or even primarily a protest against a state that provided too little support but rather for political autonomy, established land tenure practices and justice through restitution. An element of conventional market-oriented reform that it did react against was privatisation of common land, but seen exactly as a strategy that supported municipal power and tax extraction. This shows some of the complexity of local protest against the changing government-market complex.

*Implications: Rights, power and policy*

Based on the analysis of the case study it is possible to link key concepts together in a deepened understanding of tenure security that incorporates human rights. To institutionalise rights means to create power relations and practices through which individuals can reliably achieve the objects of their human rights. It involves creating sets of social and legal entitlements that make up land tenure, that are causally linked to numerous other entitlements (such as information, capital and trained skills) and that enable individuals to develop human capabilities. Human rights identify and make collective commitments to safeguard certain capabilities, such as having adequate food, and being able to enjoy racial and gender equality and engage in informed political participation. Having a right means to have a socially backed claim – someone comes to the assistance of the holder when he or she is unable to realise a right (Bromley 1991: 15). Governments, individuals and organisations have duties to contribute to the development of land tenure both as systems and as concrete individual entitlements that support the fulfilment of human rights.

In principle, rights define normative requirements for social negotiation and process (boundaries, procedure and minimum outcomes). Rights shall take pressure off individuals, because there are certain things they do not have to renegotiate, rather than leaving individuals at the mercy of localised, often individualised, struggles against oppression, so that oppression and capability failures are no longer public concerns. Having rights, women and men do not have to assert and bargain for all of their claims and interests in every new situation and arena. In the Trancraa process formal exclusion on the basis of gender was for example ruled out, while informal marginalisation of the experience of women occasionally played a role. Rights as legal norms become, institutionalised power relationship only through social practice. In Namaqualand, residents contributed to such a process through patiently participating in debates and gradual change. That distinction, and the implicit task of converting rights talk to institutionalised practices, is central to understanding and promoting rights through land reform. The Trancraa case shows how rooted and specific efforts to change land tenure need to be, and how slow and contested the process of realising rights

may be.

Human rights are collectively created and collectively realised commitments and they reject the notion that any institution can claim superiority or autonomy over them. In the process studies, there was a tension between the public commitments to human rights and a market-oriented discourse that subordinates rights to market institutions, particularly reflected in the view of the Rural Areas as private farms. In my view major tensions were caused by the severe challenge that local government leaders faced in defending community rights, promoting economic development with the public resources they had available; and linked to it, the uneven trust by residents in their ability to do so. To further institutionalise tenure security through Trancraa and the CLRA of 2004, it appears important to consider the broad range of human rights that are at stake, from the civil-political to the social and economic. Land use based approaches, as adopted by the SPP and the Transformation Committees, are key to expand land users' entitlements and capabilities but in many cases require further backing by society, at least in transformation out of a situation of inequality. The interdependence of political rights economic rights in such a development is complex and situation-specific, rather than based on any general mechanism established by liberal democracy.

To substantiate the view that *land tenure is a human rights issue* I have elaborated a way to conceptualise land tenure in terms of human rights; documented some aspects of a history of land struggle in South Africa in which human rights and notions of human capabilities played a role; reviewed South African policy formulation in the 1990s, which was framed within the human rights based constitution; and documented and analysed a land tenure reform process in Namaqualand. During the Trancraa process, key achievements were related to the rights of information, democratic participation and legal advocacy. The community and civil society implementers explored how tenure reform could be used to strengthen livelihoods and economic rights but with limited public and private sector support for the interventions identified residents and facilitators faced uncertainty about whether new land holding organisations would be viable in the prevailing political and economic context. Nevertheless, Namaqualand residents and civil society staff, lawyers, politicians, officials and others maintained practices, insights and public awareness that are critical in the work for justice in South Africa where many individuals in cities, towns and rural areas lack and demand secure tenure as of right, perhaps, as in Namaqualand, by staking the tension-ridden claim that *it is our land*.



## 21. LIST OF REFERENCES

## Reference List

- Interim Constitution of the Republic of South Africa, 1993 (Act 200 of 1993)*. 1993. Republic of South Africa.
- Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)*. 1996.
- Adger, Neil W., Tor A. Benjaminsen, Katrina Brown, and Hanne Svarstad. 2001. Advancing a political ecology of global environmental discourses. *Development and Change*, no. 32: 681–715.
- African Union. 2003. *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Adopted by the Assembly of the African Union 11 July 2003*. African Commission on Human and Peoples' Rights. Available: [http://www.achpr.org/english\\_info/women\\_en.html](http://www.achpr.org/english_info/women_en.html) [accessed Nov 18 2004].
- Agarwal, Bina. 1994. *A field of one's own: gender and land rights in South Asia*. Cambridge: Cambridge University Press.
- Aké, Claude. 1995. The democratisation of disempowerment in Africa. In *The democratisation of disempowerment: The problem of democracy in the third world*. Ed. Jochen Hippler, 70–89. London: Pluto Press.
- Alagiah, George. 2001. *A passage to Africa*. London: Little, Brown and Company.
- Alexander, John M. 2004. Capabilities, human rights and moral pluralism. *International Journal of Human Rights* 8, no. 4: 451–469.
- Aliber, Michael, and Reuben Mokoena. 2003. The land question in contemporary South Africa. In *State of the Nation. South Africa 2003–2004*. John Daniel, Adam Habib, and Roger Southall. Cape Town: Human Sciences Research Council.
- Alkire, Sabina. 2002. Dimensions of Human Development. *World Development* 30, no. 2: 181–205.
- An-Na'im, Abdullahi. 1992. *Human rights in cross-cultural perspectives: Quest for consensus*. Philadelphia: University of Pennsylvania Press.
- . 2001. The legal protection of human rights in Africa: how to do more with less? In *Human rights: Concepts, contests, contingencies*. Eds. A. Sarat, and T. R. Kearns, 89–116. Ann Arbor: The University of Michigan Press.
- , Ed. 2003. *Human rights under African constitutions. Pennsylvania studies in human rights*. Philadelphia: University of Pennsylvania Press.
- ANC. 1943. *African's Claims in South Africa, response to the Atlantic Charter*. Johannesburg: African National Congress. Available: <http://www.anc.org.za/ancdocs/history/claims.html#BILL> [March 2004].
- . 1990. *A Bill of Rights for a new South Africa by the ANC Constitutional Committee*. Cape Town: University of the Western Cape.
- . 1991a. *Land manifesto for ANC National Conference, July 1991*. Land Commission, African National Congress.
- . 1991b. *Press statement on the government White Paper on Land Reform 12 March 1991*. Marshalltown: African National Congress.
- . 1994. *RDP. Reconstruction and Development Programme. A Policy Framework*. Johannesburg: African National Congress/Umanyano Publications.

- . 1997. *Umrabulo. Understanding GEAR, growth, employment and redistribution*. African National Congress. Available: <http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo2.html> [June 2004].
- . 2003. Heritage Day: Diversity is our most valued asset. *ANC Today – Online Voice of the African National Congress*, 26 September – 2 October 3, no. 38.
- . 2004. *Manifesto 2004: A people's contract to create work and fight poverty*. African National Congress. Available: <http://www.anc.org.za/elections/2004/manifesto/manifesto.html> [18 February 2004].
- . 2005. Tasks for 2005: Local action to advance the vision of the Freedom Charter. *ANC Today – Online Voice of the African National Congress* 14–20 January 2005 5, no. 2.
- ANC Steinkopf. 1996. *Besprekingsdokument oor eiendomsreg en ander grondreelings in die Steinkopf Reservaat [Discussion document on ownership and other land rules in the Steinkopf reserve]*. Steinkopf/Cape Town: Reproduced in SPP 1996: Konsultasieverslag.
- ANC Women's League. 2004. *Comrade Ray Alexander-Simons – A true patriot and a human rights campaigner. Statement issued 17 September 2004*. African National Congress. Available: <http://www.anc.org.za/wl/docs/pr/2004/pr0917.html> [10 February 2005].
- Anderson, Megan, and Kobus Pienaar. 2003. *Municipal commonage. Evaluating land and agrarian reform in South Africa: No 5*. Cape Town: Programme of Land and Agrarian Studies, University of the Western Cape.
- Anker, Peder. 2001. *Imperial ecology. Environmental order in the British Empire, 1895–1945*. Cambridge, MA: Harvard University Press.
- Anon. 2004. *The CLRA strikes a balance between the African norms and traditions and the Constitutional and democratic values and principles. Tenure Newsletter July 2004*. Pretoria: Department of Land Affairs. Available: <http://land.pwv.gov.za/home.htm> [30 November 2004].
- Arce, Alberto, and Norman Long. 1992. The dynamics of knowledge. Interfaces between bureaucrats and peasants. Chapter 9 in *Battlefields of knowledge. The interlocking of theory and practice in social research and development*. Eds. Norman Long, and Ann Long, 211–245. London: Routledge.
- Archer, Fiona, and Shamim Meer. 1997. Women, tenure and land reform: the case of Namaqualand's reserves. In *Women, land and authority. Perspectives from South Africa*. Ed. Shamim Meer, 84–94. Cape Town: David Philip, Oxfam and the National Land Committee.
- Arendt, Hannah. 1950. *The origins of totalitarianism*. New York: Harcourt Brace & Company. New addition with added prefaces: 1985.
- . 1970. *On violence*. New York: Harcourt Brace & Company.
- Aspelund, Synnöve. 2005. Strid om ny kommisjon. UD og aktivistgrupper dypt uenige om eiendomsformalisering [Conflict over new commission. Ministry of Foreign Affairs and activists deeply divided over the formalisation of property rights]. *Bistandsaktuelt*, no. 6: 10.
- Auestad, Lene. 2005. Plurality and human dignity. *Nordic Journal of Human Rights* 23, no. 3: 261–274.
- Baloyi, Vulani Joy Gwendoline. 2000. *Indigenous peoples and their rights: With special reference to their land rights and the right to self-determination in international law. A comparative study within the South African land rights context. MA Thesis*. University of Zululand/University of Melbourne.
- Banning, Theo R. G. van. 2002. *The human right to property*. Antwerpen: Intersentia/Hart.

- Barrow, John. 1801. *Account of travels into the interior of Southern Africa in the years 1797 and 1798*. London: Cadell & Davies.
- Baxi, Upendra. 2002. *The future of human rights*. New Delhi: Oxford University Press.
- Bek, David, Tony Binns, and Etienne Nel. 2004. 'Catching the development train': perspectives on 'top-down' and 'bottom-up' development in post-apartheid South Africa. *Progress in Development Studies* 4, no. 1: 22–46.
- Benda-Beckman, Franz von. 2001. Legal pluralism and social justice in economic and political development. *IDS Bulletin* 32, no. 1: 46–56.
- Benjaminsen, Tor A., Rick Rohde, Espen Sjaastad, Poul Wisborg, and Tom Lebert. 2006. Land reform, range ecology and carrying capacities in Namaqualand, South Africa. (Forthcoming). *Annals of the Association of American Geographers* 96, no. 3.
- Bennett, T. W. 1993. Redistribution of land and the doctrine of aboriginal title in South Africa. *South African Journal on Human Rights* 9, no. 4: 443–476.
- . 1999. *Human rights and African customary law under the South African Constitution*. Cape Town: Juta & Co.
- Bentzon, Agnete Weis, Anne Hellum, Julie Stewart, Welshman Ncube, and Torben Agersnap. 1998. *Pursuing grounded theory in law. South-North experiences in developing women's law*. Harare/Oslo: Mond Books/Tano Aschehoug.
- Berry, Sara. 1993. *No Condition Is Permanent. The social dynamics of agrarian change in sub-Saharan Africa*. Madison: The University of Wisconsin Press.
- Binswanger, Hans P., and Klaus Deininger. 1992. South African land policy: the legacy of history and current options. In: *Experience with agricultural policy. Lessons for South Africa. Summary of papers presented at workshop in Mbabane, Swaziland 2–4 November 1992.*, 1–3. Washington: World Bank.
- . 1993. South African land policy: the legacy of history and current options. *World Development* 21, no. 9: 1451–1475.
- Boonzaier, Emile, Candy Malherbe, Andy Smith, and Penny Berens. 1996. *The Cape Herders. A history of the Khoikhoi of Southern Africa*. Cape Town: David Philip.
- Bradshaw, Debbie, Leigh Johnson, Helen Schneider, David Bourne, and Rob Dorrington. 2002. *Orphans of the HIV/Aids epidemic. The time to act is now. MRC Policy Brief No. 2, May 2002*. Cape Town: Medical Research Council. Available: <http://www.mrc.ac.za/bod/bodhtm> [18 February 2004].
- Brey, Rachel. 2004. 'Aids orphans' and the future: A second look at our predictions. *Aids Bulletin June 2004 (Vol. 13, No. 2)*. Cape Town: Medical Research Council. Available: <http://www.mrc.ac.za/aids/june2004/aidsorphans.htm> [13 Jan 2005].
- Bromley, Daniel W. 1991. *Environment and economy. Property rights & public policy*. Oxford: Blackwell.
- . 2005. *The empty promise of formal titles: creating Potempkin villages in the tropics*. Oslo: deSotowatch.net. Available: <http://www.desotowatch.net/> [15 November 2005].
- Bruce, John W. 1998. *Review of tenure terminology. Tenure Brief No. 1*. Madison: Land Tenure Center, University of Wisconsin.
- Budlender, Geoff. 1988. Lawyers and poverty: Beyond access to justice. In *Law and justice in South Africa*. Ed. John Hund Cape Town: Institute for Public Interest Law and Research/Centre for

- Intergroup Studies, University of Cape Town.
- . 1992. The right to equitable access to land. *South African Journal on Human Rights* 8, no. 3: 295–304.
- . 2000. *Grootboom versus Government of the Republic of South Africa (CCT 11/00). Heads of argument on behalf of the Amici Curiae: Human Rights Commission and Community Law Centre.* Cape Town: Legal Resources Centre. Available: <http://www.lrc.org.za/3News/Heads/Grootboom.pdf> [April 2002].
- . 2001. *Justiciability of the right to housing – the South African experience. Presented 17 November 2001 at Workshop for judges on justiciability of economic, social and cultural rights (India).* Cape Town: Legal Resources Centre. Available: <http://www.lrc.org.za> [20 May 2003].
- . 2002. *A paper dog with real teeth.* Mail & Guardian, 12 July 2002.
- Budlender, Geoff, and Johan Latsky. 1991. Unravelling rights to land in rural race zones. In *A harvest of discontent: the land question in South Africa.* Ed. Michael de Klerk, 115–137. Cape Town: Institute for a Democratic Alternative for South Africa.
- Bugge, Hans Christian. 1998. Human rights and resource management – an overview. In *Law and governance of renewable resources.* Eds. Erling Berge, and Nils Christian Stenseth, 93–122. Oakland, Cal.: ICS Press.
- Burr, Vivien. 1995. *An introduction to social constructionism.* London and New York: Routledge.
- Campbell, Catherine. 2003. *'Letting them die': why HIV/AIDS intervention programmes fail.* Oxford: The International African Institute/James Currey.
- Carey Miller, D. L., and Anne Pope. 2000. *Land title in South Africa.* Cape Town: Juta.
- Carstens, W. P. 1966. *The social structure of a Cape Coloured reserve: a study of racial integration and segregation in South Africa.* Cape Town.
- Catling, David. 1996. *The 'Rural Areas' (landelike gebiede): Their current status and development potential. A socio-economic study prepared on behalf of Independent Development Trust.* Cape Town.
- Chanock, Martin. 2000. 'Culture' and human rights: orientalisering, occidentalising and authenticity. *Beyond rights talk and culture talk: comparative essays on the politics of rights and culture.* Ed. Mahmood Mamdani, 15–36. New York: St. Martin's Press.
- Chipkin, Ivor. 2002. A developmental role for local government. In: *Democratising local government. The South African Experiment.* eds. Susan Parnell, Edgar Pieterse, Marc Swilling, and Dominique Woolridge, 57–78. Cape Town: University of Cape Town Press.
- Claassens, Aninka. 1992. Editorial. *South African Journal on Human Rights* 8, no. 3.
- . 2000. South African proposals for tenure reform: The Draft Land Rights Bill. In: *Evolving land rights, policy and tenure in Africa.* Eds. Camilla Toulmin, and Julian Quan, 247–66. London: DFID/IIED/Natural Resources Institute.
- . 2001. *'It's not easy to challenge a chief': Lessons from Rakgwadi. Research Report no. 9.* Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape.
- . 2003. *The Communal Land Rights Bill and Women. A submission prepared and submitted by the joint PLAAS–NLC project on broadening civil society participation in the CLRB, 2 March 2003.* Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape/National Land Committee.
- Clifford, James. 1988. *The predicament of culture. Twentieth-century ethnography, literature and art.*



- London: Harvard University Press.
- Coetzee, J. M. 1974. The narrative of Jacobus Coetzee. In *Dusklands*. J. M. Coetzee, 51–125. London: Penguin Books.
- . 1983. *Life & Times of Michael K*. London: Penguin Books.
- Comaroff, Jean, and John L. Comaroff. 1991. *Of revelation and revolution, I Christianity, colonialism and consciousness in South Africa*. Chicago: University of Chicago Press.
- Commey, Pusch. 2002. South Africa. Land: A ticking time bomb. *New African* No. 412 (November 2002): 12–16.
- Commission on Gender Equality. 2003. *Submission to the Portfolio Committee on Agriculture and Land Affairs on the Communal Land Rights Bill [B67-2003], 10 November 2003. With legal opinion by Geoff Budlender*. Cape Town: Parliamentary Monitoring Group. Available: <http://www.pmg.org.za> [30 January 2004].
- Committee on Economic, Social and Cultural Rights. 1999. *General Comment No. 12, Right to Adequate Food (Art. 11). (20th session 1999). U.N. Doc E/C. 12/1999/5*. Economic and Social Council, United Nations.
- Committee on Economic, Social and Cultural Rights. 2002. *General Comment No. 15 (2002), The right to water (Art. 11 and 12). (29th session 2002). U.N. Doc E/C. 12/2002/11*. Economic and Social Council, United Nations.
- Congress of the People. 1955. *Freedom Charter. Adopted 26 June 1955 at the Congress of the People, Kliptown*. Available: <http://www.anc.org.za/ancdocs/history/charter.html> [16 November 2003].
- Constitutional Court. 1996. *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa. 1996 (4) SA 744 (CC)*. Constitutional Court of South Africa.
- . 1998. *Soobramoney v Minister of health, KwaZulu-Natal 1998 (1) SA 765 (CC)*.
- . 2000. *Government of the Republic of South Africa vs Irene Grootboom. Case No: CCT 11/00*. Constitutional Court of South Africa.
- . 2002. *Minister of Health and Others v treatment Action Campaign and Others CCT 8/02 ('Nevirapine Judgement')*. Constitutional Court of South Africa. Available: <http://www.concourt.gov.za> [March 2004].
- . 2003. *Alexkor Ltd. and the Government of the Republic of South Africa versus the Richtersveld Community and others (CCT 19/03). Judgement 14 October 2003*. Constitutional Court of South Africa. Available: <http://www.concourt.gov.za/> [15 November 2003].
- Cook, Rebecca. 1994. State accountability under the Convention on the Elimination of All Forms of Discrimination Against Women. in *The human rights of women*. Rebecca Cook, 228–256. Philadelphia: University of Pennsylvania Press.
- Cornwall, Andrea, and Celestine Nyamu-Musembi. 2004. Putting the 'rights-based approach' to development into perspective. *Third World Quarterly* 25, no. 8: 1415-37.
- Cousins, Ben. 1995. *A role for common property institutions in land redistribution programmes in South Africa. IIED Gatekeeper series SA53*. London: International Institute for Environment and Development.
- . 1997. How do rights become real? Formal and informal institutions in South Africa's land reform. *IDS Bulletin* 28: 59–68.

- . 2000. Introduction: Does land and agrarian reform have a future and, if so, who will benefit? In *At the crossroads. Land and agrarian reform in South Africa into the 21st century*. Ed. Ben Cousins, 1–8. Cape Town: Programme for Land and Agrarian Studies, University of Western Cape and National Land Committee.
- . 2001. *A return to the apartheid era?* Mail & Guardian, 23 to 29 Nov 2001, p. 25.
- . 2002. Legislating negotiability: tenure reform in post-apartheid South Africa. In *Negotiating property in Africa*. Eds. Kristine Juul, and Christian Lund, 67–106. Portsmouth, NH: Heinemann.
- . 2003. The Zimbabwe Crisis in its wider context: The politics of land, democracy and development in Southern Africa. in *Zimbabwe's unfinished business, Rethinking land, state and nation in the context of crisis*. eds. Amanda Hammar, Brian Raftopoulos, and Stig Jensen, 263–316. Harare: Weaver Press.
- Cousins, Ben, and Aninka Claassens. 2003. *Looming land disaster*. Mail & Guardian Online, 31 October 2003. Available: <http://www.mg.za> [26 November 2003].
- Cousins, Ben, Tessa Cousins, Donna Hornby, Rosalie Kingwill, Lauren Royston, and Warren Smit . 2005. *Will formalising property rights reduce poverty in South Africa's 'second economy'? Questioning the mythologies of Hernando de Soto. PLAAS Policy Brief No. 18 – Debating land reform and rural development*. Cape Town: Programme for Land and Agrarian Reform, University of the Western Cape. Available: <http://www.uwc.ac.za/plaas/> [15 December 2005].
- Cowling, R. M., K. J. Esler, and P. W. Rundel. 1999. Namaqualand, South Africa – an overview of a unique winter-rainfall desert ecosystem. *Plant Ecology*, no. 142: 3–21.
- Cowling, Richard, Shirley Pierce, and Colin Paterson-Jones. 1999. *Namaqualand. A succulent desert*. Cape Town: Institute for Plant Conservation, University of Cape Town, Fernwood Press.
- Crawhall, Nigel. 1997. *The death of a useless language*. Mail & Guardian Online 30 July 1997. Available: <http://www.mg.co.za> [31 March 2003]. Johannesburg.
- Cross, Catherine. 1992. An alternative legality: The property rights question in relation to South African land reform. *South African Journal on Human Rights* 8, no. 4: 305–331.
- . 1997. Rural land tenure reform. Surrounded by hungry allocators. *Indicator South Africa* 14, no. 2: 72–78.
- Cross, Catherine, and Donna Hornby. 2002. *Opportunities and Obstacles to Women's Land Access in South Africa. A Research Report for the Promoting Women's Access to Land Programme*. National Land Committee/Department of Land Affairs/Centre for Rural Legal Studies/Centre for Applied Legal Studies (Wits). Available as: 'Land Reform Gender Policy Framework' by DLA: [http://land.pwv.gov.za/legislation\\_policies/policies.htm](http://land.pwv.gov.za/legislation_policies/policies.htm). [2 December 2005].
- CSS. 1995. *The October Household Survey (quoted by May 2000)*. Pretoria: Central Statistical Service.
- Davenport, Rodney, and Christopher Saunders. 2000. *South Africa. A modern history*. London: Macmillan Press Ltd.
- Davenport, T. R. H. 1987. Can sacred cows be culled? A historical review of land policy in South Africa, with some questions about the future. *Development Southern Africa* 4, no. 3.
- DBSA. 1998. *Northern Cape: Development Profile 1998*. Midrand: Development Business Information Unit, Development Bank of Southern Africa [quoted in Rohde, Hoffman and Allsopp 2003: 23].
- de Klerk, Michael. 1991. *A harvest of discontent : the land question in South Africa*. Mowbray, Cape Town: Institute for a Democratic Alternative for South Africa.

- de Soto, Hernando. 1989. *The other path*. Basic Books.
- de Soto, Hernando. 2000. *The mystery of capital*. New York: Basic Books.
- de Soto, Hernando. 2002a. Law and property outside the West: a few new ideas about fighting poverty. *Forum for Development Studies* 29, no. 2: 349-61.
- . 2002b. Rejoinder to Mathieu. *Forum for Development Studies* 29, no. 2: 376–88.
- de Swardt, Cobus. 1993. *Spoegrivier report. Unpublished report on a household survey in Namaqualand*. University of the Western Cape.
- Deacon, Roger. 2002. Why the king has kept his head: Foucault on power as sovereignty. *Politeia* 21, no. 3: 6–17.
- Department of Agriculture. 2002. *General information on agriculture in South Africa*. Ministry of Agriculture and Land Affairs. Available: <http://www.nda.agric.za/history/> [12 Sept 2002].
- Department of Constitutional Development. 1998. *White Paper on Local Government*. Pretoria: Government Printer.
- Desmond, Cosmas. 1985. Foreword, London, March 1984. in *The surplus people. Forced removals in South Africa*. Laurine Platzky, and Cherryl Walker, xvii–xix. Johannesburg : Ravan Press for the Surplus People Project.
- DFID. 2000. *Realising human rights for poor people. DFID strategy paper*. London: Department for International Development.
- Didiza, Thoko. 2001a. *Address to the National House of Traditional Leaders by the Minister for Agriculture and Land Affairs, 4 Dec 2001: 'Partnership in development and unity in Africa.'* Ministry of Agriculture and Land Affairs. Available: <http://www.gov.za> [December 2001].
- . 2001b. *Opening address by the Minister for Agriculture and Land Affairs, Ms Thoko Didiza, at the National Land Tenure Conference, International Convention Centre, Durban, 26 Nov 2001*. Ministry for Agriculture and Land Affairs.
- . 2001c. *Speech by Minister for Agriculture and Land Affairs on land redistribution in South Africa, Johannesburg, 8 Aug 2001*. South Africa Government Online. Available: <http://www.info.gov.za/speeches/2001/010817345p1008.htm> [8 Aug 2003].
- Diergaardt, Veronika. 2002. *Serwituut kwessie. Waterpypleiding oor Pella Grond Na Aggeneys/Pofadder. [The servitude issue. Water pipe line across Pella land to Aggeneys/Pofadder.] A study of Pella history with focus on the water servitude 1975 (unpublished)*. Pella.
- Directorate of Public Land Support Services. 2001. *Community of Pella - Former Coloured Rural Area (July, 2001)*. Pretoria: Department of Land Affairs.
- DLA. 1996. *Our Land: Green Paper on South African Land Policy*. Department of Land Affairs.
- . 1997a. *Land reform gender policy - a framework*. Pretoria: Department of Land Affairs.
- DLA. 1997b. *Our land. White Paper on South African Land Policy*. Pretoria: Republic of South Africa. Department of Land Affairs. Available: <http://www.info.gov.za/documents/whitepapers/index.htm> [1 December 2005].
- DLA. 1998a. *Cabinet Memorandum on the Transformation of Certain Rural Areas Act (draft)*. Pretoria: Department of Land Affairs.
- . 1998b. *Responses to public comments received on the Transformation of Rural Areas Bill. Note by Chief Director to Director-General, DLA, 14 Aug 1998*. Pretoria: Department of Land Affairs, Directorate Redistribution, Land Rights and Land Development.

- . 1999a. Commonage certificates to Namaqualanders. *Land Info* 6, no. 2: 3–4.
- . 1999b. *Land Rights Bill, Draft 3 June 1999*. Department of Land Affairs.
- . 2000. *Memorandum: Adherence with existing and new criteria for commonage projects submitted to the Minister (FRC/2/P)*. Pretoria: Department of Land Affairs.
- . 2001a. *Namaqualand Commonage Investigation. Monitoring & Evaluation, Newsletter, No. 3, 2001*. Pretoria: Department of Land Affairs.
- . 2001b. *National Land Tenure Conference: Finding Solutions, Securing Rights. Background paper*. Pretoria: Department of Land Affairs, Ministry of Agriculture and Land Affairs.
- . 2001c. *Public Notice, Government Gazette 6 July 2001. Notice in terms of section 3 (4) (a) of the Transformation of Certain Rural Areas Act, 1998 (Act No. 94)*. Pretoria: Department of Land Affairs. Made available at <http://thor.sabinet.co.za> [accessed 13.05.2002].
- DLA. 2003a. *Memorandum on the objects of the Communal Land Rights Bill, 22 September 2003*. Pretoria: Department of Land Affairs. Available: <http://land.pwv.gov.za/legislation> [6 January 2004].
- DLA. 2003b. *Notes on the indaba: The Restitution of Land Rights Amendment Bill, 26 June 2003*. Pretoria: Department of Land Affairs. Available: [http://land.pwv.gov.za/publications/news/DLA\\_in\\_the\\_news.htm](http://land.pwv.gov.za/publications/news/DLA_in_the_news.htm) [16 November 2003].
- . 2004a. *Editorial comment: End of colonial era – a new beginning. Tenure Newsletter, July 2004, 12–13*. Pretoria: Department of Land Affairs. Directorate: Tenure Reform. Available: <http://land.pwv.gov.za/home.htm> [30 November 2004].
- . 2004b. *Tenure Newsletter July 2004*. Pretoria: Department of Land Reform. Directorate: Tenure Reform. Available: <http://land.pwv.gov.za/home.htm> [30 November 2004].
- DLA. 2005. *Strategic Plan 2005–2010. Sustainable Land and Agrarian Reform: A contribution to Vision 2014, March 2005*. Tshwane: Department of Land Affairs. Available: <http://land.pwv.gov.za/home.htm> [7 June 2005].
- DLA Northern Cape. 2001a. *Pella Meent Gronde (official but unpublished overview)*.
- . 2001b. *Statistics: Land reform in Namaqualand. Presentation by Gerhaard Jordan and Dawid Smit, 26 January 2001*. Department of Land Affairs Provincial Office: Northern Cape, Namaqualand District Council Region.
- DoA. 2001. *Namakwaland: Grondbesit patrone (Unpublished overview of land owners and land redistribution in Namaqualand)*. Springbok: Department of Agriculture.
- Donnelly, Jack. 1999. Human rights, democracy and development. *Human Rights Quarterly* 21, no. 2.
- Dorrington, Rob, Debbie Bradshaw, Leigh Johnson, and Debbie Budlender. 2004. *The demographic impact of HIV/AIDS in South Africa. National indicators for 2004*. Cape Town: Centre for Actuarial Research, South African Medical Research Council and Actuarial Society of South Africa. Available: <http://www.mrc.ac.za/bod/reports.htm>. [25 January 2005].
- Dugard, John. 2000. *International law. A South African perspective*. Cape Town: Juta.
- Dworkin, Ronald. 1977. *Taking rights seriously*. Cambridge, MA: Harvard University Press (nineteenth printing 2002).
- Eide, Asbjorn. 2001. Economic, social and cultural rights: A universal challenge. In: *Economic, social and cultural rights*. Eds. Asbjorn Eide, Catarina Krause, and Rosas Allan, 3-7. Dordrecht: Martinus Nijhoff Publishers.
- Eide, Asbjorn. 2005. The importance of economic and social rights in the age of economic globalisation. In *Food and human rights in development. Volume I: Legal and institutional*

- dimensions and selected topics*. Eds. Wenche Barth Eide, and Uwe Kracht, 3-40. Antwerpen: Intersentia.
- Eide, Wenche Barth, and Uwe Kracht, Eds. 2005. *Food and human rights in development. Volume I: Legal and institutional dimensions and selected topics*. Antwerpen: Intersentia.
- Englund, Harri. 2000. The dead hand of human rights: contrasting Christianities in post-transition Malawi. *Journal of Modern African Studies* 38, no. 4: 579–603.
- Fairshare. 2003. *Financing local government - challenges and prospects for delivery. How the South African economy works, November 2003*. Cape Town: Fairshare, University of the Western Cape.
- FAO. 2002. *World Food Summit: Five years later*. Rome: United Nations Food and Agriculture Organisation.
- Ferguson, James. 1994. *The anti-politics machine: 'Development', depoliticization and bureaucratic power in Lesotho*. London: Oxford University Press.
- FIG. 1999. *Bathurst 1999. Report on the workshop on land tenure and cadastral infrastructures for sustainable development*. International Federation of Surveyors. Available: <http://www.sli.unimelb.edu.au/UNConf99/sessions/session1/bathurstdec.pdf> [Sept. 2000].
- Finance24. 2004. *Main budget seen at R363bn*. Johannesburg: News24, 16 February 2004. Available: <http://www.finance24.co.za> [17 February 2004].
- Flyvbjerg, Bent. 1991. *Rationalitet og magt: Bind I: Det konkrete videnskab*. Odense: Akademisk Forlag.
- . 1998. *Rationality and power: democracy in practice. Translated by Steven Sampson*. Chicago: University of Chicago Press.
- Forrest, Drew. 2001. *Conflicts triggered by land transfers to chiefs*. Mail & Guardian Online, 23 Nov 2001. Available: <http://www.mg.za> [29 January 2004].
- Foucault, Michel. 1986. *Discipline and punish: The birth of the prison*. Peregrine: Harmondsworth.
- Fredrickson, George M. 1981. *White supremacy. A comparative study in American and South African history*. Oxford/New York: Oxford University Press.
- FSAW. 1954. *Women's Charter. Adopted at the Founding Conference of the Federation of South African Women, Johannesburg, 17 April 1954*. Available: <http://www.anc.org.za> [18 March 2004].
- Fukuyama, Francis. 1991. *The end of history and the last man*. London: Hamish Hamilton.
- Fuller, Alexandra. 2002. *Don't let's go to the dogs tonight. An African childhood*. London: Picador.
- Gewirth, Alan. 1998. *Human Rights. Essays on justification and applications*. Chicago: University of Chicago Press.
- Gore, C. 1993. Entitlement relations and 'unruly' social practices: a comment on the work of Amartya Sen. *Journal of Development Studies* 29, no. 3: 429–60.
- Government of South Africa. 1998. *The national action plan for the promotion & protection of human rights*. Houghton: The Co-ordinating Committee on the National Action Plan.
- . Provision of Certain Land for Settlement Amendment Act 26 of 1998.
- . 2000a. *A brief explanation of the South African Legislative process*. Pretoria: Government of South Africa. Available: <http://www.polity.org.za/govdocs/legislation/process.html> [28 March 2000].
- . 2000b. *HIV/AIDS/STD Strategic Plan for South Africa 2000–2005*. Pretoria: Department of Health.
- Governor, Cape of Good Hope. 1843. The 'Ticket of Occupation' for Komaggas. By his Excellency Major-General Sir George Thomas Napier KCB Governor and Commander in Chief, &c. Appendix

- to Votes and Proceedings of Parliamentary reports of Select Committees, 1888. C2 - '88 (copied from Sharp 1977: 53).
- Groenewald, Yolandi. 2005. *Late land claimants want another chance*. Mail & Guardian Online, 13 July 2005. Available: <http://www.mg.co.za> [17 July 2005].
- Gumperz, John. 1982. *Discourse strategies. Studies in international socio-linguistics 1*. Cambridge: Cambridge University Press.
- Gutto, Shadrack B. O. 2001a. *Democracy, human rights and the land question in the new South Africa. Document officially distributed at the National Land Tenure Conference, International Convention Centre (ICC) – Durban, 26 November 2001*.
- . 2001b. *Equality and non-discrimination in South Africa. The political economy of law and law making*. Cape Town: New Africa Books.
- Hacking, Ian. 1999. *The social construction of what?* Cambridge, Mass: Harvard University Press.
- Hadland, Adrian, and Jovial Rantao. 1999. *The life and times of Thabo Mbeki*. Rivonia: Zebra.
- Hajer, M. A. 1995. *The politics of environmental discourse: Ecological modernisation and the policy process*. Oxford: Clarendon.
- Hall, Ruth, Peter Jacobs, and Edward Lahiff. 2003. *Evaluating land and agrarian reform in South Africa: No. 10 Final report*. Cape Town: Programme for Land and Agrarian Studies, University of Western Cape.
- Hall, Ruth, and Edward Lahiff. 2004. *Budgeting for land reform. PLAAS Policy Brief No. 13, August 2004*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. Available: <http://www.uwc.ac.za/academic/indexr.htm> [15 November 2004].
- Hanekom, Derek. 1995. *Aankondiging: Die toekoms van die Wet op Landelike Gebiede (Wet 9 van 1987). [Notification: The future of the Rural Areas Act (Act 9 of 1987)]. Letter from the Minister of Agriculture and Land Affairs to residents of the 23 Act 9 rural areas, 21 December 1995. Reproduced in LGK 1996: 76–81*.
- Hart, Gillian. 2002. *Disabling globalisation. Places of power in post-apartheid South Africa*. Pietermaritzburg: University of Natal Press.
- Hellum, Anne. 1999. *Women's human rights and legal pluralism in Africa: Mixed norms and identities in infertility management in Zimbabwe*. Oslo: Mond Books.
- . 2000. How to improve the doctrinal analysis of legal pluralism: A comparison of the legal doctrine about custom and local law in Zimbabwe and Norway. *Retfærd* No. 89: 40–62.
- Hellum, Anne, and Bill Derman. 2004. Land reform and human rights in contemporary Zimbabwe: balancing individual and social justice through an integrated human rights framework. *World Development* 32, no. 10: 1785–1805.
- Hendricks, Fredrick T. 1990. *The pillars of apartheid : land tenure, rural planning, and the chieftancy . PhD Dissertation*. Uppsala/Stockholm: Uppsala Universitet, Academiae upsaliensis/Almquist & Wiksell.
- Hendricks, Fredrick T. 1995. Antinomies of access. Social differentiation and communal tenure in a Namaqualand reserve, South Africa. Paper presented at *Reinventing the commons, the fifth annual conference of the International Association for the Study of Common Property, 24-28 May, 1995, Bodø, Norway*.
- Higgins, Vaughan, and Stewart Lockie. 2002. Re-discovering the social: neo-liberalism and hybrid practices of governing in rural natural resource management. *Journal of Rural Studies* 18, no. 4:

419-28.

- Hoeane, Thabisi. 2004. *Nothing new about the NNP*. Mail & Guardian Online 14 June, 2004. Available: <http://www.mg.co.za> [15 June 2004].
- Hohfeld, Wesley Newcomb. 1966. *Some fundamental legal conceptions as applied in juridical reasoning*. New Haven: Yale University Press.
- Holomisa, Patekile. 2001. *Securing rights on communal land. Address by Nkosi S. P. Holomisa (A/ Dilizintaba), President of the Congress of Traditional Leaders of South Africa. National Land Tenure Conference, 27 Nov 2001 (circulated version)* .
2001. Aas: Noragric, Agricultural University of Norway.
- HSRC and SARPN. 2002. *The impact of HIV/Aids on land reform in South Africa. Report of a Department of Land Affairs workshop organised in conjunction with the UNDP Regional Project, SARPN and the HSRC, Pretoria 14 & 15 August 2002*. Human Sciences Research Council and South African Regional Poverty network.
- Husum, Hans. 2004. *Land-based livelihoods and land reform in Kamiesberg Municipality, South Africa. MSc thesis*. Ås: Noragric, Agricultural University of Norway.
- I-Net Bridge. 2003. *R61m citrus estate returned to its rightful owners*. Mail & Guardian Online 29 Sep 2003. Available: <http://www.mg.co.za> [30 Sep 2003].
- Ikdahl, Ingunn, Anne Hellum, Randi Kaarhus, and Tor A. Benjaminsen. 2005. *Human rights, formalisation and women's land rights in southern and eastern Africa. Noragric Report No. 26*. Department of International Environment Studies (Noragric), Norwegian University of Life Sciences.
- ILO. 1989. *Convention (No. 169) concerning indigenous and tribal peoples in independent countries. Adopted on 27 June 1989 by the International Labour Organisation*.
- Independent Electoral Commission. 1999. *National Elections 1999, Municipal Results Pella TLC*. Available: <http://www.elections.org.za> [22 July 2003].
- . 2000. *Local Government Elections 2000* . Available: <http://www.elections.org.za> [22 July 2003].
- . 2004. *National & Provincial Elections 2004*. Available: <http://www.elections.org.za> [18 April 2004].
- Jacobs, Harvey M. 1995. Ethics in environmental planning and practice: The case of agricultural land protection. In *Planning ethics: A reader in planning theory, practice and education*. Ed. Sue Hendler. New Brunswick, New Jersey : Centre for Urban Policy Research.
- James, Alan. 2001. *The first bushman's path. Stories, songs and testimonies of the /Xam of the Northern Cape. Versions, with commentary by Alan James*. Pietermaritzburg: University of Natal Press.
- James, Deborah. 2000. 'After years in the wilderness': the discourse of land claims in the New South Africa. *The Journal of Peasant Studies* 27, no. 3: 142-61.
- Jenkins, Carolyn, and Lynne Thomas. 2000. *The changing nature of inequality in South Africa. UNU/WIDER Working Papers*. The United Nations University/World Institute for Development Economics Research.
- Johansen, Anders. 2003. *Samtalens tynne traad. Skriveerfaringer*. Oslo: Spartacus.
- Johnson, Craig, and Timothy Forsyth. 2002. In the Eyes of the State: Negotiating a 'Rights-Based Approach' to Forest Conservation in Thailand. *World Development* 30, no. 9: 1591–1605.

- Jordaan, Gerhaard, and René Laan. 1998. Redistribution in Namaqualand. *Land Info* 5, no. 1: 14–17.
- Kaarhus, Randi. 1992. Diskurs som analytisk begrep. *Norsk Antropologisk Tidsskrift*, no. 2: 105–117.
- Kabhebezulu, Uzwilithini. 2001. *Address by his Majesty the King at the gala dinner hosted by National Department of Land Affairs in Durban, Internationaional Convention Centre, 28 Nov 2001*.
- Kaptein Witbooy. 1851. Kaptein Witbooy requesting grant of Pella land, letter to the Governor of the Cape Colony, Memorial, Cape Archives. Source: CO. Vol. 432, ref W37.
- Keegan, Timothy. 1996. *Colonial South Africa and the origins of the racial order*. Cape Town & Johannesburg: David Philip.
- Keeley, James, and Ian Scoones. 2003. *Understanding environmental policy processes. Cases from Africa*. London: Earthscan.
- Kelly, Kevin. 2002. Hermeneutics in action: empathy and interpretation in qualitative research. In *Research in practice. Applied methods for the social sciences*. Martin Terre Blanche, and Kevin Durrheim, 398–420. Cape Town: University of Cape Town Press.
- Kepe, Thembela. 2001. *Waking up from the dream: the pitfalls of 'fast-track' development on the Wild Coast of South Africa*. Research Report, 8. Cape Town: Programme for Land and Agrarian Reform, University of Western Cape.
- Kepe, Thembela, and Ben Cousins. 2002. *Radical land reform is key to sustainable rural development in South Africa, Policy Brief No 3 – Debating land reform and rural development*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. Available: <http://www.uwc.ac.za/academic/indexr.htm> [February 2003].
- Kerner, Karl, Jens Niebuhr, and Haavard Steinshamn. 2005. *The Green Dictionary – Online*. Available: [http://www.nlh.no/biblioteket/ordbok/index\\_eng.php](http://www.nlh.no/biblioteket/ordbok/index_eng.php) [25 February 2006].
- Khâi-Ma Municipality. 2002a. *Announcement 3, 2002. Regulations in terms of the Rural Areas Act (House of Representatives), 1987 (Act No. 9 of 1987), the Municipal Structures Act (Act No. 117 of 1998) and the Municipal Systems Act (Act No. 32 of 2000), for the management, control and protection of all grazing areas and land that vests in the municipality or is managed by the municipality. Provincial Gazette No. 663, 23 Jan 2002. Addendum: Khâi-Ma Municipality Grazing Regulation*.
- . 2002b. *Weidungsregulasies (Grazing Regulations). Regulations in terms of the Rural Areas Act (House of Representatives), 1987 (Act No. 9 of 1987), the Municipal Structures Act (Act 117 of 1998) and the Municipal Systems Act (Act No. 32 of 2000), for the management, control and protection of all grazing areas and land that vests in the municipality or is managed by the municipality. Provincial Gazette No. 663, 23 Jan 2002*.
- KIV. 2002. *Grondwet van die Komaggas Vereniging vir Gemeenskaplike Eiendom [Constitution of the Komaggas Communal Property Association]*. Komaggas.
- Klare, Karl E. 1998. Legal culture and transformative constitutionalism. *South African Journal on Human Rights*, no. 14: 146-88.
- Klinghardt, G. P. 1982. *Social differentiation and local government in Pella, a rural coloured area in great Bushmanland. MA dissertation*. Cape Town: University of Cape Town.
- Klug, Heinz. 1993. *LAPC Research Paper 1: Legal issues*. Johannesburg: Land and Agriculture Policy Centre.
- . 2000. *Constituting democracy. Law, globalism and South Africa's political reconstruction*. Cambridge: Cambridge University Press.



- Kokh, Eddie, and Siven Maslamoney. 1997. *Words that click and rustle softly like the wild*. *Mail & Guardian Online* 12.09.1997. Johannesburg.
- Krog, Antjie. 1999. *Country of my skull*. London: Vintage.
- Kröhne, Henry, and Lala Steyn. 1991. *Land use in Namaqualand. Towards a community-based management strategy for agricultural land use in the Namaqualand reserves; Leliefontein, Steinkopf and the Richtersveld*. Cape Town: Surplus People Project.
- Lahiff, Edward. 2001. *Land reform in South Africa: Is it meeting the challenge? PLAAS Policy Brief No. 1 – Debating land reform and rural development*. Cape Town: Programme for Land and Agrarian Reform, University of the Western Cape. Available: <http://www.uwc.ac.za/academic/indexr.htm> [February 2003].
- Lahiff, Edward, and Ben Cousins. 2001. The land crisis in Zimbabwe – views from south of the Limpopo. *Journal of Agrarian Change* 1, no. 4 (November): 652–666.
- Lahiff, Edward, and Sam Rugege. 2002. A critical assessment of state land redistribution policy in the light of the Grootboom judgement. *New Agenda*, no. 7: 48–67.
- Land Claims Court of South Africa. 2001. *Judgement in the case between the Richtersveld community and Alexkor Ltd, 22 March 2001, case no. LCC 151/98*. Cape Town.
- Land organisations and research institutions. 2001. *Tenure reform for communal areas in the former 'homelands': Secure land rights or continuing insecurity. A discussion document for the National Land Tenure Conference, Durban, 27 November 2001*. Durban: National Land Committee, Centre for Rural Legal Studies, Surplus People Project. Women on Farms Project, Nkuzi Development Association, The Rural Action Committee, Association for Rural Advancement, Centre for Applied Legal Studies and Southern African Regional Poverty Network.
- . 2004. *No democracy for rural people. Press statement 12 February 2004*. Cape Town: By National Land Committee, The Programme for Land and Agrarian Studies, Nkuzi Development Association, Transkei Land Services Organisation, Rural Action Committee Mpumalanga Province and the Association for Community and Rural Advancement.
- Landelike Gebiede Komitee. 1996a. *Verbatim notule van die vergadering gehou te Komaggas 24 Augustus, 1996 (Wet 9 van 1987) [Verbatim minutes of the meeting held in Komaggas 24 August 1996 on Act 9 of 1987]*. Pretoria: Transcribed and printed by International Data Solutions.
- . 1996b. *Wetlike en administratiewe konteks: Landelike gebiede geadministreer kragtens die Wet op Landelike Gebiede 9 van 1987. Besprekingsdokument [Legal and administrative context: Rural Areas administered under the Rural Areas Act 9 of 1987. Discussion document]*. Pretoria: Landelike Gebiede Komitee [Rural Areas Committee].
- Landless delegates. 2001. *The Landless People's Charter. Adopted by landless delegates at the Landless People's Assembly held in Durban 30.08.2001 with amendments by Landless Rural Women meeting in Kimberley in October 2001*. Johannesburg: National Land Committee. Available: <http://www.nlc.co.za/pubs2003/landlesscharter1.html> [20 January 2004].
- Latour, Bruno. 1993. *We have never been modern*. Cambridge (MA): Harvard University Press.
- Leach, Melissa, Robin Mearns, and Ian Scoones. 1999. Environmental entitlements: Dynamics and institutions in community-based natural resource management. *World Development* 27, no. 2: 225–47.
- Letsoalo, Essy. 1987. *Land reform in South Africa. A black perspective*. Johannesburg: Skotaville Publishers.

- Liebenberg, Sandra. 2001. The right to social assistance: The implications of Grootboom for policy reform in South Africa. *South African Journal on Human Rights* 17, no. 2: 232–57.
- Lindquist, Sven. 1997. *'Exterminate all the brutes'*. London: Granta Books.
- Lodge, Tom. 2002. *Politics in South Africa. From Mandela to Mbeki*. Cape Town/Oxford: David Philip/James Currey.
- Long, Norman, and Ann Long. 1992. *Battlefields of knowledge. The interlocking of theory and practice in social research and development*. London: Routledge.
- Louw, J. G. 2000. *Pofadder 20th century. Information brochure from Pofadder municipality*. Pofadder.
- LRC. 2002a. *Annual Report 1 April 2000–31 March 2001*. Johannesburg: Legal Resources Centre. Available <http://www.lrc.org.za> [5 August 2002].
- . 2002b. *Konsep regulasies/beleidvoorskrif vir Ontwikkelingsprojekte op die restant [Draft regulations/policy direction regarding development projects on the remainder], 5 November 2002. Quoted in SPP 2003: Steinkopf Verslag*. Cape Town: Legal Resources Centre.
- . 2002c. *Ses van die een/Half dosyn van die ander [Six of the one, half a dozen of the other]. Memo for options workshop in Concordia 6 September 2002 (6 p.)*. Cape Town: Legal Resources Centre (unpublished document).
- LRC and SPP. 1999. *Proposed amendments to the Transformation of Certain Rural Areas Act No. 94 of 1999 to be included in the draft Land Affairs General Amendment Bill, 1999 (revised draft 19 July 1999) (unpublished document)*. Cape Town: Legal Resources Centre/Surplus People Project.
- Lukes, Steven. 1974. *Power. A radical view*. London: British Sociological Association.
- Maanen, John van. 1988. *Tales of the field. On writing ethnography*. Chicago: The University of Chicago Press.
- Macroplan. 2000. *Socio-economic survey of various rural communities in the Northern Cape (Komaggas)*. Upington: Macroplan Town & Regional Planners.
- Mail & Guardian. 1998. *Hanekom to let go of 'coloured reserve' land*. Mail & Guardian, 16 October 1998. Available: <http://www.mg.za> [3 February 2004].
- . 2001. *Editorial: The state lands a role*. Mail & Guardian, September 28 to October 4, 2001.
- . 2003. *'Robbery, not politics, behind farm attacks'*.
- . 2004. *Land won't belong to all by 2005*. Mail & Guardian Online, 20 Feb 2004. Available: [www.archive.mg.co.za](http://www.archive.mg.co.za) [4 March 2004].
- . 2005. *Skweyiya to hold urgent talk with big banks*. Mail & Guardian Online, 15 June 2005. Available: [www.mg.co.za](http://www.mg.co.za) [16 June 2005].
- Makgoba, Malegapuru William, Thaninga Shope, and Thami Mazwai. 1999. Introduction. In *African Renaissance. The new struggle*. Ed. Malegapuru William Makgoba, i–xii. Mafube Publishing/Tafelberg Publishers.
- Makopi, Sibongile. 2000. Awards to provide security of tenure and comparable redress. In: *At the crossroads. Land and agrarian reform in South Africa into the 21st century*. Ed Ben Cousins, 143–150. Cape Town: Programme for Land and Agrarian Studies/National Land Committee.
- Mamdani, Mahmood. 1989. *Social movements and constitutionalism in the African context. Working Paper 2*. Kampala: Centre for Basic Research.
- Mamdani, Mahmood, ed. 2000. *Beyond rights talk and culture talk: comparative essays on the politics of rights and culture*. New York: St. Martin's Press.
- Mandela, Nelson. 1994. *Long walk to freedom*. London: Abacus.

- . 1996. Foreword. in *A practical guide to human rights in local government*. Ed. Shadrack Bo Gutto/Durban/Johannesburg/Cape Town: Butterworth Publishers.
- Manji, Feroze. 1998. The depoliticisation of poverty. In *Development and rights*. Ed. Deborah Eade, 12–33. Oxford: Oxfam.
- Marais, Hein. 2001. *South Africa. Limits to change: The political economy of transition*. 2nd ed. Cape Town/London/New York: University of Cape Town Press/Zed Books Ltd.
- Marais, J. S. 1939. *The Cape Coloured People 1652–1937*. Cape Town: Witswatersrand University Press (edition 1957).
- Mathieu, Paul. 2002. Security of land tenure papers and unleashing grass-root investment for rural development in Africa: Some comments. *Forum for Development Studies* 29, no. 2: 367–75.
- Matshikiza, John. 1999. *Change blooms in Namaqualand*. Mail & Guardian Online, 4 September 1999. Available: <http://archive.mg.co.za> [5 June 2003].
- May, Julian. 2004. *Poverty, social policy and the social wage. Paper presented at the conference on the 'Politics of socio economic rights in South Africa: Ten years after apartheid', 8–9 June 2004, Oslo*. (Published as May and Hunter 2005).
- May, Julian, and Nina Hunter. 2005. Poverty, social policy and the social wage. Balancing the books in post-apartheid South Africa. In *Democratising development. The politics of socio-economic rights in South Africa*. Eds. Peris Jones, and Kristian Stokke, 101–129. Leiden: Martinus Nijhoff Publishers.
- May, Julian, Ingrid Woolard, and Stephan Klasen. 2000. The nature and measurement of poverty and inequality. *Poverty and inequality in South Africa: Meeting the challenge*. ed. Julian May, 19–48. Cape Town/ London, New York: David Philip Publisher/ZED Books.
- Mayende, Gilingwe. 2001. *The challenge of land tenure reform in South Africa. Issues, problems and prospects. Technical Paper by the Director General, Department of Land Affairs the National Land Tenure Conference, Durban, 26 November 2001 (circulated document)*. Department of Land Affairs.
- Mbali, Mandisa. 2005. The Treatment Action Campaign and the history of rights-based, patient-driven HIV/AIDS activism in South Africa. In *Democratising development. The politics of socio-economic rights in South Africa*. Eds. Peris Jones, and Kristian Stokke, 213–243. Leiden: Martinus Nijhoff Publishers.
- Mbeki, Govan. 1964. *South Africa. The peasants' revolt*. Durban: IDAF (1984).
- Mbeki, Thabo. 1996. I am an African. Statement of Deputy President Thabo Mbeki on the occasion of the adoption of the Constitutional Assembly of the Republic of South Africa Constitution Bill 1996, Cape Town, 8 May 1996. Reprinted in *The life and times of Thabo Mbeki*. 1999 ed., Adrian Hadland, and Jovial Rantao/Rivonia: Zebra.
- . 1998. South Africa: Two nations, Statement of Deputy President Thabo Mbeki at the opening of the debate in the National Assembly on reconciliation and nation building, 29 May 1998. Reprinted in *The life and times of Thabo Mbeki*. 1999. Adrian Hadland, and Jovial Rantao, 184–193. Rivonia: Zebra.
- . 1999. Prologue. In *African Renaissance: The new struggle*. Ed. William Makgoba Malegapuru, xiii–xxi. Mafube Publishing/Tafelberg Publishers.
- . 2002. *State of the Nation Address at the opening of Parliament, Cape Town, 8 February 2002*. Cape Town: South African Government Information. Available:

- <http://www.info.gov.za/speeches/2002/0202281146a1001.htm> [30 Nov 2004].
- . 2003. Letter from the President: The land shall belong to those who work it. *ANC Today – Online Voice of the African National Congress 20– 26 June 3*, no. 24.
- . 2004. Letter from the President: The ANC will not disappoint the people. *ANC Today – Online Voice of the African National Congress 16– 22 April 4*, no. 15.
- Mbongwa, Masiphula, Nick Vink, and Johann van Zyl. 2000. The agrarian structure and empowerment: the legacy. *South African agriculture at the crossroads. An empirical analysis of efficiency, technology and productivity*. eds. Colin Thirtle, Johan van Zyl, and Nick Vink. London: Macmillan Press Ltd.
- MDB. 2003. *Municipal Profiles 2003*. Pretoria: Municipal Demarcation Board. Available: <http://www.demarcation.org.za/municprofiles2003/index.asp> [30 June 2004].
- Medical Research Council. 2001. *Release of MRC technical report: The impact of HIV/Aids on adult mortality in South Africa*. Medical Research Council,. Available: <http://www.mrc.ac.za/bod> [December 2001].
- Mehta, Lyla, Melissa Leach, Peter Newell, Ian Scoones, K. Sivaramakrishnan, and Sally-Anne Way. 1999. *Exploring understandings of institutions and uncertainty: New directions in natural resource management*, Institute of Development Studies, Brighton, Sussex.
- Mellvill, Samuel. 1890. *Report on the lands in Namaqualand set apart for the occupation of natives and others (G 60'90) (transcribed version)*. Cape Town: W. A. Richards and Sons Government printers.
- Merriam-Webster Online. 'Policy'. Available: <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=policy&x=12&y=14> [05 Jan 2005].
- Migot-Adholla, P. Hazell, B. Blarell, and F. Place. Indigenous land rights systems in sub-Saharan Africa, a constraint on productivity? *World Bank Economic Review* 5: 155–175.
- Mingo, Chris. 2002. *The 2002 Land Affairs budget: Is land reform on track? Budget Brief No. 89*. IDASA – Budget Information Service. Available: <http://www.idasa.org.za/biz/> [15 September 2002].
- Ministry of Agriculture and Land Affairs. 2001. *Land Redistribution for Agricultural Development (LRAD). A sub-programme of the Land Redistribution Programme*. Pretoria: Ministry of Agriculture and Land Affairs. Available: <http://www.nda.agric.za/docs/redistribution.htm> [30 Nov 2004].
- Mngxitama, Andile. 2004. *Let black voices speak for the voiceless*. Johannesburg: Mail & Guardian Online, 22 June 2004. Available: <http://www.mg.co.za> [23 June 2004].
- Moore, Niki, and Nawaal Deane. 2003. Tensions rise over Land Rights Bill. Mail & Guardian Online, 30.01.2003. Available at [www.mg.za](http://www.mg.za) [accessed 31.01.2003].
- Moore, Sally Falk. 1973. *Law as process: an anthropological approach. New introduction by Martin Chanock. (2nd ed. 2000)*. Münster-Hamburg: James Currey.
- . 1998. Changing African land tenure: Reflections on the incapacities of the state. *The European Journal of Development Research* 10, no. 2: 33–49.
- Moser, C, and A Norton. 2001. *To claim our rights: livelihood security, human rights and sustainable development*. London: Overseas Development Institute. Available at: [http://www.odi.org.uk/PPPG/activities/concepts\\_analysis/RightsInAction/Publications/ToClaimOurRights.html](http://www.odi.org.uk/PPPG/activities/concepts_analysis/RightsInAction/Publications/ToClaimOurRights.html).
- Mufamadi, F. S. 2003. *Remarks by minister F. S. Mufamadi in lieu of introduction of the Traditional Leadership and Governance Bill, National Assembly 11 November 2003*. Pretoria: Ministry of

- Provincial and Local Government. Available: <http://www.gov.za/speeches/index.html> [19 January 2004].
- Murphy, Dervla. 1977. *South from the Limpopo: Travels through South Africa*. London: Flamingo.
- Mutua, Makau. 1995. The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties. *Virginia Journal of International Law* 35, no. 339.
- . 2002. *Human rights: A political and cultural critique*.
- Nader, Laura. 2001. The underside of conflict management – in Africa and elsewhere. *IDS bulletin. Making law matter. Rules, rights and security in the lives of the poor*. Eds. Richard C. Crook, and Peter P. Houtzager, 19– 27. Norwich: University of East Anglia.
- Nama-Khoi Municipality. 2001. *Weidingsregulasies [Grazing Regulations]. Regulations in terms of the Rural Areas Act (House of Representatives), 1987 (Act No. 9 of 1987), the Municipal Structures Act (Act 117 of 1998) and the Municipal Systems Act (Act No. 32 of 2000), for the management, control and protection of all grazing areas and land that vests in the municipality or is managed by the municipality*. Provincial Gazette No. 619, 11 June 2001.
- Nama-Khoi Municipality. 2002. *Regulasies kragtens die Wet op Munisipale Strukture, Wet 117 van 1998, die Wet op Munisipale Stelsels, Wet 32 van 2000, en die Wet op Landelike Gebiede (Raad van Verteenwoordigers), 1987 (Wet 9 van 1987) vir die bestuur, beheer en beskerming van droëlandpersele in landelike gebiede [Regulations concerning the management, control and protection of dryland plots in the Rural Areas]*.
- National Botanic Institute. 1998. *Paulshoek, Namaqualand, South Africa: A Country Study. A Preliminary Report and Literature Review. Global Change and Subsistence Rangelands in Southern Africa: Resource Variability, Access and Use in Relation to Rural Livelihoods and Welfare. INCO-DC Project No. ERBIC18CT970162*. Cape Town: National Botanic Institute.
- NDC. 2001. *The Namakwa 4X4 Trail (Package 1, Package 2)*. Namaqualand District Council.
- NDMT. 2000. *Namaqualand District Situation Analysis. Report prepared by The Initiative for Sub-District Support & the Namaqualand District Management Team*. Springbok.
- Nelson, Paul J., and Ellen Dorsey. 2003. At the Nexus of Human Rights and Development: New Methods and Strategies of Global NGOs. *World Development* 31, no. 12: 2013-26.
- Neumann, Iver B. 2001. *Mening, materialitet og makt: En innføring i diskursanalyse [Meaning, materiality and power: an introduction to discourse analysis]*. Bergen: Fagbokforlaget.
- Ngoro, Blackman. 1997. New pastures for Namaqualand shepherds. Diamond giant De Beers sells of old mining land. *Cape Argus*, 8 December 1997.
- NLC. 1991. *Press statement on the government White Paper on Land Reform 12 March 1991*. Johannesburg: National Land Committee.
- . 2000. *Tenure reform. Gender & Land: Media Fact Sheets*. National Land Committee. Available: <http://www.nlc.co.za/mdtenref.htm> [20 January 2004].
- . 2001. *The rule of law, land occupations and the call for a social obligations clause: A critique of the constitutional property clause*. Johannesburg: National Land Committee, South Africa.
- . 2002. *Invitation to a two day seminar on African perspectives on land and sustainable development*. Johannesburg: National Land Committee.
- NLC/LPM. 2002. *Declaration of the African Perspectives on Land and Sustainable Development Forum by the National Land Committee and Landless People's Movement at the close of the World Summit on Sustainable Development, Johannesburg, 27th August 2002*. Johannesburg.

- NORAD. 2001. *Handbook in human rights assessment. State obligations, awareness & empowerment*. Oslo: Norwegian Agency for Development Co-operation.
- North, Douglass C. 1990. *Institutions, institutional change and economic performance*. Cambridge: Cambridge University Press.
- Northern Cape Province. 1997. *Provincial Development Strategy (Draft)*. Kimberley.
- Notarius Publicus. 1981. *Notariele Akte van Serwituut [Notarial deed of servitude], 16 April 1981*. Cape Town.
- NPA and others. 2005. *deSoto.Watch.net. Empowering or disempowering the Poor. Web-page by four Norwegian NGOs*. Norwegian People's Aid. Available <http://www.desotowatch.net/> [5 Dec 2005].
- Ntsebeza, Lungisile. 1999. *Land tenure reform, traditional authorities and rural local government in post-apartheid South Africa. Case studies from the Eastern Cape. Research Report No. 3*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape.
- . 2001. *Land rights and democratisation: Rural tenure reform in South Africa's former bantustans. Presentation at the National Land Tenure Conference, International Convention Centre, Durban, 26 November 2001 (circulated document)*.
- Nussbaum, Martha C. 2000. *Women and human development*. Cambridge: Cambridge University Press.
- Nyamu-Musembi, Celestine. 2002. *Towards an actor-oriented perspective on human rights. IDS Working Paper 169*. Brighton: Institute of Development Studies.
- Nyborg, Ingrid. 2002. *Yours today, mine tomorrow? A study of women and men's negotiations over resources in Baltistan, Pakistan. Doctor Scientiarum Thesis 2002: 27*. Aas: Centre for International Environment and Development Studies, Noragric, Agricultural University of Norway.
- OAU. 1981. *African Charter on Human and People's Rights, adopted June 27 1981 and entered into force October 21 1986*. Organization of African Unity.
- . 1989. *Declaration of the OAU Ad Hoc Committee on Southern Africa on the Question of South Africa, Harare, Zimbabwe, 21 August 1989*. Harare: Organisation of African Unity .
- Oba, Gufu, Nils Chr. Stenseth, and Walter J. Lusigi. 2000. New perspectives on sustainable grazing management in arid zones of Sub-Saharan Africa. *BioScience* 50, no. 1: 35-51.
- Odinkalu, Chidi Anselm. 2003. Back to the future: The imperative of prioritizing for the protection of human rights in Africa. *Journal of African Law* 47, no. 1: 1–37.
- OUP. 2003. *Oxford Dictionary of Law (5th edition)*, ed. Elizabeth A. Martin. Oxford: Oxford University Press.
- Oxfam. 2003. *Secret version of the Communal Land Rights Bill gives extraordinary powers to chiefs, 22 October 2003. E-mail to subscribers*. Oxfam (WomensLandRights@mail.oxfam.org.uk).
- Parsons, Talcott. 1967. *Sociological Theory and Modern Society*. New York: Collier-Macmillan.
- Paton, Alan. 1981. Homelands policy won't work. in *Save the beloved country*. 2nd ed., Alan Paton, 279–281. Melville: Hans Strydom Publishers.
- Pella TC. 2001a. *Ansoek vir verlenging van die oorgangstydperk vir die Pella landelike gebied [Application for extension of the transition period for Pella Rural Area], Letter to Khâi-Ma Municipality dated 21 August 2001*.
- . 2001b. *Notule van die Pella Transformasie Komitee vergadering gehou te Pella 22/11/01 [Minutes of Transformation Committee Meeting, Pella, 22 November 2001]*.

- . 2001c. *Notule van die Transformasie Komitee vergadering gehou op die 21/8/2001 in die Pella Raadsaal [Minutes of the Transformation Committee Meeting 21 August 2001 held in the Pella Council Hall]*.
- . 2002. *Notule van die Pella Transformasie Loodskomitee vergadering gehou te Pella op 10.06.2002 [Minutes of Transformation Committee Meeting, Pella, 10 June 2002]*. Pella.
- Pella TLC. 2000. *Letter to Minister Didiza about Notice in terms of Article 3 (4)(a) of Act No 94 of 1998, 26 Oct 2000*.
- Peters, Pauline E. 2002a. Grounding governance: Power and meaning in natural resource management. In *Contested resources. Challenges to the governance of natural resources in Southern Africa*. Eds. Tor Arve Benjaminsen, Ben Cousins, and Lisa Thompson, 7–19. Cape Town: Programme for Land and Agrarian Studies, University of Western Cape.
- . 2002b. The limits of negotiability: Security, equity and class formation in Africa's land systems. In *Negotiating property in Africa*. Eds. Kristine Juul, and Christian Lund, 45–66. Portsmouth, NH: Heinemann.
- Pienaar, Kobus. 2000a. 'Communal' property institutional arrangements: A second bite. In *At the crossroads. Land and agrarian reform in South Africa into the 21st century*. Ed. Ben Cousins, 322–339. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape/National Land Committee.
- . 2000b. *Index of acts and amending acts relevant to Namaqualand from 1909–2000*. Cape Town: Legal Resources Centre (unpublished).
- . 2002. An overview of land law in South Africa. Lecture notes. LAS 708, dated 6 June 2002.
- Pieterse, Edgar. 2002. Participatory local government in the making: opportunities, constraints and prospects. In: *Democratising local government. The South African Experiment*. eds. Susan Parnell, Edgar Pieterse, Marc Swilling, and Dominique Woolridge, 1-17. Cape Town: University of Cape Town Presss.
- Pieterse, M. 2003. Beyond the welfare state: globalisation of neo-liberal culture and the constitutional protection of social and economic rights in South Africa. *Stellenbosch Law Review*, no. 14.
- PLAAS. 2005. *Umhlaba Wethu. A quarterly bulletin tracking land reform in South Africa. No. 3 – June 2005*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape.
- PLAAS/NLC. 2003. *Submission to the Portfolio Committee for Land and Agriculture on The Communal Land Rights Bill, 10 November 2003*. Parliamentary Monitoring Group. Available: <http://www.pmg.org.za/> [20 November 2003].
- Plaatje, Solomon T. 1916. *Native life in South Africa: before and since the European war and the Boer rebellion; introduced by Brian Willan (1991 edition)*. Athens: Ohio University Press.
- Platteau, JP, Does Africa need land reform? 2000. In *Evolving land rights, policy and tenure in Africa*. Eds. Camilla Toulmin, and Julian Quan, 324. London: DFID/IIED/Natural Resources Institute.
- Platzky, Laurine, and Cheryl Walker. 1985. *The surplus people. Forced removals in South Africa*. Hohannesburg: Ravan Press for the Surplus People Project.
- Pogge, Thomas. 2002. *World poverty and human rights*. Cambridge: Polity Press.
- Powelson, John P. 1988. *The story of land. A world history of land tenure and agrarian reform*. Cambridge MA: The Lincoln Institute of Land Policy.
- Ragin, Charles C. 1994. *Constructing social research. The unity and diversity of method*. Thousand Oaks/London/New Delhi: Pine Forge Press.

- Rajan, Nalini. 2002. John Raws (1921–2002). *Economic and Political Weekly*, December 7, 2002 .
- Rawls, John. 1971. *A theory of justice [Revised edition 1999]*. Cambridge, MA: Harvard University Press.
- . 1990. Preface dated 1990 . In *A Theory of Justice [Revised edition 1999]*. John Rawls, xi–xvi. Cambridge, MA: Harvard University Press.
- . 1999. *The law of peoples*. Cambridge, MA: Harvard University Press.
- RDIC. 1999. *Rural People's Charter. Adopted at the Rural Development Initiative Convention, 25 April, 1999, Bloemfontein*.
- Risse, Thomas, Stephen C. Ropp, and Kathryn Sikkink, Eds. 1999. *The power of human rights. International norms and domestic change*. Cambridge Studies in International Relations. Cambridge: Cambridge University Press.
- Robertson, Janet. 1971. *Liberalism in South Africa 1948–1963*. Oxford: Clarendon Press.
- Roe, Emery M. 1991. Development narratives, or making the best of blueprint development. *World Development* 19, no. 4: 287–300.
- Rohde, Rick, Tor Arve Benjaminsen, and Timm Hoffman. 2001. *Land reform in Namaqualand: Poverty alleviation, stepping stones and 'economic units'*. *Land Reform and Agrarian Change in Southern Africa No. 16*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape.
- Rohde, Rick, Timm Hoffman, and Nicky Allsopp. 2003. *Hanging on a wire: A historical and socio-economic study of Paulshoek village in the communal area of Leliefontein, Namaqualand. Research report no. 17*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape.
- Rose, Carol M. 1994. *Property and persuasion. New perspectives on law, culture, and society*. Boulder: Westview Press.
- Rosenthal, Jane. 2003. *Gift of tongues. Speaking to Antjie Krog on 'A change of tongue'*. Mail & Guardian Online, 3 October 2003. Available: [www.mg.co.za](http://www.mg.co.za) [accessed 5 October 2003].
- Roth, Michael. 2002. Finding solutions and securing rights in South Africa's land reform. *Land Tenure Center Newsletter* No. 83 (Spring 2002).
- Roy, Arundhati. 2004. *Public power in the age of empire*. New York: Seven Stories Press.
- RSA. 1991. *White Paper on Land Reform*. Cape Town: Government Printer, Republic of South Africa.
- . 1995. *White Paper on Reconstruction and Development*. Pretoria: Government Printer.
- . 1996. *Republic of South Africa Constitution Act 108 of 1996*. Government of South Africa Online. Available at: <http://www.info.gov.za/documents/constitution/index.htm> [4 Mar 2005].
- RSA. 1997. *Batho Pele – 'People First'. White Paper on Transforming Public Service Delivery. Government Gazette, 1 October 1997 (No. 18340)*. Department of Public Service and Administration, Republic of South Africa.
- . 1998. *Transformation of Certain Rural Areas Act, Act 94 of 1998. Government Gazette No. 19417, 2 November 1998*. Cape Town: Republic of South Africa.
- . 2001. *Communal Land Rights Bill. Third Draft, 25 October 2001*. Department of Land Affairs, Directorate for Legal Services (unpublished).
- . 2002. *Communal Land Rights Bill*. Government Gazette no 23740, General Notice 1423, 14 August 2002.
- . 2003a. *Communal Land Rights Bill as approved by Cabinet 8 October 2003. Republic of*



- South Africa, Minister of Agriculture and Land Affairs [B 67 – 2003]. *Government Gazette No. 25562 of 17 October 2003*. Pretoria: Available: <http://land.pwv.gov.za/home.htm> [6 January 2004].
- . 2003b. *Memorandum on the Objects of the Traditional Leadership and Governance Framework Bill, [ B58 2003] as amended by the Portfolio Committee on Provincial and Local Government (page 22-3 of the text of the Bill)*. Minister for Provincial and Local Government available at South Africa Government Online <http://www.gov.za/bills/index.html> [accessed 19.01.2004].
- . 2004. *Communal Land Rights Act, Act. No. 11, 2004. Government Gazette No 26590, 20 July 2004*. Cape Town: Government of South Africa.
- Rural communities. 1994. *The Land Charter. Adopted by 353 rural and landless communities at the Community Land Conference in Bloemfontein, 1994*. Published in Ground Work, Border Rural Community Newsletter Vol. 2 No 3, June 1994.
- Sachs, Albie. 1990a. *Protecting human rights in a new South Africa*. Cape Town: Oxford University Press.
- . 1990b. *Rights to the land: A fresh look at the property question. Some starting points*. London: South Africa Constitution Studies Centre.
- Sahn, David E., and David C. Stifel. 2003. Progress Toward the Millennium Development Goals in Africa. *World Development* 31, no. 1: 23–52.
- SAHRC. 1999. *[1st] Economic and social rights report 1997/1998*. Johannesburg: South African Human Rights Commission. Available: <http://www.sahrc.org.za/publications.htm> [January 2004].
- . 2000. *2nd economic and social rights report 1998/1999*. Johannesburg: South African Human Rights Commission. Available: <http://www.sahrc.org.za/publications.htm> [January 2004].
- . 2001. *3rd economic and social rights report 1999/2000*. Johannesburg: South African Human Rights Commission. Available: <http://www.sahrc.org.za/publications.htm> [January 2004].
- . 2003a. *4th economic and social rights report 2000/2002*. Johannesburg: South African Human Rights Commission. Available: <http://www.sahrc.org.za/publications.htm> [January 2004].
- . 2003b. *Inquiry into human rights violations in farming communities*. Johannesburg: South African Human Rights Commission.
- . 2004. *5th economic and social rights report 2002/2003*. Johannesburg: South African Human Rights Commission. Available: <http://www.sahrc.org.za/publications.htm> [January 2004].
- SALC. 1991. *Interim report on group and human rights, Project 58*. South African Law Commission.
- Sands, Phillipe. 2005. *Lawless world. America and the making and breaking of global rules*. London: Allen Lane.
- Sapa. 2003a. *SA's Aids pandemic a 'world disgrace'*. Mail & Guardian Online, 6 Aug 2003. Available: <http://www.mg.co.za> [6 Aug 2003].
- . 2003b. *Tutu 'baffled' at Zimbabwe debacle*. Mail & Guardian Online, 15 Dec 2003. Available: <http://www.mg.co.za> [15 Dec 2003].
- . 2004. *'No land, no vote'*. Mail & Guardian Online 13 April 2004. Available: <http://www.mg.co.za> [13 April 2004].
- . 2005. *More than 60,000 land claims settled, reports minister*. Mail & Guardian Online, 18 July 2005. Available: <http://www.mg.co.za> [20 July 2005].
- Sapa-AFP. 2004a. *Aids report: The state we are in*. Mail & Guardian Online, 6 July 2004. Available: <http://www.mg.co.za> [6 July 2004].

- Sapa-AFP. 2004b. *Mugabe fans the flames of revolution*. Mail & Guardian Online, 21 April 2004. Available: <http://www.mg.co.za>. [22 April 2004].
- Schadeberg, Jurgen. 2005. *National evictions survey. Briefing to Parliamentary Portfolio Committee for Agriculture and Land Affairs*. Nkuzi Development Association and Social Surveys.
- Schlager, E., and E. Ostrom. 1992. Property rights regimes and natural resources. A conceptual analysis. *Land Economics* 68, no. 3: 249–262.
- Scott, James C. 1985. *Weapons of the weak. Everyday forms of peasant resistance*. New Haven: Yale University Press.
- Scott, James C. 1998. *Seeing like a state. How certain schemes to improve the human condition have failed*. New Haven: Yale University Press.
- Seafield, Lucrecia. 2003. South Africa: The interdependence of all human rights. In *Human rights under African constitutions. Pennsylvania studies in human rights*. Ed. Abdullahi An-Na'im, 295–341. Philadelphia: University of Pennsylvania Press.
- Seekings, Jeremy. 2000. *The UDF. A history of the United Democratic Front in South Africa 1983–1991*. Cape Town/Oxford/Athens: David Philip/James Currey/Ohio University Press.
- Sen, Amartya. 1980. *Equality of what? Tanner Lectures on Human Values*. Cambridge: Cambridge University Press.
- . 1985. *Commodities and capabilities*. Amsterdam: Elsevier.
- . 1992. *Inequality reexamined*. New York/Oxford: Russell Sage Foundation/Clarendon Press.
- . 1999. *Development as freedom*. Oxford: Oxford University Press.
- . 2000. A decade of human development. *Journal of Human Development* 1, no. 1: 17–23.
- Sengupta, Arjun. 2000. Realizing the right to development. *Development and Change* 31, no. 3: 553–578.
- Sevatdal, Hans, and Per Kaare Sky. 2003. *Eigedomsteori. Innføring i samfunnsvitenskapleg teoritilfang for utøving av eigedomsfag*. Noregs landbrukshøgskole.
- Shanmugaratnam, Naderajah. 2001. On the meaning of development: An exploration of the capability approach. *Forum for Development Studies* 28, no. 2: 263–288.
- Shanmugaratnam, Naderajah, Ragnhild Lund, and Kristi Anne Stölen, eds. 2003. *In the maze of displacement. Conflict, migration and change*. Oslo: Norwegian Academic Press.
- Sharp, John. 1977. *Community and boundaries: an enquiry into the institution of citizenship in two Cape Coloured reserves. PhD thesis*. Cambridge: University of Cambridge.
- . 1984. *Rural development schemes and the struggle against impoverishment in the Namaqualand Reserves. Carnegie Conference Paper No. 69*. Cape Town: University of Cape Town.
- . 1994. Land claims in the Komaggas reserve. *Review of African Political Economy* 61: 403–13.
- . 1995. *Dispute over rights to certain farms in Namaqualand. Background and opinion. A report for the Legal Resources Centre (unpublished)*. Cape Town: Legal Resources Centre.
- Sheehan, Helena. 2002. *Interview with Jeremy Cronin, 24 January 2002*. Available: <http://www.comms.dcu.ie/sheehan/za/cronin02.htm> [28 December 2005].
- Shishana, Olive, and Simbayi Leickness. 2002. *Nelson Mandela/HSRC Study of HIV/Aids household survey 2002*. Cape Town: Human Sciences Research Council Publishers.
- Shivji, Issa G. 1989. *The concept of human rights in Africa*. London: Codesria.
- . 2000. Contradictory perspectives on rights and justice in the context of land tenure reform in

- Tanzania. In *Beyond rights talk and culture talk: comparative essays on the politics of rights and culture*. ed. Mahmood Mamdani, 37–60. New York: St. Martin's Press.
- Sibanda, Siphon M. D. 2001. *The principles underpinning the Communal Land Rights Bill, 2001. Paper presented at the National Land Tenure Conference, Durban, 26 November 2001 (circulated document)*. Department of Land Affairs.
- Sibanda, Siphon M. D. 2004. The long walk to the Communal Land Rights Act. *Tenure Newsletter July 2004* : 8–9.
- Simon, John Marie. 1959. *Bishop for the Hottentots. African memoirs 1882-1909*. New York: Benziger Brothers, Inc. 2nd edition, 1997 by Jopie Kotzé, Namaqualand Tourism Development Company.
- Sjaastad, Espen. 1998. *Land tenure and land use in Zambia . Doctor scientiarum thesis, NLH. 1998: 10*. Aas: Department of Forest Sciences, Agricultural University of Norway.
- Skotnes, Pippa. 1996. *Miscast: Negotiating the presence of the Bushmen*. Cape Town: University of Cape Town.
- Skweyiya, Zola. 1989. Towards a solution to the land question in post-apartheid South Africa: Problems and models. *Columbia Human Rights Law Review* 21, no. 1: 211–233.
- SLSA team. 2003. *Rights talk and rights practice. Challenges for Southern Africa*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape.
- Smith, Henk. 1989. *Land struggles in Namaqualand. Background to legal strategies (unpublished report)*. Cape Town: Legal Resources Centre.
- . 1991. *Some implications of the White Paper on Land Reform and the four bills on trust land for 'coloureds' in Namaqualand and elsewhere. Memorandum 13 March 1991*. Cape Town: Legal Resources Centre.
- . 1993. *Movement between property regimes in four 'rural' communities: Buisplaas, Suurbraak, Steinkopf, Richtersveld*. Legal Resources Centre (unpublished report).
- Soyinka, Wole. 2004. *Climate of fear. The Reith Lectures 2004*. London: Profile Books.
- Sparks, Allister. 1990. *The mind of South Africa. The story of the rise and fall of apartheid*. London: William Heinemann.
- . 1994. *Tomorrow is another country. The inside story of South Africa's negotiated revolution* . Johannesburg: Struik Book Distributors.
- SPP. 1995. *Land claims in Namaqualand*. Cape Town: Surplus People Project.
- . 1996a. *Konsultasieverslag aan die Landelike Gebiede Komitee: Wet op Landelike Gebiede (Wet 9 van 1987). Noord-Kaap Provinsie [Consultation Report to the Rural Areas Committee: Rural Areas Act (Act 9 of 1987). Northern Cape Province]*. Surplus People Project.
- . 1996b. *Namaqualand District Planning and Management Project. Final Report on Phase One (Pre-Planning Phase). Report by Philip van Ryneveld for SPP*. Cape Town: Surplus People Project.
- . 1996c. *The Rural Areas Act 9 of 1987 – Background and context of the revision of the Act, Pamphlet August 1996*. Cape Town: Surplus People Project.
- . 1999. *Report on the 'Saailand' pilot study in the Rural Areas of Namaqualand*. Cape Town: Surplus People Project.
- . 2000. *Minute and Draft memo arising out of meeting of Thursday 2 March 00 discussing Minister Didiza's new policy proposals to the Department of Land Affairs, 07.03.2000 (SPP, LRC, PLAAS)*. Cape Town, Unpublished.

- . 2001a. *Komaggas Transformasie Nuus [Komaggas Transformation News]*, May 2001. Surplus People Project.
- . 2001b. *Notule van die Vergadering tussen die Boesmanland Munisipaliteit en die Meentkomitee van Pella en Boerevereniging van Pofadder gehou te Pofadder, 29 Jan 2001*. Pofadder: Surplus People Project (unpublished).
- . 2001c. *Pella. Wet op die Transformasie van Sekere Landelike Gebiede. Transformasie Vorderings Verslag vir Khâi-Ma Munisipaliteit [Pella. Transformation of Certain Rural Areas Act, Transformation Progress Report]*, December 2001. Surplus People Project.
- . 2002a. *Notule van die Transformasie Komitee Vergadering vir besproeiingsboere gehou te Pella 21/9/02 [Minutes of the Transformation Committee meeting with irrigation farmers held at Pella 21 September 2002]*. Surplus People Project.
- SPP. 2002b. *Pella. Wet op die Transformasie van Sekere Landelike Gebiede. Transformasie Vorderings Verslag vir Khâi-Ma Munisipaliteit [Pella. Transformation of Certain Rural Areas Act, Transformation Progress Report]*, 10 June 2002. Springbok: Surplus People Project.
- SPP. 2002c. *Verslag van die Transformasie en Meentkomitees Bestursplan Werkswinkel gehou te Pella 30.01.2002 [Report from the Transformation and Meent Committees' Management Planning Workshop held in Pella 30 January 2002. Unpublished document]*. Pella: Surplus People Project.
- . 2003. *Steinkopf Verslag [Report on Steinkopf]*. Cape Town: Surplus People Project.
- SPP/IDS. 1996. *Wet 9 van 1987 Vergadering [Meeting on Act 9 1987], held in Pella Community Centre, 30 August 1996*. Kimberley: Surplus People Project/International Data Solutions.
- SPP/LRC. 2002. *Khâi-Ma Munisipaliteit: Besproeiings- en tuinperseelregulasies, opgestel deur SPP & LRC: Konsep 4 [Irrigation- and garden plot regulations, compiled by SPP & LRC: Draft 4], 29 October 2002*. Surplus People Project and Legal Resources Centre.
- SPP/LRC. 2003. *Comments on PLAAS policy brief [on Trancraa. Wisborg and Rohde, 2003]*.
- SPP/LRC/DLA. 1999. *Information pamphlet on the Transformation of Certain Rural Areas Act 94 of 1998 [available in Afrikaans and English]*. Cape Town.
- SPP/LRC/Pella TLC. 2000. *Draft Notice (in terms of Article 3 (4)(a) of the Transformation of Certain Rural Areas Act No 94 of 1998) to the Minister of Agriculture and Land Affairs from the Pella Transitional Council (draft 5 July 2000)*.
- SPP/Pella Grondkomitee. 1996. *Pella Opname, April 1996 [Survey of Pella, April 1996]*. Cape Town: Surplus People Project/Pella Land Committee.
- SPP/Pella TC. 2001. *Pella Transformasie Nuus No 1, Augustus 2001 [Transformation News No. 1, August 2001]*. Springbok/Pella: Surplus People Project.
- SPP/Pella TC. 2002a. *Pella Transformasie Nuus No 2, Februarie 2002 [Transformation News No. 2, February 2002]*. Springbok/Pella: Surplus People Project.
- . 2002b. *Pella Transformasie Nuus No 3, Junie 2002 [Transformation News No 3, June 2002]*. Springbok/Pella: Surplus People Project.
- SPP/Pella TC. 2002c. *Swartkoppies Transformasie Verslag [Transformation Report on Swartkoppies. Census 2001 by Statistics South Africa. Key results*. 2003a. Statistics South Africa. Available: <http://www.statssa.gov.za/SpecialProjects/Census2001/Census2001.htm> [3 October 2003].
- StatsSA. 2003b. *Census 2001. Census in brief*. Pretoria: Statistics South Africa. Available: <http://www.statssa.gov.za/SpecialProjects/Census2001/Census2001.htm> [20 February 2004].
- . 2004a. *Labour Force Survey September 2003*. Pretoria: Statistics South Africa. Available:

- <http://www.statssa.gov.za/keyindicators/lfs.asp> [30 June 2004].
- . 2004b. *Statistics for Khâi-Ma Municipality – Ward 3 [Pella]*. Pretoria: Statistics South Africa. Available: [http://www.statssa.gov.za/SpecialProjects/Census2001/Atlas\\_ward/stats/stats\\_306070](http://www.statssa.gov.za/SpecialProjects/Census2001/Atlas_ward/stats/stats_306070) [20 February 2004].
- Steenkamp, Willem. 1975. *Land of the Thirst King*. Cape Town: Howard Timmins.
- Stigen, Anfinn. 1983. *Tenkningens historie. Vol. 1*. Oslo: Gyldendal.
- Stiglitz, Joseph E. 2002. *Globalization and its discontents*. New York: W. W. Norton & Company.
- Streicher, Julie. 2001. Sappige Oranjerivier dadels gaan di wêreld in [Juicy Orange River dates for the world]. *WPKaner* April 2001: 11-13.
- Strickland, Richard S. 2004. *To have and to hold. Women's property and inheritance rights in the context of HIV/Aids in sub-Saharan Africa. Working Paper June 2004*. International Center for Research on Women and the Global Coalition on Women and Aids.
- Surveyor-General. Certificate of Occupation (Pella mission station), Signed by A. de Smidt, Surveyor General, 27 July 1874 [Reproduced in Klinghardt 1982: 234–235].
- . 1881. Certificate of Occupation (Pella land), Signed by A. de Smidt, Surveyor General, 9 June 1881 [Reproduced in Klinghardt 1982: 237–239].
- Sánchez, Oscar Arias. 2000. The legacy of human development: a tribute to Mahbub ul Haq. *Journal of Human Development* 1, no. 1: 9–16.
- Taylor Committee. 2002. *Transforming the present – protecting the future. Consolidated report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa*.
- Terre Blanche, Martin, and Kevin Durrheim. 2002. Social constructionist methods. In *Research in practice. Applied methods for the social sciences*. Martin Terre Blanche, and Kevin Durrheim, 147–172. Cape Town: University of Cape Town Press.
- The Economist. 2005. Special report: Thabo Mbeki: A man of two faces. London.
- Thünemann, Thérèse-Bernard. 1975. *Thirstland epic. Heroic struggle of pioneer missionaries in Namaqualand (revised and updated 1982 and 1996)*. Upington: Trans Oranje Drukkers.
- Tindall, Henry. 1890. *Memorandum on the Lelyfontein Institution, Namaqualand, dated 13 June 1890 (Annexure H in Mellvill, 1890)*.
- Tomkins, Adam. 2001. Introduction: On being sceptical about human rights. In *Sceptical essays on human rights*. Tom Campbell, K. D. Ewing, and Adam Tomkin, 1–11. Oxford: Oxford University Press.
- Tomlinson Commission. 1955. *Report of the Commission for the socio-economic development of the Bantu Areas within the Union of South Africa, UG 61*.
- Torres, Liv. 2004. *The alliance as a platform for reconstruction and development in South Africa? Paper presented at the conference on the 'Politics of socio economic rights in South Africa: Ten years after apartheid', 8–9 June 2004, Oslo*.
- Toulmin, Camilla, and Julian Quan. 2000. Evolving land rights, tenure and policy in sub-Saharan Africa. in *Evolving land rights, policy and tenure in Africa*. eds. Camilla Toulmin, and Julian Quan, 1–29. London: DFID/IIED/Natural Resources Institute.
- Transvaal FSAW. 1955. *'What women demand'. Compiled in preparation for the Congress of the People*. Available: <http://www.anc.org.za/ancdocs/history/charter.html> [16 Nov 2003].
- Turner, Stephen. 2002. *Land and agrarian reform in South Africa. A status report, 2002*. Cape Town: PLAAS.

- Turok, Ben. 2002. *Architect of the Charter. Obituary Rusty Bernstein*. Mail & Guardian June 28 to July 4, 2002.
- UN-CfHR. 1994a. *Human rights. A compilation of international instruments. Volume I (First Part)*. Geneva: United Nations Centre for Human Rights.
- . 1994b. *Human rights. A compilation of international instruments. Volume I (Second Part)*. Geneva: United Nations Centre for Human Rights.
- UNAIDS. 2004a. *2004 Report on the global Aids epidemic*. Geneva: Joint United Nations Programme on HIV-Aids/World Health Organization. Available: <http://www.unaids.org> [12 Jan 2005].
- . 2004b. *Country HIV and Aids estimates, end 2003. South Africa*. Joint United Nations Programme on HIV-Aids/World Health Organization. Available: <http://www.unaids.org> [13 Jan 2005].
- . 2004c. *Regional HIV and Aids estimates, end 2003. Sub-Saharan Africa*. Joint United Nations Programme on HIV-Aids/World Health Organization. Available: <http://www.unaids.org> [18 Jan 2005].
- UNDP. 1998. *Integrating human rights with sustainable human development. A UNDP policy document*. New York: United Nations Development Programme. Available: <http://magnet.undp.org/Docs/policy5.html> [accessed 2001].
- . 2000. *Human Development Report 2000*. New York: United Nations Development Programme.
- . 2002. *Millennium Development Goals (MDGS): Goals, targets and indicators*. United Nations Development Programme. Available: <http://www.undp.org/mdg/goalsandindicators.html> [September 2003].
- . 2003. *Deepening democracy in a fragmented world. Human Development Report 2002*. United Nations Development Programme.
- . 2004. *South Africa Human Development Report 2003: Unlocking human creativity*. Pretoria: United Nations Development Programme. Available: <http://www.undp.org.za/> [accessed 31 May 2004].
- . 2005. *Human development report. International cooperation at a crossroads: Aid, trade and security in an unequal world*. New York: United Nations Development Programme.
- Union of South Africa. 1947. *Report of Inter-departmental Committee on Matters affecting Coloured Persons on Coloured Mission Stations, Reserves and Settlements (by Liefeldt, A. W.). D.G No. 33 – 1947*. Pretoria: The Government Printer.
- United Nations. 1945. *The Charter of the United Nations, signed 26 June 1945, entered into force 24 October 1945*. New York: United Nations. Available: <http://www.un.org/aboutun/charter/> [30 October 2003].
- . 1948. *The Universal Declaration of Human Rights. Adopted by the General Assembly of the United Nations, December 10, 1948*. United Nations. Available <http://www.un.org/rights/50/decla.htm> [June 2000].
- United Nations. 1965. *The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) Adopted by General Assembly Resolution 2106 A (XX) of 21 December 1965*.
- United Nations. 1966. *International Covenant on Civil and Political Rights (ICCPR). Adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966, entered into force 23 March*

- 1976.
- United Nations. 1969. *Declaration on Social Progress and Development. Proclaimed by General Assembly resolution 2542 (XXIV) of 11 December 1969.*
- . 1973. *International Convention on the Suppression and Punishment of the Crime of Apartheid, approved by General Assembly resolution 3068 (XXXVIII) of 30 Nov 1973.*
- . 1979. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Adopted by General Assembly Resolution 34/180 of 18 December 1979, entered into force 3 September 1981.
- . 1986. *Declaration on the Right to Development, Adopted by General Assembly resolution 41/128 of 4 December 1986.* United Nations.
- United Nations. 1992. *Agenda 21: Chapter 10. Land management.* United Nations.
- . 1993. *Vienna Declaration and Programme of Action, World Conference on Human Rights, General Assembly, 48th Session, 22nd Plenary Meeting.*
- . 1995. *Beijing Declaration and Platform for Action. Adopted at the Fourth World Conference on Women, 15 September 1995.* United Nations. Available at <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm> [accessed July 2003].
- Uvin, Peter. 2002. On high moral ground: the incorporation of human rights by the development enterprise. *Praxis 17*: 1–11. Available: <http://fletcher.tufts.edu/praxis/xvii/Uvin.pdf> [1 March 2004].
- Van der Merwe, Derek. 1989. Land tenure in South Africa. A brief history and some reform proposals. *Tydskrif Vir Die Suid-Afrikanse Reg* TSAR: 663-92.
- Van der Walt, André. 1990. Towards the development of post-apartheid land law: an exploratory survey. *De Jure 23*, no. 1.
- Van der Walt, André. 1997. *The constitutional property clause. A comparative analysis of Section 25 of the South African Constitution of 1996.* Kenwyn: Juta & Co Ltd.
- Van der Walt, André. 1999. Property rights and hierarchies of power: an evaluation of land reform policy in South Africa. *Koers* : 259-94.
- Van Zyl, J. A., and others. 1851. *Letter from J. A. van Zyl and other farmers of ward of Namaqualand to Sir H. W. Smith, Governor of the Colony of the Cape of Good Hope. Requesting that certain land may not be granted to inhabitants of missionary stations at Kookfontein, Pella and Kamaggas.* Cape Archives, Cape Town. Ref Z2. Doc No.TAB496858619.
- Vos, Pierre de. 1997. Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution. *South African Journal on Human Rights* , no. 13: 67-101.
- Waal, H. J de. 2003. *The Communal Land Rights Bill (October 2003 version). Legal opinion for the Legal Resources Centre, 10 November 2003.* Cape Town: Parliamentary Monitoring Group. Available: <http://www.pmg.org.za/> [30 January 2004].
- Walker, Cheryl. 1982. *Women and resistance in South Africa.* London: Onyx Press.
- . 1998. *Land reform and gender in post-apartheid South Africa.* Geneva: United Nations Research Institute for Social Development, Gender, Poverty and Well-being.
- . 2003. Piety in the sky? Gender policy and land reform in South Africa. *Journal of Agrarian Change 3*, no. 1 & 2: 113–148.
- . 2004. *The land question in South Africa: The challenges of transformation and redistribution. Paper presented at Harold Wolpe Memorial Trust Conference, Cape Town, 25–27 March 2004.* Cape Town: Harold Wolpe Memorial Trust. Available:

- <http://www.wolpetrust.org.za/show.asp?inc=docs/conf/2004/walker.htm> [May 2005].
- Wellman, Gwendolyn. 2000. *An Investigation of Commonages in Namaqualand*. Kimberley: Provincial Department of Land Affairs, Northern Cape Province.
- Wet, C. J. de, P. A. McAllister, and T. Hart. 1987. Editorial. The land tenure and rural development workshop. An analytical overview. *Development Southern Africa* 4, no. 3.
- Wilkins, Ivor, and Hans Strydom. 1979. *The Super-Afrikaners: Inside the Afrikaner Broederbond*. Johannesburg: Jonathan Ball.
- Wilson, Scott. 1999. *Conceptual economic regeneration plan for Namaqualand (final draft report)*. Durban: Planning and Development Resources.
- Wisborg, Poul, and Rick Rohde. 2003. *Trancraa and communal land rights: Lessons from Namaqualand, Policy Brief No 5 – Debating land reform and rural development, April 2003*. Cape Town: Programme for Land and Agrarian Studies, University of Western Cape.
- . 2005. Contested tenure reform in South Africa – Experiences from Namaqualand. *Development Southern Africa* 22, no. 3 (September): 409–427.
- Witoszek, Nina. 2005. *Mediemakt blåser liv i myter*. Oslo: Aftenposten, 27 Jan 2005.
- Woodhouse, Philip. 2003. African Enclosures: A Default Mode of Development. *World Development* 31, no. 10: 1705–1720.
- World Bank. 1975. *Land reform policy paper*. Washington: World Bank.
- World Bank. 2003a. *Land policies for growth and poverty reduction. A World bank policy research report*. Oxford: Oxford University Press.
- World Bank . 2003b. *South Africa at a glance*. Available: [http://www.worldbank.org/data/countrydata/aag/zaf\\_aag.pdf](http://www.worldbank.org/data/countrydata/aag/zaf_aag.pdf) [18 Feb 2004].
- World Bank. 2003c. *World Development Indicators Database, April 2003*. Available: <http://devdata.worldbank.org> [20 May 2003].
- Zapiro. 1994. The restoration of land rights. Derek Hanekom, Minister of Land Affairs, attempts surgery for a chronic complaint. *Mail & Guardian*, 10 November 1994.



**Annex I: Major human rights instruments referred to in the text**

Acronym	Full name	Adopted	Entered into force	No. of states that have ratified as per June 2005	Status of ratification: South Africa
<b>International</b>					
UDHR	Universal Declaration of Human Rights	1948 UN General Assembly	-	-	-
ICERD	International Convention on the Elimination of all forms of Racial Discrimination	1965 UN General Assembly	1969	170	March 1999
ICESCR	International Covenant on Economic Social and Cultural Rights	1966 UN General Assembly	1976	151	Not ratified Signed October 1994
ICCPR	International Covenant on Civil and Political Rights	1966 UN General Assembly	1976	154	March 1999
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women	1979 UN General Assembly	1981	180	January 1996
CRC	Convention on the Rights of the Child	1989 UN General Assembly	1990	192	July 1995
<b>Regional</b>					
ACHPR	African Charter of Human and People's Rights	1981 Organisation of African Unity, now African Union	1986	53	July 1996
AfPRW	Protocol to the African Charter on Human and People Rights on the Rights of Women	2003 African Union	2005	17	2005

**Sources:**

- Office of the United Nations for the High Commissioner for Human Rights: Status of ratifications of the Principal International Human Rights Treaties. Available: <http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf> [20 February 2006]
- African Commission on Human and People's Rights. Available: [http://www.achpr.org/english/\\_info/index\\_ratifications\\_en.html](http://www.achpr.org/english/_info/index_ratifications_en.html) [20 February 2006]
- Protocol on the Rights of Women, 20 November 2005. African Union. Available: <http://www.africa-union.org/home/bienvenue.htm> [20 February 2006]
- Eide, Wenche Barth, and Uwe Kracht, Eds. 2005. Food and human rights in development. Volume I: Legal and institutional dimensions and selected topics. Antwerpen: Intersentia. (Eide and Kracht 2005: xxxi)



**Annex II: Selected terms in Afrikaans, English and Norwegian**

<i>Afrikaans</i>	<i>English</i>	<i>Norwegian</i>
	LAND	
<i>Land</i>	Country, nation (but also 'land')	<i>Land, nasjon</i>
<i>Grond</i>	Land	<i>Grunn, jord, land</i>
<i>Veld</i>	Pasture, land, vegetation cover	<i>Beiteland, beite, felt, vegetasjon</i>
<i>Trekveld</i>	Rangeland that stock may be driven though	<i>Utmarksbeite</i>
<i>Meent</i>	Commonage, commons	<i>Allmenning, landsbysameie, fellesareal</i>
<i>Binnemeent</i>	Inner commonage (open land adjacent to and surrounding a settlement area).	<i>Allmenning m.v. i innmark</i>
<i>Buitemeent</i>	Outer commonage – outside the 'inner commonage' (also in contrast to town)	<i>Allmenning m.v., utmark</i>
<i>Ou meent</i>	The old commonage – trust land areas excluding the proclaimed township areas (the Act 9 land)	<i>Den gamle allmenning</i>
<i>Nuwe meent</i>	New commonage (redistribution farms)	<i>Den nye allmenning (resultat av jordreform)</i>
	COMMUNITY AND RESIDENTS	
<i>Gemeenskap</i>	Community	<i>Bygd, lokalsamfunn</i>
<i>Gemeente</i>	Congregation	<i>Menighet</i>
<i>Boorling</i>	Born member / native	<i>Innfødt</i>
<i>Inwoner</i>	Resident (has a legal meaning of person entitled to community membership)	<i>Bruksberettiget innbygger</i>
<i>Burger</i>	'Citizen', member /rightholder	<i>Borger/rettighetshaver</i>
<i>Vreemdelinge</i>	Stranger, immigrant	<i>Fremmed, innflytter</i>
<i>inkomer</i>	Person who came from another community to settle as part of the existing community	
<i>Bywoner</i>	Co-resident (often in position of dependence), 'tenant', someone who lives precariously at the behest of the owner	<i>Leilending / Husmann (omtrent)</i>
<i>Dorp</i>	Town, settled area, village	<i>By, tettsted, landsby</i>
	LIVESTOCK AND FARMING	
<i>Landbou</i>	Agriculture	<i>Jordbruk</i>
<i>Boerdery</i>	Farming (in Namaqualand stock farming may be implied)	<i>Jord- og husdyrbruk</i>
<i>Veeboerdery</i>	Stock farming	<i>Husdyrbruk, februk</i>
<i>Akkerbou</i>	Agriculture (crop cultivation)	<i>Åkerbruk, planteproduksjon</i>
<i>Plaas</i>	Farm	<i>Gård, plass, sted</i>
<i>Saailande</i>	Sowing allotment	<i>Dyrket mark, jorde</i>
<i>Droëlandperseel</i>	Dryland plot (which may include <i>saailand</i> )	<i>Utmarksteig (omtrent). Kan inkludere dyrkede jordlapper.</i>
<i>Besproeiing</i>	Irrigation	<i>Kunstvanning</i>
<i>Vee</i>	Livestock	<i>Fe, husdyr, besetning</i>
<i>Bok</i>	Goat	<i>Geit</i>
<i>Skap</i>	Sheep	<i>Sau</i>
<i>Beest</i>	Cattle	<i>Storfe</i>
<i>Esel, donkie</i>	Donkey	<i>Esel</i>
<i>Veepos</i>	Livestock post	<i>Gjeterbu, koie (omtrent)</i>
<i>Veewagter</i>	Herder	<i>Gjeter</i>
<i>Kraal</i>	Corral/kraal, fenced area for livestock	<i>Inngjerding, kve</i>

<i>Afrikaans</i>	<i>English</i>	<i>Norwegian</i>
	LAND TENURE	
<i>Grondbesitregte</i>	Land (posessory) rights	<i>Landrettigheter</i>
<i>grondbesitregstelsel</i>	Land tenure	
<i>Eienaar (skap)</i>	Owner (ship)	<i>Eier (skap)</i>
<i>Eiendomsreg</i>	Ownership / freehold	<i>Eiendomsrett</i>
<i>Grondbrief</i>	Title deed	<i>Skjøte</i>
<i>Kart 'n transport</i>	Deed of transfer and map attached to it. Direct transl.: 'map and title deed'	<i>Registrering av eiendomstransaksjon, tinglysing</i>
<i>Toekenningsbrief</i>	Letter of allocation, permit	<i>Målebrevbrev, tillatelse</i>
<i>Akteskantoor</i>	Deeds Registry Office /Title register, Deeds Office	<i>Registreringsmyndighet / Grunnbok</i>
<i>Perseel (pl: persele)</i>	Allotment	<i>Parsell, tomt, teig, grunn</i>
<i>Erw</i>	Plot, 'erf' / residential plot – as distinct from an agricultural allotment	<i>Parsell, tomt</i>
	GOVERNANCE	
<i>Wet / die wet</i>	An Act, the law	<i>En lov, lovverket</i>
<i>Grondwet</i>	Constitution	<i>Grunnlov</i>
<i>Die reg</i>	The Law	<i>Rett / rettsområde</i>
<i>'n reg</i>	A right (countable)	<i>Enkeltrettighet</i>
<i>Regverdig</i>	Just	<i>Rettferdig</i>
<i>Raad (pl.: rade)</i>	Council	<i>Råd (valgt forsamling)</i>
<i>Komitee</i>	Committee	<i>Komité / utvalg</i>
<i>Regering</i>	Government	<i>Regjering</i>
<i>Hof</i>	Court	<i>Domstol</i>
<i>Reël</i>	Rule	<i>Regel</i>
<i>Regulasie</i>	Regulation	<i>Regulering</i>
<i>Munisipaliteit</i>	Municipality	<i>Kommune</i>
<i>Munisipal</i>	Municipal	<i>Kommunal</i>
<i>Kommunaal</i>	Communal	<i>Felleseid</i>
<i>Verkiesing</i>	Referendum	<i>Folkeavstemning</i>

Sources: Personal communication K. Pienaar, K. Kerner and H. Steinsholt, and other sources (including Boonzaier et al. 1996; Kerner, Niebuhr, and Steinshamn 2005).

**Annex III: Transformation of Certain Rural Areas Act, Act 94 of 1998**