TOWARDS THE DEVELOPMENT OF POST-APARTHEID LAND LAW:

AN EXPLORATORY SURVEY

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OPSOMMING

Die ontwikkeling van post-apartheid grondreg: 'n verkenning

Gewoonlik behels die grondreg (of reg aangaande onroerende sake) 'n verskeidenheid regsreëls ten aansien van die vestiging, inhoud en beskerming van die reg op eiendom, gebruik of eksploitasie van grond en natuurlike hulpbronne. In Suid-Afrika het die grondreg egter 'n bykomende funksie verkry, naamlik om te dien as die basis vir ruimtelike skeiding van rassegroepe as deel van die ideologie en praktyk van apartheid. Die huidige grondreg word ook oorheers deur rasbepaalde wetgewing en maatreëls, en daarom is dit nie vreemd nie dat 'n aansienlike deel van die debat oor hervorming op die grondreg ingestel is. Tot op datum is die debat oor grondreghervorming egter nog relatief oppervlakkig, en daar word selde indien ooit tot die werklike wydte of diepte van die probleem deurgedring. In hierdie artikel word 'n verskeidenheid van onderwerpe aangespreek wat noodwendig deel van die grondhervormingsproses sal moet uitmaak, en enkele van die belangrikste probleemvrae op elkeen van hierdie gebiede word kortliks toegelig en bespreek. Verder word sommige van die moontlike oplossings vir hierdie probleme geopper en krities beoordeel. Die aspekte wat behandel word is die volgende: (a) Impliseer grondhervorming noodwendig dat die gewoonteregtelike grondreg afgeskaf moet word? Die aard en kenmerke van die gewoonteregtelike benadering tot grondregte word behandel, en die voorlopige voorstel is dat dit nie afgeskaf moet word nie, maar eerder behou moet word ter wille van die sosiale sekuriteit wat dit bied, en ten einde die gemeenskapsgeoriënteerde grondregetiek daarvan te bewaar. (b) Hoe kan die grondreg in stedelike gebiede hervorm word? Die verskillende aspekte van rasbepaalde grondreg in stedelike gebiede word kortliks uiteengesit, en die gevolgtrekking is dat hierdie deel van die grondreg uitsluitlik op die beginsel van rasseskeiding gegrond is, en daarom nie hervorm nie maar afgeskaf moet word. Die blote afskaffing van bestaande wetgewing is egter onvoldoende, en daar sal stappe geneem moet word om ongelykhede en historiese ongeregtighede deur middel van herstellende optrede uit te skakel. (c) Hervorming van gekriminaliseerde grondreg is

baie na aan die stedelike situasie verwant, en die gevolgtrekkings daaroor is wesenlik dieselfde. Bestaande wetgewing moet afgeskaf word, herstellende optrede ten aansien van historiese ongeregtighede is noodsaaklik, en daar sal daadwerklike stappe geneem moet word om die woningnood by wyse van behuisingsprogramme en die toelating van informele nedersettings te verlig. (d) Moet die gemenereg in die proses van grondreghervorming afgeskaf word? In hierdie afdeling is verskillende ontwikkelinge ten aansien van gemeenregtelike eiendomsreg ondersoek, en die gevolgtrekking is dat hierdie ontwikkelinge daartoe kan bydra dat die gemeenregtelike eiendomsreg vir 'n groter deel van die bevolking aanvaarbaar is, veral as die hervormings deur geselekteerde ad hoc wetgewing gerugsteun word. Die afskaffing van die gemenereg sal 'n vakuum laat wat deur kodifikasie gevul sal moet word, en kodifikasie sal waarskynlik daartoe lei dat ongewenste elemente van die bestaande reg verskans word en dat gewenste nuwe ontwikkelinge gestuit word. (e) Moet eiendomsreg en die reg op behuising in 'n menseregte-akte verskans word? Die voor- en nadele van sodanige verskansing word ondersoek, en die gevolgtrekking is dat dit waarskynlik tot dieselfde gevolge as kodifikasie sal lei, naamlik die verskansing van ongewenste ontwikkelinge en die stuiting van gewenste en voordelige ontwikkelinge en inisiatiewe. In die gevolgtrekking word die voorgaande resultate saamgevat by wyse van 'n agenda vir verdere bespreking.

1 INTRODUCTION

Generally speaking land law consists of legal rules which govern the content, acquisition and protection of various rights to own, use or exploit land and natural resources. In South Africa land law has also been employed to entrench the political ideology of racial segregation by means of spatial separation of race groups, thereby creating a controversial body of statutory law which may be called apartheid land law. Apartheid land law was introduced for a number of interrelated reasons: to define and physically separate various race groups; to provide a legal framework for administrative and political control over black population movements and concomitant land rights;[1] to create and control a black

unskilled labour market;[2] and to ensure through spatial-political separation that universal suffrage does not result in black majority rule.[3]

The policy of spatial segregation or partition[4] has been the core of white political ideology for more than four decades,[5] and it

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1 See Schoombee "Group areas legislation - the political control of ownership and land" 1985 Acta Juridica 77-118; Davenport "Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the state to impose political and economic control" 1985 Acta Juridica 53-76; Devenish "The development of administrative and political control of rural blacks" in Race and the law in South Africa 1987 (eds Rycroft et al) 26-40; Robertson and McCarthy "'Orderly urbanization': the new influx control" 1986 Natal University Law and Society Review 155-174; Robertson "Segregation land law: a socio-legal analysis" in Essays on law and social practice in South Africa 1988 (ed Corder) 285-317; Platzky "Relocation and poverty" Second Carnegie inquiry into poverty and development in Southern Africa Conference paper no 73 1984 7; Donald "Removals of a quiet kind: removals from Indian, Coloured and White-owned land in Natal" Second Carnegie Inquiry (above) Conference paper no 75 1984 3. According to the report of the Tomlinson Commission UG 61 of 1955 par 42 seperation of the race groups was the only solution for the racial problems facing South Africa.

2 See especially Robertson "Segregation land law: a socio-legal analysis" 285-317; Van der Merwe "'Not slavery but a gentle stimulus': labour-inducing legislation in the South African Republic" 1989 TSAR 353-369; Davenport South Africa: a modern history 1987 526-527.

3 See Haines and Cross "An historical overview of land policy and tenure in South Africa's black areas" in Towards freehold: options for land and development in South Africa's black rural areas 1988 (eds Cross and Haines) 92. The Bantu Authorities Act 68 of 1951 was also criticized for its "surreptitious 'divide and rule' technique"; see Devenish 29 and 32. See further Albertyn "Reflections on race and change" in Race and the law (n 1) 243 ff.

4 Devenish 32 calls it "unilateral partition".

5 At least since the National Party came to power in 1948. The underlying philosophy can, however, be traced back to the introduction of the Glen Grey Act of 1894, which was promulgated to provide a legal framework for the administration and control of black land holding in the Glen Grey district of the Cape Colony. See Robertson "Segregation land law: a socio-legal analysis" 294 ff; Davenport South Africa 123-183 379-

has not changed fundamentally during that period. The much-vaunted promulgation of the Abolition of Influx Control Act 68 of 1986 did not (and was probably never intended to) result in the elimination of spatial segregation,[6] and the changes brought about by the introduction of the so-called "free settlement areas"[7] and "grey areas"[8] are negligible. Apartheid, particularly in the form of segregation land law, is currently as strong and effective as ever before.

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6 Schoombee and Davis "Abolishing influx-control - fundamental or cosmetic change?" 1986 South African Journal on Human Rights 208-216; Robertson and McCarthy 1986 Natal University Law and Society Review 155-174 agree that the act in question did not even change the process of influx control dramatically, not to mention the much wider issue of spatial segregation as such.

7 See the Free Settlement Areas Act 102 of 1988 and Local Government Affairs in Free Settlement Areas Act 103 of 1988. These acts provide for the proclamation of certain areas as so-called "free settlement areas", with the result that persons are free to trade in that area irrespective of their race.

8 "Grey areas" are supposed to be residential areas which are exempted from the racial segregation brought about by the Group Areas Act 36 of 1966. Legislation to that effect has not yet been promulgated, and the government's intentions in this regard have been questioned recently as a result of the strict "petty apartheid" which was re-introduced by certain conservative local authorities. Critics of government policy have pointed out that "petty apartheid" is also enforced by other local authorities and by central government itself, backed up as it is by the still valid Reservation of Separate Amenities Act 49 of 1953. The ambit of this act was limited more recently by the Supreme Court (per Eloff DJP) when a decision of a local authority, which was ostensibly justified by the said act, was found to be invalid for not having been in the interest of all residents (Sorrel Geoffrey Waks, John Billy Motsau and Abdul Rhaman Bhamjee v Gert Petrus Jacobs en Die Stadsraad van Carletonville unreported case nr 5971/89 1989-08-31 (T)).

Since apartheid is entrenched in existing land law, land reform should top the list of issues to be discussed in any constitutional reform process. It is, therefore, not strange that the current spate of talks, discussions, conferences and political demands for constitutional reform all contain references to land reform. However, these calls for land reform are usually limited to rather simplistic demands for the scrapping of a number of controversial segregation statutes such as the Group Areas Act 36 of 1966, the Land Act 27 of 1913 and the Population Registration Act 30 of 1950.[9] Important as the scrapping of these acts may be for the ultimate dismantling of apartheid, the call for their revocation does not reflect the extreme complexity of the issues involved, specifically with reference to the important differences in the land questions pertaining to rural and urban land respectively. The mere revocation of certain segregation acts, regardless of the political, social, economic and legal ramifications that complicate the land question, will probably create more problems than it will solve.

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9 Apart from these acts and other obvious ones such as the Black Administration Act 38 of 1927, the Black Authorities Act 68 of 1957, the Black Affairs Act 55 of 1959 and the Reservation of Separate Amenities Act 49 of 1953, there are more than 100 Acts of Parliament that will have to be repealed or amended in order to eradicate statutory apartheid. See the recent article "Axing the Amenities Act will never erase the pain of the past" in The Sunday Star 1989-11-12 8, where a number of legislative measures that will have to be abolished together with the Reservation of Separate Amenities Act 49 of 1953 are enumerated.

For this reason it is argued in this article that the revocation of segregation legislation will have to form part of a well-planned and comprehensive process, which will not only rid South African society of apartheid but also replace it with a legal structure within which post-apartheid land law can develop. Land law was not allowed to develop naturally during the apartheid era, and consequently there is no well-developed residual land law system to replace apartheid land law. The scrapping of apartheid legislation will, therefore, have to be accompanied by the positive development of a non-racial land law, in which imaginative use is made of the principles of tribal or customary law, common law and statutory law. The aim of this article is to provide an exploratory survey of the most important issues that are involved in land reform, the problems posed by each of them and the implications of some of the possible solutions for those problems.[10]

2 AGRICULTURAL AND RESIDENTIAL TENURE IN RURAL AREAS

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10 Because of the very existence of this unique body of apartheid land law it is impossible to describe or discuss South African land tenure without having recourse to the inherently discriminatory and emotive language of apartheid created by the white legislature. Recurring references to different racial groups, as defined by the Population Registration Act 30 of 1950 and the Group Areas Act 36 of 1966, are necessitated by the fact that these acts define different race groups, and that people from different racial groups are accorded different rights and disabilities by the legislation in question. See in this regard Schoombee 1985 Acta Juridica 107 (note on racial terminology); Robertson "Black land tenure: disabilities and some rights" in Race and the law (n 1) 119. Use of this terminology should not be construed as acquiescence in its existence or agreement with its underlying philosophy.

2.1 Introduction

Since the formation of the Union of South Africa in 1910 the policy of the white South African government has been to introduce and maintain spatial separation of the various race groups. As far as the rural areas are concerned this policy was aimed primarily at the segregation of whites and blacks. This process was initiated by the Black Land Act 27 of 1913, in which the so-called "traditional" black land was identified and "reserved" for exclusive black use and occupation, while all other land was reserved for exclusive white use and occupation. The reserved land identified for black occupation was extended with the addition of "released" land in terms of the Development Trust and Land Act 18 of 1936, which introduced the concept of trust land to black land tenure. Together these two statutes form the backbone of black land law in rural areas.[11] Control over black land tenure in

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11 See Davenport 1985 Acta Juridica 53 ff; Van der Post 1985 Acta Juridica 213 ff; Olivier, Pienaar and van der Walt Statutêre sakereg 1988 sv "Swart grondreg" 1-3. Control over land in the so-called national states was transferred to the governments of those states in terms of the Constitution of National States Act 21 of 1971, and some of the national states that have accepted independence have arrived at their own solutions already; compare the Bophuthatswana Land Control Act 39 of 1979 and the Allocation of Agricultural Lands Act 20 of 1983 of the Republic of Bophuthatswana; the Venda Land Control Act 16 of 1986 of the Republic of Venda; and the Land Use Regulation Act 15 of 1987 of the Republic of Ciskei. The fact that control over land tenure in the national states has been transferred to their respective governments has prompted certain authors to conclude that land in those areas no longer poses a problem; see Van der Wall "Towards a system of land tenure in the national states" in Towards freehold (n 3) 38. This rather callous attitude loses sight of the fact that eventual land reform will probably include the so-called

terms of these two acts was rounded off by the promulgation of regulations[12] which control land tenure in rural black areas.

In terms of the Black Areas Regulations[13] the nature of land rights in black rural areas is determined by the question whether the land has been surveyed or not. In terms of chapter 5 of the regulations protected rights of occupancy, based on the system of customary land allocations, are granted with regard to unsurveyed land. Chapter 2 of the regulations determines that land rights with regard to surveyed land amount to quitrent. The acquisition and transfer of both categories are administered by officers of the Department of Development Aid.[14] In effect land in the so-called traditional black areas is mostly unsurveyed and therefore held in terms of customary tenure or a modified version thereof,[15] while quitrent rights apply to released land acquired and controlled by the South African Development Trust in terms of the Development Trust and Land Act 18 of 1936.[16] Neither of these ca-

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homelands, whether independent or not.

12 In terms of section 25 of the Black Administration Act 38 of 1927 and section 21(1) of the Development Trust and Land Act 18 of 1936.

13 PR 188 of 1969-07-11, Government Gazette 2486 of 1969-07-11.

14 Compare Olivier, Pienaar and Van der Walt 1988 sv "Swart grondreg" 37 in general.

15 Especially in terms of the Native Administration Act 38 of 1927, which was aimed at the reconstruction of the traditional tribal system, with certain modifications which changed the traditional relationships that determine land rights: Letsoalo Land reform in South Africa: a black perspective 1987 37.

16 Section 4.

tegories amounts to ownership of the land, and both are no more than protected rights of occupancy.[17]

As a result of the introduction and control of these land rights in terms of the hated apartheid legislation their abolition is often seen as an inevitable part of land reform. The main question in this regard is whether customary tenure should be abolished or not.[18] Essentially the debate on this question consists of various perceptions of the possible benefits or dangers of replacing customary tenure with common law ownership, but much of what has been said in this regard is the result of misunderstandings of the nature of customary tenure.[19] The necessity for the abolition of customary tenure is ultimately determined by perceptions of its legal nature and content, and therefore it is important to reach some clarity about the nature, the advantages and

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17 See Olivier, Pienaar and Van der Walt 1988 sv "Swart grondreg" 37; Olivier, Pienaar and Van der Walt Law of property students' handbook 1989 345.

18 The question whether quitrent should be abolished is very similar in the sense that it also amounts to a "different" or "separate" form of landholding for blacks, but it is also quite different in the sense that it does not involve customary rights. For that reason the abolition of quitrent is almost identical with the abolition of leasehold, which is also a separate form of tenure that applies almost exclusively to blacks. The arguments advanced and discussed below with reference to leasehold are, therefore, considered to apply to quitrent as well.

19 See Letsoalo 15. The correct term for this form of tenure will not be debated here. In what follows the term "customary" will be used to refer to the tribal, customary, African or indigenous systems that have developed amongst the various indigenous groupings of southern Africa. See Kerr The customary law of immovable property and succession 1976 chapter II.

the merits of customary tenure before the question of its abolition can be addressed satisfactorily.[20]

2.2 Nature of customary tenure

In its original form customary tenure comprises a variety of land use rights which differ from common law land rights, mainly because the legal nature and content of customary land rights must be appreciated within the context of the traditional extended family relationship.[21] This makes it not only difficult but also quite hazardous to compare tribal or customary land relations to similar relations in western or westernized societies. The terminology in which land relations are described in common law systems[22] is inadequate when attempting to describe customary law.[23]

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20 See Bentsi-Enchill "Do African systems of land tenure require a special terminology?" 1965 Journal of African Law 114; Cross "Introduction: land reform and the rural black economy in South Africa" in Towards freehold (n 3) 3.

21 Seagle The quest for law 1941 53 makes the same observation with regard to the property relations which are found in most so-called primitive societies. See Bentsi-Enchill 1965 Journal of African Law 124; MacCormack "Problems in the description of African systems of landholding" 1983 Journal of Legal Pluralism and Unofficial Law 9; Cross "Introduction: land reform and the rural black economy in South Africa" 16-18; Margeot "Freehold for black areas: structure, requirements, and prospects" in Towards freehold (n 3) 290; Cross "Informal freehold and the free market" in Towards freehold (n 3) 367; Moll "Transition to freehold in the reserves" in Towards freehold (n 3) 314; Létsoalo 19 ff.

22 The term as used here refers specifically to the so-called Roman-European ius commune, of which South African common law is part. It does apply to some extent to the Anglo-American systems, even though the terminology of those systems differ from the Roman-European systems. According to the paradigm used by David and Brierley Major legal systems in the world today: an introduction to the comparative study of law 1978 29 the terminological-sources structure of the Roman-European systems differs from that of the Anglo-American systems, while

In the Roman-European common law tradition property relations are usually defined in terms of ownership, possession or one of the limited real rights. Tribal or customary land rights cannot be defined with reference to ownership, since that term has acquired[24] an element of individualism that is foreign to tribal property relations. Possession is also inadequate, as it does not accurately reflect the strong protection afforded to the landholder in a tribal system. The only comparable limited real right, viz usufruct, is also inappropriate because the inherent structural bond between the limited real right (usufruct) and the mother right (ownership) is foreign to tribal land relations.[25] Gluckman's conclusion is, therefore, that the terminology of Roman-

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they share a comparable philosophical and socio-economic structure. However, as far as the tribal or customary systems are concerned both their terminological-sources structure and their philosophical and socio-economic structure differ from the Roman-European systems. See in this regard Van der Walt "Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" 1988 De Jure 24-35.

23 See Gluckman The ideas in Barotse jurisprudence 1965 77, 85-86; "Property rights and status in African traditional law" in Ideas and procedures in African customary law: studies presented and discussed at the eighth international African seminar 1966 258.

24 It was not always part of the Roman heritage; see Birks "The Roman concept of dominium and the idea of absolute ownership" 1985 Acta Juridica 1-37; Visser "The 'absoluteness' of ownership: the South African common law in perspective" 1985 Acta Juridica 39-52; Van der Walt 1988 De Jure 16-35 306-325.

25 Despite the obvious differences many authors still prefer to work with this inappropriate usufruct model: Van der Wall 36; Lenta and Maasdorp "Limit factors on food production in the homelands" in Towards freehold (n 3) 229. Letsoalo indicates in the summary of the contents of chapter 2 (table of contents) that the traditional land tenure system is a form of leasehold without the problems generally associated with leasehold, but this aspect is not expanded or mentioned in the chapter itself.

European property law cannot explain tribal or customary land relations accurately.[26]

The inadequacy of Roman-European terminology is due to its inability to reflect the social concept of status that is inherent in all tribal land relations.[27] As a result of this inadequacy Gluckman designed his own terminology, based upon the English concept "estate",[28] with which to describe tribal land relations. Although Gluckman's approach has been criticised on the basis that it still transposes foreign concepts[29] onto customary relations,[30] his observations are still accepted as far as the importance of status in land relations are concerned.[31] According to

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26 Bennett "Terminology and land tenure in customary law: an exercise in linguistic theory" 1985 Acta Juridica 173 describes the simplistic application of western terminology to customary relations as "a method now deplored by theorists and completely discredited." Although Letsoalo 17 advocates a departure from the view that a dichotomy exists between individual landownership and communal landownership, his explanation of the nature of traditional land tenure shows that it is fundamentally different from common law individual landownership, especially as far as the strong bond between social status and land rights is concerned.

27 It is not quite true that Roman-European terminology is absolutely individualistic in nature, so that it cannot reflect status in its property terminology at all. Van der Merwe Oorlas in die Suid-Afrikaanse reg 1982 582 ff has shown that land rights contain and reflect a very interesting reference to status as far as neighbour relations are concerned. Apart from examples such as this it must be conceded, though, that Roman-European law is sadly underdeveloped in this regard.

28 Which is derived from "status" and therefore closer to tribal structure.

29 As opposed to foreign terminology.

30 See Bennett 1985 Acta Juridica 174.

31 See Bennett 1985 Acta Juridica 174, who shows that the results of other approaches are similar on this point (he refers to Bentsi-Enchill 1965 Journal of African Law 114; MacCormack 1983 Journal of Legal Pluralism and Unofficial Law 10.) See also Allott "Towards a definition of 'absolute ownership'" 1961 Journal of African Law 99-102 (with regard to the various

customary law land is either not owned at all,[32] or owned by a tribe or smaller social unit as a whole, while individuals obtain protected rights of occupancy, use and exploitation to certain parts of such land, within the social structure of the group in question.[33] Bentsi-Enchill[34] indicates, quite correctly, that common or group holding of land or land rights is not at all foreign to common law - the difference between common and customary law is evident in what Cross[35] refers to as the "community land ethic" inherent in customary law rather than in the phenomenon of group holding as such. The "community land ethic" is a strong ethical element of land law, which reflects the status of the land holder within the group and governs the acquisition, con-

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interests in mixed customary/English systems).

32 For instance when it is state or trust land in terms of the Development Trust and Land Act 18 of 1936. Tapson "Freehold versus leasehold in the homelands" in Towards freehold (n 3) 329 takes the view that "[r]egardless of the de jure responsibilities of State Presidents or land trusts, it is reasonable to assume that traditional land is viewed as being communally owned by the tribe that occupies it." Two glosses should be added to his observation: firstly it should be noted that the common law concept of joint ownership cannot apply to tribal "ownership" of land; and secondly the perception that a tribe owns the state or trust land it occupies does not detract from the legal fact that the state or the relevant trust is the owner of that land. Bentsi-Enchill 1965 Journal of African Law 120 ff refers to this as feudal or dependent title, as opposed to allodial or plenary title.

33 Kerr 41 ff; Koyana Customary law in a changing society 1980 63; Cokwana "A close look at tenure in Ciskei" in Towards freehold (n 3) 305.

34 1965 Journal of African Law 128.

35 See Cross "Freehold in the homelands: what are the real constraints?" in Towards freehold (n 3) 346.

tent, exercise and protection of his land rights. In customary law land rights are usually[36] allocated and administered by the head of a particular group (such as a family, kraal or tribe), in consultation with the elders and other members of the group (such as the head wife or heirs). The acquisition, retention, exercise and protection of these rights are deeply embedded in and reflect the social structure and fabric of the particular social group, and cannot exist or be understood apart from it.

This brief outline illustrates the profound mistake made by authors who represent or interpret customary tenure as an individual or private right which is not significantly different from common law tenure. Louw[37] goes so far as to describe customary tenure as being "characterised by laissez-faire individualism", and refers to the idea that customary tenure is communal in nature as "the myth of 'African socialism'".[38] The truth is that tribal or customary land rights cannot be described in terms of either socialism or individualism, since these terms were created in and with reference to western society, and are simply not suitable for an accurate description of tribal custom. Even though it is true that customary tenure can amount to individual owner-

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36 This traditional arrangement has been modified through state intervention: Cokwana 305. See Kerr 30-41.

37 See especially Louw and Kendall South Africa: the solution 1986 chapter 5; Louw "Black tenure vs white tenure in South Africa: the impact on development" in Towards freehold (n 3) 294-301; "Towards resolving the new confusion about land tenure" in Towards freehold (n 3) 357-363; and "Freehold land rights, other freedoms, and the future of the rural poor" in Towards freehold (n 3) 379-380.

38 "Towards resolving the new confusion about land tenure" 357.

ship of land by a family or social group, and even though land use rights are usually allocated so permanently that it can be bequeathed to the heirs of the grantee,[39] the rights in question must still be distinguished from common law landownership because they are granted, retained, bequeathed and exercized within the limits of the social group in question.[40] The strong social aspect of these land rights should not be called "communal", since this term has a common law meaning[41] which differs from customary tenure.[42] The very antithesis between "communal" and "individual" which underlies the use of these terms in western discourse is foreign to the customary way of thinking, and therefore tends to distort the true meaning of customary land relations.[43] Moreover, Louw's interpretation of the spirit of customary tenure as basically individual and free market-oriented is simply not supported by recent research.[44] Calls for the abolition of customary tenure

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39 See Letsoalo 20-23.
40 See Letsoalo 19-20.
41 Which is understood as common or joint ownership.
42 See the criticism of Bennett 1985 Acta Juridica 176.
43 Gluckman "Property rights and status in African traditional law" 252 257; Bennett 1985 Acta Juridica 173; Cross "Freehold in the homelands: what are the real constraints?" 339; Bam "Land law and poverty" Second Carnegie inquiry (n 1) Conference paper no 80 1984 1-3.
44 The statement made by Louw "Freehold land rights, other freedoms and the future of the rural poor" 379 to the effect that he "would have challenged [the classical account of communal tenure] had there been a little more opportunity to consult sources" seems like a bit of a lame excuse - there simply is no source that backs his basically individualist free-market account of tribal tenure. Bentsi-Enchill 1965 Journal of African Law 116 128 makes the statement that African systems of land tenure present no special or extraordinary problems as compared to western systems, and that individual ownership of interests in land need not be introduced into African systems as it is already present. This does not imply that African systems are basically individual in the same sense as common law systems - it simply means that the natural process of in-

which are based on the simplistic and mistaken assumption that it is basically not that different from common law ownership should, therefore, be treated with circumspection.

One of the main points of contention with regard to the replacement of customary tenure with common law ownership is concerned with the existence and creation of a land market. The close interrelationship between land rights and status in customary law tends to limit land transactions which are natural in the common law tradition, such as sale or lease of land or land rights.[45] Since the right to occupy, use and exploit land is afforded to members of a close social group on the basis of their status in that group and administered by the authority structure of the group, individuals can usually not sell, lease or burden their rights as they wish.[46] Even in cases where land transactions do appear they are usually allowed only with the consent of the

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dividuation in African systems tends to develop in a direction that is not so foreign to especially English tenure (which in itself is not so individualist as common law ownership).

45 Bentsi-Enchill 1965 Journal of African Law 127 137-138 points out that the more or less free sale and disposal of land depend on several factors, such as the beliefs, fears and opportunities of the group. His examples indicate that land transactions usually occur in cases where the land has acquired a commercial value due to the introduction of cash crop farming, the discovery of minerals etc. It seems, therefore, that the emergence of land transactions is dependent on the creation of a land market, which is usually a result of a fundamental change in the economic structure of the group.

46 See Kerr 71 ff; Bromberger "Cash cropping, subsistence and grazing: prospects for land tenure in KwaZulu" in Towards freehold (n 3) 208; Cross "Informal freehold and the free market" 367.

group authority structure, and they are often limited to members of the group.[47] This socio-economic restraint has prevented the emergence of a market in rural black land, thereby ensuring that poor black families do not lose their land rights in exchange for short term cash.[48]

The social context of land relations, coupled with the socio-economic realities of the South African migrant labour system, has given birth to a somewhat unusual and very interesting development which makes the social restraints of customary tenure even more important. From fieldwork done by researchers in development administration and politics it appears that segregationist economic and political policy has created a very strong migrant labour culture, in which black societies in rural tribal areas have become dependent upon cash income from their kinsmen who work in urban areas,[49] while those who work in urban areas often depend upon the retention of their customary land rights in the rural area in order to retain their tribal or family status with all its social privileges and securities. While many individuals who work in urban areas would like to obtain permanent rights there,

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47 That does not mean that outsiders can never acquire land rights - they can acquire land rights when they are accepted in and associate themselves with the group. See Letsoalo 20; Cross "Freehold in the homelands: what are the real constraints?" 340; "Informal freehold and the free market" 367. The rule of consent or consultation is not absolute; see Cross "Freehold in the homelands: what are the real constraints?" 340 342, Bentsi-Enchill 1965 Journal of African Law 128 138.

48 See Cross "Freehold in the homelands: what are the real constraints?" 342.

49 Letsoalo 26; Cross "Freehold in the homelands: what are the real constraints?" 342.

they are loathe to lose their customary land rights in the rural area for fear of losing the social security accompanying their status as landholding members of a particular group.[50] The retention of customary land rights in rural areas seems, therefore, to serve the purpose of social insurance against disability, retirement or unemployment. This interesting socio-economic phenomenon tends to promote the development of a rural land market, albeit a limited one, amongst absentee holders of land rights and members of their group who wish to use or exploit those rights against some consideration. However, the emergence of such a land market remains firmly embedded in the social group structure, and does not amount to a social quantum leap towards western common law landownership.

The social mutations of customary tenure within the context of migrant labour have, therefore, initiated a process of development that may create a superficial semblance of comparability between customary and common law tenure. Research by Cross[51] suggests that the physical absence of large numbers of migrant workers may increase the incidence of indirect exploitation of customary land rights. Migrant workers seem to transfer some or all of their land rights to other members of the relevant social group, especially if the remaining members of their own families

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50 See Manona "Movement into town from a rural area: a case study in the Eastern Cape" in Towards freehold (n 3) 162; Möller "Some thoughts on black urbanization after the abolition of influx control measures" in Towards freehold (n 3) 154; Lenta and Maasdorp 229.

51 See Cross "Freehold in the homelands: what are the real constraints?" 340.

are unable to exploit their rights to the full. Such a transfer of rights must usually be agreed to by the chief in consultation with the elders, and is often limited to members of the social structure within which it is allocated, so that it does not separate land rights from status. Cross[52] refers to this phenomenon as "informal freehold", which suggests a movement away from customary and toward common law tenure, but with retention of the "community land ethic".[53] It does seem possible that the development in question may ultimately resemble something like the shift in landownership which occured in post-medieval Europe,[54] with the result that the actual user or exploiter of land becomes its de facto owner,[55] but given the apparent retention of the community land ethic[56] it is perhaps misleading to refer to this phenomenon as "freehold".[57]

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52 Cross "Informal freehold and the free market" 369-370.

53 Compare Bromberger "Cash cropping, subsistence and grazing: prospects for land tenure in KwaZulu" 208.

54 See in this regard Van Iterson "Beschouwingen over rolverwisseling of eigendomsverschuiving" in Verslagen en Mededelingen van de Vereniging tot Uitgave der Bronnen van het Oud-Vaderlands Recht part XIII nr 3 1971 407-466; Van den Bergh Eigendom: grepen uit de geschiedenis van een omstreden begrip 1989 59 ff; Van der Walt and Kleyn "Duplex dominium: the history and significance of the concept of divided ownership" in Essays on the history of law (ed Visser) 1989 240-241.

55 Compare Cross Land tenure, labour migrancy, and the options for agricultural development in KwaZulu 1981 report to Buthelezi Commission 20; Haines and Cross 77.

56 See Cross "Freehold in the homelands: what are the real constraints?" 346. Compare Bromberger "Afterword: issues in future land policy in South Africa's black reserves" in Towards freehold (n 3) 387.

57 It is also very much the question whether the Anglo-American "freehold" should be used in the South African context. The typical common law right that derives from Roman dominium should rather be translated as "ownership", while "freehold" has connotations in the Anglo-American system of tenures and estates that are foreign to the Roman-European legal systems. Mutations of customary land rights in the South African con-

What emerges from this brief discussion is that customary land tenure differs from common law tenure, that it cannot be explained accurately in terms of the common law distinction between ownership and limited real rights, and that it is characterized by a community land ethic which reflects the internal relationships of a social group in its land rights allocation. Customary law also seems to be capable of adaptations and developments which may be required by the needs of the community or by its circumstances. In view of this consideration the question is whether customary law should be abolished in a comprehensive land reform process.

2.3 Abolition of customary tenure

The question whether customary tenure should be abolished can only be asked once the ills or shortcomings thereof and the possible advantages of its replacement by common law ownership have been investigated.[58] For this reason a number of the most impor-

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(continued)

text could hardly be described accurately or adequately in terminology which is not only foreign to itself, but also to the common law system with which it co-exists.

58 In the words of Cross "Introduction: land reform and the black rural economy in South Africa" 26: "Land reform does not cure what is not wrong." See also Bentsi-Enchill 1965 Journal of African Law 114: "... a need exists for a kind of comparative legal analysis of existing systems of landholding which can throw into relief the real points of weakness that need to be remedied or pruned away,..."

tant criticisms usually levelled against customary tenure will be enumerated and discussed briefly in this section, together with the possible benefit that may be derived from replacing it with common law ownership.

Customary tenure is often seen as an outdated and anachronistic historical curiosity which is unable to satisfy contemporary needs, and which cannot be accommodated in a modern legal system. On this basis its abolition is sometimes called for in order to keep up with new developments.[59] However, some of the remarks made above point in the opposite direction: with regard to the development of so-called "informal freehold" and the migrancy-related land economy customary tenure does not appear to be outdated and anachronistic, but rather as a resilient form of landholding that is capable of development and change. Cross[60] argues that customary tenure has adapted very efficiently to modern conditions in dealing with the massive and socially disruptive population movements in the rural areas, and in providing an alternative land economy that accommodates the economic and social rea-

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59 See the general drift of Sibanyoni "A report submitted to KaNgwane after a fact-finding trip to the Far East" in Towards Freehold (n 3) 302-304.

60 "Freehold in the homelands: what are the real constraints?" 342. McCarthy "African land tenure as a popular issue and power relation in South African urban and peri-urban areas" in Towards freehold (n 3) 127 argues that there is no indigenous preference for a particular form of tenure, and that preferences depend upon the needs of the society involved and the possibilities of the various tenure forms.

lities of migrancy labour. Customary tenure can, therefore, not be criticized for being outdated: under the circumstances it has coped remarkably well with changing social and economic circumstances in rural areas. In this regard both Cross[61] and Bentsi-Enchill[62] argue that it would serve no purpose to abolish customary tenure, while both are in favour of legislation that will aid the natural resilience and development of customary tenure by providing it with some measure of control and formality.

Customary tenure is sometimes seen as an insecure form of landholding, and many of its critics want to replace it with a form of tenure that provides better security. Of these critics some focus their attention on the powers of dispossession vested in the tribal authority structure,[63] while others argue that customary tenure does not seem to offer the appropriate kind of security required for mortgage financing,[64] or point out that customary tenure poses various problems with regard to land survey and registration, which seems to render it irreconcilable with common law rights.[65] None of these points of criticism seems to offer sufficient justification for the abolition of customary tenure. While it may be true that the practical exercise of customary

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61 "Informal freehold and the free market" 373 ff.
62 1965 Journal of African Law 133 ff.
63 See Cobbett "The land question in a post-apartheid South Africa: a preliminary assessment" in Towards freehold (n 3) 71; Beck "Land tenure and social justice: an outline of the situation in Transkei" in Towards freehold 278 282; Moll 322-323; Cokwana 312. Compare Kerr 25 ff.
64 Lenta and Maasdorp 229; Moll 321; Möller 156.
65 See Van der Post "Land law and registration in some of the black rural areas of southern Africa" 1985 Acta Juridica 213 ff; Beck 282; Margeot 289 ff; Moll 321.

land rights is sometimes marred by high-handed actions of tribal authorities,[66] the injustices so caused should not necessarily be blamed upon the system of customary tenure. In many cases they are the result of modifications[67] of or the imposition of what is mistakenly perceived to be customary law rather than of actual customary law, which offers security of tenure as a matter of fact within the fabric of the societal structure.[68] As far as land survey and registration are concerned it has been pointed out that there is no reason why the present strict survey requirements should be retained for all land, and that it is possible to develop and implement a system of survey and registration which is simpler, cheaper and more suited to the needs of especially rural areas, while still retaining a sufficient measure of accuracy and dependability commensurate with the value and use of the land in question.[69] Relatively major innovations in the land law such as sectional title ownership, property time-sharing and ownership of air space have been and are accommodated in the registration system by means of special provisions,[70] and it must be possible to make special provision for the registration of

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66 See Beck 278; Louw "Black tenure vs white tenure in South Africa: what is the impact on development?" 299.

67 Especially by the reconstruction of the traditional tribal system through the Native Administration Act 38 of 1927; see Letsoalo 36-38. Compare Cokwana 305 307; De Wet 348; Tapson 329; Kerr 81 ff.

68 Beck 278; Margeot 290-291; Cokwana 307.

69 See Barnes "Approaches to land tenure and survey" in Towards freehold (n 3) 285-287; Margeot 292; Beck 282.

70 See in this regard Olivier, Pienaar and Van der Walt 1988 sv "Aktesregistrasie" and "Deeltitels"; Olivier, Pienaar and Van der Walt 1989 chapter 6.

customary land rights on a similar basis. Special registers such as the sectional title register could perhaps be used for the registration of unsurveyed customary land rights of a specific group within one specific and surveyed area.[71] Such a registration system can preserve customary tenure,[72] while eliminating present difficulties with regard to security for mortgage financing purposes.[73]

Customary tenure is often blamed for the poor state of agriculture in rural areas, either because it prevents the consolidation of economic agricultural units or because it protects ineffecient farmers from the healthy influence of market forces.[74] Research does not justify such a general conclusion. Agricultural underproduction and rural poverty are often the result of the limitations and restrictions of the rural household economy[75] rather than examples of the failure of customary tenure, which is forced to evolve its own informal solutions for changing circumstances and the obstructions posed by official policy.[76] Available sources rather seem to indicate that the tenurial system as such can-

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71 Compare Barnes 287.
72 See Van der Post 231-233.
73 Cross "Credit, mortgage, and savings: what does rural agriculture need to succeed?" in Towards freehold (n 3) 272 argues that the credit requirements of the rural agricultural communities are already met to some extent through informal arrangements within the society.
74 See Moll 314; Louw "Black tenure vs White tenure in South Africa: what is the impact on development?" 300.
75 According to Cross "Freehold in the homelands: what are the real constraints?" 344.
76 Bentsi-Enchill 1965 Journal of African Law 116.

not be blamed for the failure of rural agriculture[77] or for rural poverty in general,[78] and that the abolition of customary tenure and its replacement by common law landownership does not offer a practical and comprehensive solution for these problems.[79] The abolition of customary tenure will, in fact, cause a loss of social cohesion in the rural population,[80] thereby contributing to rural poverty by removing the social security system. It seems clear from research results that the twin problems of rural poverty and agricultural inefficiency cannot be solved by the abolition of customary tenure, and that a number of other social and political reforms are required for this purpose. The first requirement in this regard is a clear realization and acknowledgement of the fact that these problems can only be solved in a total approach that starts out from a realistic understand-

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77 Letsoalo 24 ff; Moll 318; Cross "Introduction: land reform and the rural black economy in South Africa" 23; Bromberger "Cash-cropping, subsistence and grazing: prospects for land tenure in KwaZulu" 212; De Wet "Land tenure, local government and agricultural development in the Ciskei" in Towards freehold (n 3) 353; Lyster "Agricultural marketing in KwaZulu: increasing private sector involvement" in Towards freehold (n 3) 253; Wilson and Ramphele Uprooting poverty: the South African challenge 1989 40-43.

78 Cross "Informal freehold and the free market" 365; Wilson and Ramphele chapters 10-12; Platzky 20; Donald 8-9; Bromberger "Some remarks on land reform in South Africa" 1980 Reality 14; Lodge "Some remarks on land reform in South Africa: a discussion" 1980 Reality 4.

79 See Evans "Black land in white Natal: how to set up a bureaucratic impasse" in Towards freehold (n 3) 129; Tapson 333.

80 Compare Cross "Introduction: land reform and the rural black economy in South Africa" 26; "Freehold in the homelands: what are the real constraints?" 340; "Informal freehold and the free market" 370; Bromberger "Cash-cropping, subsistence and grazing: prospects for land tenure in KwaZulu" 212.

ing of the rural economy. All the available evidence indicate that the rural economy cannot take the form of a entirely agrarian economy based upon efficient large-scale production on consolidated agricultural units, but that it must be allowed to develop within its own natural boundaries. These boundaries seem to include an inevitable link between small-scale peasant production on the one hand and cash income from migrant labour on the other, at the same time allowing a wide range of cash-producing alternatives for the rural household.[81] Such an approach would mean that agricultural improvements schemes such as conservation and betterment planning, which are currently enforced upon rural landholders, must be either discontinued or applied with much greater circumspection.[82] A more relaxed attitude towards rural tenure implies, furthermore, that the maximum number of rural people should be allowed access to land, and consequently the problem of labour tenancy should also be addressed to ensure that people are not made landless labourers for the benefit of large-scale agricultural production.[83]

Another aspect of rural land tenure that will have to be addres-

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81 Compare Cross "Introduction: land reform and the black rural economy in South Africa" 6-10 24-28; "Freehold in the homelands: what are the real constraints?" 340-344.

82 Compare in this regard Cross "Introduction: land reform and the black rural economy in South Africa" 11-13; Tapson 332; Glavovic "State policy, agriculture and environmental values" in Race and the law (n 1) 41-51; Yawitch "Betterment as state policy in South Africa" in Towards freehold (n 3) 101-111; McAllister "The impact of relocation in a Transkei betterment area" in Towards freehold (n 3) 112-121; Letsoalo 51.

83 See Hathorn "Legal aspects of labour tenancy" paper read at a workshop on forced removals, University of Cape Town, April 1989.

sed in a process of land reform is the question of removals. Ostensibly the policy of forced removals was abolished with the abolition of influx control, but that does not mean that all removals have ceased. The new policy of so-called voluntary removals amounts to political abuse of the statutorily modified version of traditional tribal custom, and requires no more than the cooperation of individuals or minorities in order to justify the removal and resettlement of "unwanted" groups and populations.[84] The process of land reform will undoubtedly require the abolition of the inhuman experiment in social engineering known as grand apartheid, and with it the legislative machinery of forced and so-called voluntary removals.

2.4 Conclusion: reform of rural land tenure

In the final analysis it appears as if the abolition of customary tenure will cause more problems than it will solve, especially if a transition from customary law to common law ownership means that a large number of poor rural people will be tempted to sell their land for short term cash gain, without solving their financial problems in the long term.[85] The creation of a free market in rural land should be avoided not only because it will deprive

84 See inter alia Cross and Haines 81; Platzky 1-20; Donald 1-16; Claassens "The myth of 'voluntary removals'" Second Carnegie inquiry (n 1) Conference paper no 74 1984 1-17.

85 Compare Cross "Introduction: land reform and the black rural economy in South Africa" 8 13; "Informal freehold and the free market" 311.

the rural poor of the land which is their only socio-economic security, but also because the resultant increase in rural poverty will be accompanied by the demise of the social structure which serves as a buffer between poverty and irrevocable destitution. Furthermore, research indicates that amendments to social and economic policy can provide a solution for rural poverty and agriculture without the abolition of customary land tenure.[86] Seen against that background the suggestion[87] that customary tenure should be stabilized rather than abolished makes a lot of sense.[88]

Most of the problems with customary tenure, such as arbitrary action by tribal authorities and resultant insecurity, can be solved by the abolition not of customary law, but of the unwarranted statutory modifications of customary principles. Other minor problems can be solved by way of limited reform measures, while the accommodation of customary land rights in the land survey and registration system can also be dealt with by way of statutory re-

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86 Cross "Informal freehold and the free market" 373; Wilson and Ramphele 285-292; Evans 136; De Wet 353.

87 See Cross "Introduction: land reform and the black rural economy in South Africa" 28-29; "Freehold in the homelands: what are the real constraints?" 347; Tapson 335; Letsoalo 83.

88 At a recent congress entitled "A new jurisprudence for a future South Africa", presented at the University of Pretoria by the Centre for Human Rights Studies, University of Pretoria and Lawyers for Human Rights, Pretoria (24-26 October 1989) a number of speakers on land law expressed the opinion that it is part of the colonialist approach to view customary law as less progressive and undeveloped. All of them stated that customary law should be retained and allowed to develop in areas where it still suited the needs of the population.

form. It seems, therefore, as if land reform with regard to rural land tenure should concentrate upon the reinstatement of customary tenure in its original social structure, while making allowances for and accommodating natural developments of customary tenure which reflect its adjustment to the changing circumstances and needs of society. In doing so the very important social security function of customary land tenure will be allowed, at least temporarily, to prevent a regression from rural poverty to absolute destitution of a large part of the population; while positive reforms in social and economic policy can be employed to improve rural agriculture and economy.

3 RESIDENTIAL TENURE IN URBAN AREAS

3.1 Background

Group areas control in terms of the Group Areas Act 36 of 1966 is probably the most important legislative measure affecting residential tenure in urban areas, but it is dealt with in the next main section of the article. This section concentrates, therefore, on aspects of residential tenure not directly involved with group areas control as such.

Residential tenure in black areas should actually be considered together with rural rather than urban tenure, since the relevant

regulations were promulgated in terms of the legislation that control rural black land. This curious state of affairs is a hangover of pre-1986 influx control, when the presence of blacks in urban areas was still seen as a temporary state of affairs, based upon the assumption that all blacks should eventually return to the reserved and released areas (rural areas), where "own" black urban areas were supposed to develop. This approach was changed with the promulgation of the Abolition of Influx Control Act 68 of 1986, and the permanence of blacks in white urban areas is now officially accepted as part of the policy of "positive urbanization", even though their presence in those areas is still controlled by means of separate measures.[89] For that reason it seems natural to deal with all forms of residential tenure under one heading, while distinguishing between residential tenure in black and in white areas respectively.

3.2 Residential tenure in black areas

Residential tenure in townships in the reserved and released areas[90] is governed by the Regulations[91] for the Administration

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89 See Olivier 1988 SA Public Law 25; and compare Olivier "Urbanization: policy/strategy with particular reference to urbanization and the law" 1988 Koers 580-599; Schoombee and Davis 1986 South African Journal on Human Rights 218.

90 That is, in the TBVC states, the national states and land held by the South African Development Trust; see Olivier "Property rights in urban areas" 1988 SA Public Law 23-24.

91 Promulgated in terms of section 25 of the Black Administration Act 38 of 1927 and section 21(1) of the Development Trust and Land Act 18 of 1936: see Olivier, Pienaar and Van der Walt 1988 sv "Swart grondreg" 36.

and Control of Townships in Black Areas.[92] The regulations provide the South African Development Trust with the power to establish townships in these areas.[93] In the areas controlled by the South African Development Trust these regulations have been largely replaced by a number of proclamations,[94] but in the national states[95] they are still in force.

In terms of R 293 and its replacements residential tenure in the black areas may take the form of ownership, lease or leasehold. Registrations of grants or transports of ownership and leasehold are, in terms of the new proclamations of 1988, supposed to be recorded in the Deeds Registry, but the national states have the power to control their own registration procedures, and the necessary requirements of the Survey Act 9 of 1927 were never complied with in terms of R 293.[96] The acquisition of ownership and leasehold rights are, therefore, frustrated by the fact that the survey requirements have not been complied with. In view of the

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92 R 293 of 1962-11-16, Government Gazette 373 of 1962-11-16. Compare Olivier 1988 SA Public Law 23-33; Olivier, Pienaar and Van der Walt 1988 sv "Swart grondreg" 3 ff.

93 See Olivier, Pienaar and Van der Walt 1988 sv "Swart grondreg" 36.

94 R 29 and R 30 of 1988-03-29 (Government Gazette 11166 of 1988-03-29), R 402, R 403, R 404 and R 405 of 1988-03-29 (Government Gazette 11166 of 1988-03-29). See Olivier, Pienaar and Van der Walt 1988 sv "Swart grondreg" 36.

95 That have not opted for independence yet. The independent states have promulgated their own land use and development control measures; see n 11 above.

96 See Olivier, Pienaar and Van der Walt 1988 sv "Swart grondreg" 36; Olivier 1988 SA Public Law 24-25.

relatively high cost of the required surveys it is not surprising that it is possible for local authorities and government bodies to practically prohibit the acquisition of ownership in these areas by delaying the survey process.

The main problems with residential tenure in the black areas seem to be the following: coordination of registration procedures and requirements, especially with the national states; a solution for the problems caused by the survey requirements for registration; and the fact that both ownership and leasehold rights can be acquired.[97]

3.3 Residential tenure in white areas

Residential tenure by blacks in the black townships in white urban areas[98] is governed by the Black Local Authorities Act 102 of 1982,[99] the Black Communities Development Act 4 of 1984 and the Regulations for the Administration and Supervision of a Black Urban Residential Area and Related Issues.[100] The regulations pro vide five forms of urban tenure for blacks:

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97 Compare the problems enumerated by Olivier 1988 SA Public Law 24-25.

98 Most of these townships are governed by R 1036; see Robertson "Black land tenure: disabilities and some rights" 131-133; Olivier 1988 SA Public Law 26.

99 The control of land and land use in these areas was transferred to black local authorities by the Abolition of Development Bodies Act 75 of 1986.

100 R 1036 of 1968-06-14, Government Gazette 2096 of 1968-06-14; issued in terms of section 38(8)(a) of the Blacks (Urban Areas) Consolidation Act 25 of 1945.

(a) Site permits. Such a permit authorises the holder to rent an undeveloped or vacant plot and to erect an approved building upon it. The permit holder acquires the exclusive right to the use and occupation of the site. The permit may, subject to the approval of the Administrator,[101] lease or sell the right.

(b) Residential permits. Such a permit authorises the holder to rent a house from the local authority, subject to payment of rents and levies.

(c) Lodger's permits. Such a permit authorises the holder to rent part of a house from the holder of another permit holder.

(d) Certificates of occupation. Such a certificate grants the holder a protected personal right to a house that he has "bought" from a local authority. The "sale" in question does not confer ownership or leasehold of the house on the "buyer", and he obtains no more than a protected right of occupancy.[102]

(e) Hostel permits. Such a permit authorises the holder to occupy single quarters in a specified hostel belonging to the local authority.[103]

The nature of these very limited and insecure forms of tenure

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101 See Olivier 1988 SA Public Law 27 n 22.
102 See Olivier 1988 SA Public Law 27.
103 Compare Olivier, Pienaar and Van der Walt 1989 341.

reflects the policy according to which the presence of blacks in the white urban areas (outside the national states) was purely temporary.[104] With the abolition of influx control in 1986 and the acceptance of the positive urbanization policy it became necessary to make it possible for blacks to acquire permanent rights (and specifically ownership) in these areas, and some of the relevant statutes were amended towards that purpose in 1986.[105] In the process the Black Communities Development Act 4 of 1984 became the main statutory measure in control of black residential tenure in urban areas.

The main objective of the Black Communities Development Act 4 of 1984 is to control the development of black communities outside the black areas,[106] including control over black land tenure in these areas.[107] The act provides that land and rights to it in

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104 Compare the following dictum of Van den Heever J in Ex parte X 1940 OPD 156 158: "It contemplates he territorial segregation of Natives and persons other than Natives and to this end divides the entire population into two classes without touching upon previous existing special prohibitions of land tenure by other genetic groups such as Asiatics and Coloured persons."

105 See Olivier, Pienaar and Van der Walt 1988 sv "Swart grondreg" 45.

106 See Olivier, Pienaar and van der Walt 1988 sv "Swart grondreg" 52.

107 Ownership of land that belonged to the development councils was transferred to black local authorities in terms of the Black Local Authorities Act 102 of 1982. In the act functions concerned with local authorities, housing and development are granted to development councils (see sections 16 and 17) but their functions have been transferred to the provincial authorities in terms of the Abolition of Development Bodies Act 75 of 1986. In development areas outside of the jurisdiction of black local authorities the development councils have the same functions and concomitant powers as those of the local authorities. See section 32 with regard to powers, including those related to the provision of housing; sections 33 and

development areas can be acquired by competent persons, that is, by black persons, mortgagees and employers.[108] Residential properties in a development area that belong to a local authority or development council may be rented out, and the rent fees and service fees for such properties are controlled by the authority in question.[109]

In terms of the act land tenure in the black urban townships can take the form of either leasehold or ownership.[110] The right of leasehold acquired in terms of this act[111] amounts to no more than a statutory limited real right, and cannot be seen as ownership.[112] Ownership of the land (and all that is attached to it permanently, in accordance with the rule superficies solo cedit) remains with the local authority. However, leasehold affords the landholder a stronger right than a mere permit, since it includes

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34 with regard to the acquisition and utilization of land in development areas; section 35 with regard to township development in development areas. Compare sections 36-39 with regard to township development. Related legislation concerned with township development in black areas is discussed by Olivier, Pienaar and Van der Walt 1988 sv "Swart grondreg" 70-71. Compare Olivier 1988 SA Public Law 29-30.

108 Section 41.

109 Sections 43-45.

110 The nature and acquisition of leasehold is governed by sections 52-57 of the act. Leasehold rights must be registered in accordance with the provisions of the Deeds Registries Act 37 of 1947: section 53 of the Black Communities Development Act 4 of 1984.

111 All leaseholds registered by the chief commissioner in terms of the erstwhile Blacks (Urban Areas) Consolidation Act 25 of 1945 are considered to be registered in terms of the 1984 act; section 56.

112 Olivier, Pienaar and Van der Walt 1989 341; Olivier 1988 SA Public Law 30-31.

a wider range of use entitlements; it can be used as security for the acquisition of financing; and the extent of administrative government discretion with regard to the right has been limited. Moreover, the act provides for the unilateral conversion of leasehold into ownership,[113] which brings leasehold much nearer to common law ownership. The effect of this opportunity to acquire ownership was extended by the Conversion of Certain Rights to Leasehold Act 81 of 1988, which provides the holders of site permits, certificates of occupation and business premises permits[114] with the opportunity to convert their permit or certificate unilaterally, and free of payment, into leasehold.[115] Although this opportunity is not without problems,[116] it does represent a move away from the position according to which blacks could only obtain very limited and insecure temporary forms of tenure in urban areas.

With the transfer of control over land use in the urban black residential areas to black local authorities in 1986 these authorities took over the control which the development councils have exercized with regard to the lease of houses, provision and admi-

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113 Section 57A-E. See Olivier, Pienaar and Van der Walt 1988 sv "Swart grondreg" 81 ff.
114 In terms of the Regulations for the Administration and Supervision of a Black Urban Residential Area and Related Issues R 1036 of 1986-06-14; see above.
115 Compare Olivier, Pienaar and Van der Walt 1989 344.
116 Such as the fact that it is unlikely to provide large numbers of blacks with ownership in a short period of time; compare Olivier, Pienaar and Van der Walt 1989 344-345.

nistration of sites, control over building standards and plans, and the elimination of illegal occupation of sites.[117] The effect of this process of "deregulation" was that the local authorities were entrusted with the unenviable task not only of administering the black urban residential areas, but also of enforcing the policy of apartheid inherent in its administration. Through this process the political pressure on the government was relieved to some extent, but it created a major legitimacy and confidence crisis for the local authorities, which will have to be addressed together with the land tenure problem as such.

3.4 Housing policy

Apartheid land law is not restricted to the use and occupation of land as such, but extends to housing policy. While the national policy with regard to housing is determined by the South African Housing Advisory Council in terms of the National Policy for General Housing Matters Act 102 of 1984, the actual provision of and control over housing is seen as the "own affairs" of each of the population groups as determined according to the ideology of separate development. Housing policy and the availability of housing[118] are, moreover, to a large extent still used as subsidiary instruments of influx control, and are therefore of direct relevance as far as land tenure reform is concerned.[119]

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117 Section 23 read with the items mentioned in the schedule.
118 See Wilson and Ramphele 1989 124-129 with regard to the extent of the housing shortage and 129-130 with regard to the quality of housing.
119 Compare Möller 150; Budlender "Influx control in he Western

In terms of the National Policy for General Housing Matters Act 102 of 1984 the South African Housing Advisory Council[120] must inquire into and make recommendations to the minister[121] concerning the norms and standards[122] of housing and the classification of income groups with regard to the financing of housing.[123] The minister[124] then determines the general policy to be applied with regard to housing, with due regard to land and the provision of land for housing, township planning and township establishment, methods of housing, cost of housing and services, and other related aspects.[125] The minister is also responsible for the co-ordination of housing matters in general.[126]

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Cape: from pass laws to passports" 1986 SA Labour Bulletin 36-37.

120 Established in terms of section 2.

121 That is the minister of the department of state for general affairs responsible for housing, see section 1.

122 There is evidence of a new awareness of the problems surrounding low-costs housing; see Humphry "Low-cost housing in Cape Town: the supply, shortage and possibilities for improvement" Second Carnegie Inquiry (n 1) Conference paper no 158.

123 Section 4.

124 In consultation with every minister of state departments involved in housing and after consideration of the recommendations of the Advisory Council: section 6.

125 The government's "new" financial approach to the provision of housing, which is to a large extent based upon the sale of state-owned houses and the involvement of the private sector in the financing of housing, is discussed by Wilkinson "The sale of the cventury? A critical review of recent developments in African housing policy in South Africa" Second Carnegie Inquiry (n 1) Conference paper no 160; Glover and Watson "The 'affordability' of the new housing policy and its likely impact on the 'Coloured' housing crisis in Cape Town" Second Carnegie Inquiry (n 1) Conference paper no 161.

126 Section 6(h).

The provision of government-controlled white housing is regulated by the Development and Housing Act 103 of 1985. This act is administered as a white own affair under the control of the white House of Assembly. The act provides for the establishment of a Development and Housing Fund[127] and a Development and Housing Board[128] in order to provide the necessary funding for and control over white housing; and for the acquisition of land for white housing,[129] township establishment and development in the course of providing white housing,[130] loans[131] and related matters.

Indian housing is controlled by the Housing Development Act (House of Delegates) 4 of 1987, which provides for the establishment of the Housing Development Board[132] and the Housing Development Fund.[133] The act is administered as an own affair by the Indian House of Delegates, and contains virtually the same provisions as in the case of white and coloured housing.[134]

In the case of coloured people housing policy[135] is embodied in

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127 Section 12.
128 Section 2.
129 Sections 19-22.
130 Sections 23-29.
131 Sections 30-37.
132 Section 2.
133 Section 12.
134 Sections 19-22 with regard to the acquisition of land, sections 23-29 with regard to township establishment and development, sections 30-37 with regard to loans.
135 See Glover and Watson 45-50.

two separate acts instead of one, viz the Housing Act (House of Representatives) 2 of 1987 and the Development Act (House of Representatives) 3 of 1987.[136] Between the two of them these acts contain the same provisions found in the case of the white and Indian own affairs acts referred to above. They provide for the establishment of a Housing Board[137] and a Housing Fund[138] and a Development Board[139] and a Development Fund[140] respectively, and contain comparable provisions with regard to the acquisition of land,[141] township establishment and development,[142] loans[143] and related matters. Apart from these acts the coloured House of Representatives also administers the Rural Areas Act (House of Representatives) 9 of 1987, which provides for the development and control of rural areas and settlements reserved for the coloured group.[144] Even though this act is concerned with rural areas it is worth mentioning here because of its relevance for residential tenure. In the rural coloured areas in question[145] ownership of the land vests in the Minister of Local Government, Housing and

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136 The sudden departure from the established white example as followed in the Indian act must be the result, however improbable it may sound, of the frantic search for different names for the identical provisions for white, Indian and coloured "own affairs".
137 Section 3 of the Housing Act 2 of 1987.
138 Section 9 of the Housing Act 2 of 1987.
139 Section 3 of the Development Act 3 of 1987.
140 Section 11 of the Development Act 3 of 1987.
141 Sections 62-69 of the Housing Act 2 of 1987; sections 18-22 of the Development Act 3 of 1987.
142 Sections 70-73 of the Housing Act 2 of 1987; sections 23-28 of the Development Act 3 of 1987.
143 Sections 33-61 of the Housing Act 2 of 1987; sections 29-30 of the Development Act 3 of 1987.
144 Sections 2-3.
145 Called "existing areas" and "incorporated areas"; compare section 1.

Agriculture (House of Representatives), who holds it in trust for the community.[146] The minister may determine who are allowed, according to local usage, to occupy or own land in that area, and grant an erf to such a person.[147] Such an erf may only be sold to persons who are also registered as occupiers of the area.[148]

The Community Development Act 3 of 1966 and the Housing Act 4 of 1966 are aimed at the provision of government-controlled development and housing schemes for blacks, since its provisions with regard to white, Indian and coloured housing have been repealed with the introduction of the various "own affairs" acts mentioned above.[149] Since the black group is not represented in the tricameral Parliament the said acts are administered by the Department of Constitutional Development and Planning. Whereas the Community Development Act 3 of 1966 is primarily concerned with the development of certain areas and control over land in such areas, the Housing Act 4 of 1966 deals with the construction of houses and housing schemes and the control over housing so provided.[150] It seems fair to conclude that the effect of race-related legislation over the last decades has been to exacerbate the black housing crisis, especially in urban and peri-urban areas.[151] The

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146 Section 7. Compare section 10.
147 Section 20.
148 See sections 9, 20(1)(a).
149 The "general note" below the title of each of these acts set out the rather intricate way in which the applicable provisions with regard to white, Indians and coloureds have been abolished with the commencement of the various "own affairs" acts discussed above.
150 See Wilkinson 30-34 with regard to the impact of the government's policy to sell government-owned houses in the black townships.

housing crisis affects not only the availability of housing as such, but has resulted in overcrowding, health hazards and poverty in general.[152]

One of the most pertinent questions that will have to be addressed in the near future is whether the supply of housing should enjoy more prominence in the determination of priorities with a view to land tenure reform. While it is obvious that the abolition of apartheid is one of the prerequisites for the formulation and implementation of a satisfactory housing policy, it is also clear that the provision of housing should enjoy more attention in future. Kentridge[153] and others[154] are of the opinion that housing has become a basic right. This aspect is dealt with in another section below.

3.5 Physical planning

Apart from the statutory measures mentioned above the provision of housing is also affected by other statutes such as the Group

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(continued)

151 Compare Elias "A housing study: legislation and the control of the supply of urban African accommodation" Second Carnegie Inquiry (n 1) Conference paper no 157 38-39.

152 Compare Wilson and Ramphele 1989 330-336; Elias 37-39; Lipschitz "Housing and health" Second Carnegie Inquiry (n 1) Conference paper no 164 23-25.

153 "Housing in South Africa: from political privilege to basic right" Second Carnegie Inquiry (n 1) Post Conference Series no 14.

154 Such as the supporters of the Freedom Charter, which guarantees the right to adequate housing.

Areas Act 36 of 1966[155] and legislation pertaining to township establishment and town planning. The Physical Planning Act 88 of 1967 provides for the co-ordinated and planned utilization of physical resources. It controls the zoning and subdivision of land for various purposes, and provides for the compilation of guide plans for physical development. The zoning provisions of the act and the guide plans compiled in terms of it form a basic outline within which provincial, regional and local township development and town planning must operate.[156] The power to exercize local land use planning and control in white areas was delegated to the various provincial authorities,[157] and is embodied in the relevant provincial ordinances.[158] The ordinances in question[159] provide that the relevant provincial or local authority may, in the course of exercizing its powers for the planning of a township, make provision for the establishment and development of separate residential areas for the various population groups. Moreover, township establishment and town planning in black areas

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155 Which is dealt with in the next section below.

156 Compare in general Olivier, Pienaar and Van der Walt 1988 sv "Fisiese beplanning" 1 ff.

157 See the Schedule 2 to the Financial Relations Act 65 of 1976: Matters the control of which and the power to legislate in respect of which may be transferred by the State President to a province in terms of paragraph (a) of subsection (1) of section 11.

158 Town-planning and Towns Ordinance 15 of 1986 (T); Land Use Planning Ordinance 15 of 1985 (C); Townships Ordinance 9 of 1969 (O); Town Planning Ordinance 27 of 1949 (N).

159 Compare item 1 of the First Schedule to the old Town-planning and Townships Ordinance 25 of 1965 (T); item 7 of the Second Schedule to the old Townships Ordinance 33 of 1934 (C). Since new schedules have not yet been drawn up for the new Town-planning and Townships Ordinance 15 of 1986 (T) and the new Land use Planning Ordinance 15 of 1985 (C) it is presumed that the old schedules are still valid.

are controlled by separate measures.[160]

Prior to the promulgation of the various town planning measures it was already established practice to provide for a rudimentary form of town planning by way of restrictive covenants in the purchase contract of land. These restrictions were also entered into the title deed of the land in question, thus giving them the effect of real burdens upon the land. While many of the early restrictive covenants in question were concerned with the density of occupation of land or with its uses for industrial purposes, it was quite common to employ them for the purposes of racial segregation.[161] Early examples include restrictions that prohibit the occupation of land by other racial groups[162] or the sale of the land to members of other racial groups.[163] Racial segregation of residential land is effected through these restrictive covenants in a roundabout and hidden way.

3.5 Conclusion: reform of urban tenure

From the discussion above it is obvious that racial separation

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160 See section 3.2 above. In the case of coloured and Indian housing the Development Act (House of Representatives) 3 of 1987 and the Housing Development Act (House of Delegates) 4 of 1987 respectively contain certain measures concerned with township development.

161 Compare Denoon "Conditions in deeds" 1948 SALJ 362; Floyd Town planning in South Africa 1960 41-42 111-112; Van Reenen Land: its ownership and occupation in South Africa 1962 5.

162 Compare Alexander v Johns 1912 AD 431; Norbreck v Rand Townships Registrar 1948 1 SA 1037 (W).

163 Compare Alexander v Johns 1912 AD 431; Norbreck v Rand Townships Registrar 1948 1 SA 1037 (W).

still forms the basis of residential tenure in the urban areas, and that its race-oriented basis has, in fact, been strengthened and increased by recent legislation. The reservation of separate residential areas are provided for in planning and development legislation, and the kind of tenure that can be obtained, the registration of the various rights involved, the establishment of these areas and the provision of housing in them are all administered and controlled according to race group.

One of the most noticeable problems with residential tenure is the proliferation of bodies and authorities that operate in this field and the obvious duplication of administration that it implies. Recent changes in housing legislation as discussed above perhaps provide the best example of the way in which unnecessary and unwarranted duplication and administrative absurdity result from the ideologically inspired effort to implement housing policy as an "own affair" of various race groups. Quite apart from the administrative and financial waste that results from this duplication the serious legitimacy crisis that it entails, especially for local authorities in black areas, will have to be addressed as a matter of urgency. It is said in a recent publication[164] that the social importance of changes in the law of property is more conspicuous in the conflict between private landowners on the one hand and the needs of the destitute and the homeless on the other than anywhere else, and that the relation-

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164 Van der Walt "Developments that may change the institution of private ownership so as to meet the needs of a non-racial society in South Africa" 1990 Stellenbosch Law Review ***.

ship between the institution of private landownership and the emergence of a non-racial society is to be found in the capability of the law of property to accommodate solutions to the housing crisis. A satisfactory programme of land tenure reform will have to include a housing policy which reflects the value that society attaches to the provision of housing, especially for the poor.

Apartheid land law and the efforts of the white government to withhold ownership of land in "white" South Africa from blacks have given birth to a wide variety of "black" forms of land tenure. These include the quitrent still encountered in rural areas, and the various occupation permits and leasehold encountered in the urban areas. All these statutory forms of tenure are the result of rationalizations intended to maintain the fiction that the presence of especially blacks in "white" South Africa was temporary, and they were all intended to serve as temporary alternatives for common law ownership. The fact that most of the occupation permits can now be converted to leasehold, and leasehold to ownership, is an indication of the degree to which the fiction of temporary rights have been eroded. However, this erosion should not cloud the fact that the formerly temporary rights still serve a political purpose: these rights may be converted into ownership unilaterally by the occupier, but their actual conversion is still to a large degree frustrated by the physical shortage of land, the lack of mortgage financing and the high

cost of the survey requirements. While the possibility to acquire ownership looks good from a political point of view, the fact is that it will take a long time before large numbers of blacks can acquire ownership of land in the former white areas.[165] Real reform of land tenure in the urban areas requires much more than the possibilities created by the Black Communities Development Act 4 of 1984 and the Conversion of Certain Rights to Leasehold Act 81 of 1988: it requires the abolition of the second-class forms of tenure available to blacks; the summary conversion of present rights to ownership; and a programme of affirmative action that will bridge the wide gaps of inequality posed by years of discrimination, the scarcity of financing and the problem of surveying. While the unique nature and very important social function of customary tenure in rural areas justify its retention for those black tribal communities that may still benefit from it, urban blacks derive no benefit from the forms of tenure created exclusively for them, and these forms of tenure can serve no further purpose.

Discriminatory legislation and separate "own affairs" legislation concerned with physical planning and housing will also have to be abolished, and it seems necessary to return to a unitary and comprehensive body of planning and housing legislation. As was indicated above the abolition of the legislation in question will not

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165 Compare Olivier, Pienaar and Van der Walt 1989 342 344-345.

solve all problems in this regard, given the existence of race-related restrictive covenants that were created and registered in the absence and without reference to any legislation. In order to really eradicate racial land law it will also be necessary to provide for the abolition and invalidation of these and similar restrictions, whether registered against the title deeds of land or not. This could perhaps be done by way of amendment of the Removal of Restrictions Act 84 of 1967.

4 CRIMINALIZED TENURE: SQUATTING AND GROUP AREAS CONTRAVENTIONS

4.1 Background

One of the most curious and perhaps most despicable aspects of segregation land law is the fact that the ideology of apartheid is not only institutionalized by means of the statutory enforcement of spatial race segregation, but that land tenure which is contrary to such segregation is criminalized. The most obvious and well-known form of criminalized tenure in terms of segregation land law is occupation of premises contrary to the provisions of the Group Areas Act 36 of 1966, but statutes such as the Prevention of Illegal Squatting Act 52 of 1951 and others are equally objectionable to opponents of apartheid. The infamous policy of forced removals (and lately so-called "voluntary" removals) is to a large extent the result of criminalization of tenure, and must be seen in the same context. In this section of the article the various forms of criminalized land tenure are investigated, and the function of tenure reform in this regard is discussed.

4.2 The Group Areas Act 36 of 1966

The Group Areas Act 36 of 1966 is important for segregation land law because it forms the basis of separate development as far as especially residential areas are concerned.[166] The purpose of the act is to establish separate group areas for the different racial groups as described in the act,[167] and to control the use, occupation and acquisition of ownership of land in these areas.[168] The act applies to the whole of South Africa with the exception of certain "prescribed areas",[169] thereby partitioning the country into areas where the separate race groups must exercize their rights to own, occupy and use land. People are disqualified from obtaining ownership of land and prohibited from occupation or use of land which is not situated in an area specifically designated for the use of the group to which they belong. The principle of spatial partitioning applies irrespective of considerations of equality between various race groups with regard to the quality, volume or availability of the land. In Minister of the Interior v Lockhat[170] the policy of spatial segregation was described by the Appellate Division as a "colossal social experiment and a long

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166 See Schoombee 1985 Acta Juridica 77.
167 Section 12.
168 Compare Olivier,, Pienaar and Van der Walt 1988 sv "Groepsgebiede" 1; Olivier, Pienaar and Van der Walt 1989 79.
169 See Olivier, Pienaar and Van der Walt 1988 sv "Groepsgebiede" 4-5, where these areas are enumerated. The act does not apply to urban black residential areas as a result of the exclusion of these prescribed areas, but the Black Communities Development act 4 of 1984 reserves these areas for the exclusive use of blacks. Compare Schoombee and Davis 1986 SA Journal on Human Rights 211 215.
170 1961 2 SA 587 (A) 602D. Compare D'Oliviera "Group areas" in LAWSA vol 10 1980 par 492.

term policy" which must "inevitably cause disruption and, within the forseeable future, substantial inequalities." It was accepted, therefore, that the act empowered the State President to cause not only racial differentiation but substantial discrimination and inequality in the application of the act. This approach was accepted in later decisions.[171]

With regard to the occupation of land in group areas the act distinguishes between the following areas:

(a) In controlled areas the race group of a person determines his eligibility for lawful occupation of land. Occupation of land by a person that does not belong to the indicated group is a criminal offence.[172]

(b) In specified areas, which are parts of controlled areas, occupational control is subject to the group idendity of the lawful occupant on a certain date.[173]

(c) Defined areas are established with a view to occupational control in the future, usually for the purpose of proclamation of a group area.[174]

(d) Border strips are areas bordering upon group areas and future group areas, and special provisions with regard to

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171 See Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad 1959 3 SA 651 (A); Minister of the Interior v Mariam 1961 4 SA 740 (A); S v Adams, S v Werner 1981 1 SA 187 (A).
172 Section 46(1).
173 Sections 16 and 17.
174 Section 18(3).

ownership and occupation of land in them are proclaimed by the State President.[175]

(e) Future group areas are declared with a view to the proclamation of a group area. As far as ownership and occupation of land in them are concerned they are regarded as part of the controlled area in which they are situated, but occupation by a specific group may be proclaimed legal for the interim period.[176]

(f) Group areas are proclaimed for ownership and occupation by a specific race group.[177]

In various cases the courts have indicated that they consider the government's "colossal social experiment" to be more important than the hardship or inequality caused by it. For that reason people who are criminally prosecuted for contraventions of the act are found guilty and sentenced, even if the available housing in their own areas are proven to be highly uncomfortable and unhygienic. Circumstances such as the unavailability of suitable accommodation in a person's own group area are not considered a sufficient defence in criminal proceedings for a contravention of group areas legislation.[178] A number of recent decisions[179] in

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175 Section 25.
176 Sections 23 and 24.
177 Section 23.
178 Compare S v Adams, S v Werner 1981 1 SA 187 (A) 221H-222A. Compare Van der Vyver "Qu'ils mangent de la brioche!" 1981 SALJ 138; Schoombee 1985 Acta Juridica 77; Van der Walt 1990 Stellenbosch Law Review ***.
179 S v Govender 1986 3 SA 969 (T); Vereeniging City Council v Rhema Bible Church, Walkerville 1989 2 SA 142 (T) and Sorrel Geoffrey Waks, John Billy Motsau and Abdul Rhaman Bhamjee v Gert Petrus Jacobs en Die Stadsraad van Carletonville un-

which the courts have restricted the exercize or enforcement of racial discrimination should not cloud the fact that statutes such as the Group Areas Act 36 of 1966 still provide the necessary legislative power and structure for segregation land law - judicial activism can do little more than to highlight and perhaps curb the excesses of a policy which is still legally enforceable. In principle the words of Van der Vyver are as true as ever before:

> South African law is not particularly famous for its display of justice. [...] Of all such manifestations of distorted governmental powers, the institutionalization of racial discrimination probably deserves the highest ranking on the scale of moral debasement; and in the context of the laws and legal institutions founded upon racial bias, the profound hardships caused by the implementation of group-areas policies represent perhaps the ultimate in legally sanctioned human suffering.[180]

In terms of the Group Areas Act 36 of 1966 people are still forced to exercize their ownership, occupation and use of land in

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reported case nr 597/89 1989-08-31 (T). The development is discussed by Van der Walt 1989 Stellenbosch Law Review ***-***.

180 Van der Vyver 1981 SALJ 136.

the areas designated for use by their race group. Especially black people have no guarantee that the size and quality of land reserved for their occupation will bear any relationship to the needs of their community, and they are in fact faced with a policy that allows gross discrimination and inequalities in that regard. Furthermore, any effort to alleviate the situation by way of occupation of available and suitable premises in white areas can and will meet with criminal sanction, despite the fact that they cannot find suitable accommodation in their own areas, and even though they do not deprive anybody else of accommodation by occupying premises in a white area. The government's intentions in this regard is clear from the fact that the highly controversial Group Areas Amendment Bills 112 and 124 of 1988 were supposed to increase the harshness of existing group areas provisions. Some of the new measures that would have been introduced by the proposed amendments include eviction from property owned or occupied in contravention of the act, attachment and sale of such property, the increase of fines in terms of the act, and the appointment of group areas inspectors. The bills met with stern opposition in the coloured and Indian houses of parliament, but the ideas contained in them were not dropped entirely. The inspectors have been appointed, and they work from the regional offices of the white "own affairs" Department of Local Government and Housing. These inspectors can be approached by white residents with complaints concerning suspected group area contraventions. Complaints are investigated by the inspectors, who attempt to solve the problem without legal intervention through a process of "assistance and negotiation", which may include offers from the department to buy the house from the person and to provide

alternative accommodation in the group area where that person is supposed to live. If the inspector cannot obtain the co-operation of the person involved a prosecution may be instituted. This bureaucratic process, which formed part of the National Party's five year plan during the election campaign, has been described as "little Gestapo bureaus" by a member of the Democratic Party, on the basis that it encourages people to spy on their neighbours and report them.[181] Seen in this light it is understandable that this act is a focal point for criticism levelled against apartheid land law.

4.3 The Prevention of Illegal Squatting Act 52 of 1951

The hardship and distress caused by the Prevention of Illegal Squatting Act 52 of 1951 are, if anything, worse than in the case of the Group Areas Act 36 of 1966. This act is concerned with the implementation of spatial segregation by way of the prevention, control and elimination of illegal squatting, as defined by the act, upon both public and private land. Its promulgation and development were characterized by the introduction of increasingly stronger powers of self-help for those charged with its administration on the one hand, and the exclusion of the courts' jurisdiction on the other.[182]

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181 See Sunday Star 1989-10-29 4: "Group areas 'spy' set-up now in place".

182 See Lewis "The Prevention of Illegal Squatting Act: the promotion of homelessness?" 1989 SA Journal on Human Rights 233-235 with regard to the background of the act and some statistics on homelessness. Olivier, Pienaar and Van der Walt 1988 sv "Onregmatige okkupasie" 1-15 provides an overview and

The act allows and forces owners of private land, local authorities and other government bodies[183] to demolish and remove buildings or structures erected or occupied without the consent of the owner of the land, or which do not comply with legal provisions concerning the approval of plans or descriptions of buildings by the local authority. The administrator in question is also allowed to remove the building material from the premises after having demolished it.[184] This may be done, and both the building material and the contents of the building may be removed from the premises, without any prior notice to any person,[185] and the courts are not allowed to consider or grant any order, judgement or relief founded upon the exercize of powers under the section in question, unless the applicant can show that the action was or is going to be undertaken in bad faith.[186] That means that a demolition and removal in terms of the act cannot be prevented or adjudicated even if the land was occupied lawfully under valid title, unless the demolition can be proven to be in bad faith. This particularly draconian piece of legislation is obviously designed to provide the government with the necessary power to

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analysis of the most important provisions of the act.

183 See the definition of "administrator" introduced to section 10 of the act by section 14 of the Prevention of Illegal Squatting Amendment Act 104 of 1988.

184 Section 3B(1).

185 Section 3B(2).

186 Section 3B(4)(a). Before this much stricter requirement was introduced by the amendment act of 1988 proof was required of title or right to the land in question, in terms of which right the applicant could lawfully occupy the land.

enforce its policy of segregation with impunity, and to move and remove groups of people without interference by the courts.[187]

Once again, as in the case of the Group Areas Act 36 of 1966, a number of recent court decisions provide evidence of a greater judicial activism in curbing the administrative excesses allowed by the act.[188] In Vena v George Municipality[189] the court interpreted section 3B(1)(a)-(b) of the act restrictively so as to limit the powers of a local authority with regard to the demolition of structures that do not comply with building regulations to land not owned by the local authority itself.[190] Even more importantly the court decided that the harsh measures foreseen by the legislature applied only to illegal squatters, and not to people who occupy land lawfully with the permission of the owner. Even though this decision was overruled in part by the Appellate Division,[191] it was upheld in essence with regard to the decision that the act must be interpreted restrictively in view of the principle that no one may take the law into his own hands. The effect of the two Vena-decisions was that occupiers of premises

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187 See Budlender "Urban land issues in the 1980's: the view from Weiler's Farm" paper read at a workshop on forced removals, University of Cape Town, April 1989, 17. Compare Van der Walt 1990 Stellenbosch Law Review ***.

188 Some of the cases in questione are discussed by Van der Walt 1990 Stellenbosch Law Review ***-***.

189 1987 4 SA 29 (C). The case was discussed by Roos "On illegal squatters and spoliation orders" 1988 SA Journal on Human Rights 167-178.

190 See Van der Walt 1990 Stellenbosch Law Review ***.

191 George Municipality v Vena 1989 2 SA 263 (A). See the discussion by Lewis 1989 SA Journal on Human Rights 233-239.

in squatters' camps on state land were effectively protected, because they could approach the court if they could prove that they were allowed to occupy the premises against payment of rent to the authority involved,[192] and because section 3B(1) could not be invoked against them.[193] This result was not to the liking of the government, and as a result the ouster clause in section 3B(4)(a) was amended.[194] The new ouster clause is now formulated in such a way that it is irrelevant whether the "squatter" occupied the land lawfully or with a valid title - the jurisdiction of the courts to consider an application with regard to a demolition in terms of section 3B is excluded unless the applicant can prove that the demolition was or is going to be carried out in bad faith. The fact that the occupants were in lawful occupation of the premises with the express consent of the demolishing authority itself is also irrelevant unless mala fides can be proven. It is, however, possible that the courts will interpret the new ouster clause equally restrictively, with the result that the permission to occupy may be an indication of bad faith.[195]

It is interesting to note the ruthlessness with which local auth-

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192 Which neutralized the ouster clause in section 3B(4)(a) as it was formulated at that stage.

193 Either because the authority was owner of the land (section 3B(1)(b)), or because they had the permission of the owner (section 3B(1)(a)). Compare Van der Walt 1990 Stellenbosch Law Review *** n 61; and authorities cited there.

194 By the Prevention of Illegal Squatting Amendment Act 104 of 1988.

195 See Van der Walt 1990 Stellenbosch Law Review *** n 63.

orities exercize their draconian powers under the act, especially at a time in which forced removals are supposed to have been suspended. It is even more interesting that the recent amendments to the act[196] were obviously aimed not against people who can be regarded as "illegal squatters" in the normal sense, but against homeless people who occupy land with the consent of the authority involved, mostly against payment of rents and levies to that authority, and often after having been moved to that premises by a previous forced removal. The act not only makes it possible for the administrative authorities to implement this kind of legal harassment by way of the ouster clause, but actually provides for what amounts to a practically endless series of forced removals of squatters.[197] This kind of governmental insensitivity was demonstrated once again in the Port Nolloth cases.[198] In this (as yet unreported) decision the ouster clause contained in section 3B(4)(a) (before its amendment) was also interpreted restrictively on the basis that it applied only to the demolition of buildings and structures as defined in that section, and not in terms of the wider definition of section 3B(1)(a).[199] The "squatters" involved in this case lived in tents in an emergency camp where they were settled by the administrators of the act in the first

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196 In terms of the Prevention of Illegal Squatting Amendment Act 104 of 1988.

197 section 5.

198 Die Munisipaliteit van Port Nolloth v Xhalisa; Luwalala v The Municipality of Port Nolloth unreported cases nrs 8580/88 and 10458/88 1989-01-12 (C).

199 See Van der Walt 1990 Stellenbosch Law Review ***, and compare the note by Levin 1989 SA Journal on Human Rights 112. Note the subsequent amendment of the definition of "building or structure" in section 10(iii), as inserted by the amendment act of 1988.

place. Due to an administrative decision the local authority in question wanted to remove them from the camp, demolish the tents and dump them somewhere in the open veld, all on the authority of the Prevention of Illegal Squatting Act 51 of 1952. The callousness with which it was done evoked strong words of condemnation from the court, which found that the ejection and deportation order sought by the municipality was unprecedented and unwarranted, especially in view of the fact that the people involved were dumped in the emergency camp by the same municipality in the first place.

However, despite the fact that the court's attitude and approach must be welcomed, it must be stressed once again that it amounts to nothing more than a rather futile attempt to curb powers that the legislature and administrative authorities want to exercize without interference by the court. It is to be expected, as is evident from recent amendments, that every activist decision and restrictive interpretation by the courts will be met with a new amendment that extends the powers of the authorities and limit the jurisdiction of the courts even further. The simple fact is that the administrative excesses based upon the ideology of apartheid cannot be eradicated by court action, and that it will be stopped only when the legislative power behind it is abolished. In terms of the harassment and misery caused by it the Prevention of Illegal Squatting Act 51 of 1952 rather than any other

example of apartheid legislation should be the focal point for criticism and action against apartheid land law.

The "squatting problem" cannot be solved by the mere abolition of squatting legislation. The very existence of squatter camps is a clear indication of the enormity of the housing problem, and this problem will have to be addressed as part of the process of land reform. Reform of this aspect of land law requires, in the very first place, a fundamental revaluation of the nature of the problem itself. It is not an aspect of life that can be wished or legislated out of existence, and while many of the squatter camps are themselves the products of apartheid policy and action, they also reflect one of the basic results of urbanization and poverty which is unrelated to apartheid as such, and which must be addressed on that basis. The solution of this problem requires a basic reformulation of policy with regard to the related problems of urbanization, unemployment, poverty, and a lack of housing. One of the ways in which this problem can be approached involves the establishment and control of so-called informal settlements, in which a basic form of accommodation can be provided at low cost, while the usual norms and standards with regard to planning, building controls and services are either waived or adapted to serve the needs of that specific community.

4.4 Criminalized tenure in terms of other legislation

A number of other legislative measures contain provisions which are or may be used in tandem with or as alternatives to the Prevention of Illegal Squatting Act 51 of 1952 for the removal, and specifically forced removal, of people from certain areas.

The Trespass Act 6 of 1959 provides that nobody may be present upon land without the permission of the lawful occupant or the owner of the land, and prescribes a criminal sanction for contraventions of the act.[200] The Slums Act 76 of 1979 goes much further, and provides for the declaration (by a slums clearance court on application by the local authority) of premises or of an area as a slum, in which case the owner of the land is obliged to have the slum cleared. Should the owner fail to do so, the local authority can clear the slum at his cost.[201] The act prohibits anyone from entering into or living on premises which has been declared a slum,[202] and provides for the removal of such persons.[203] The unavailability of alternative accommodation is expressly excluded as a defence in cases concerned with such removals.[204] The Health Act 63 of 1977 provides local authorities with the necessary powers to take any steps that may be necessary in order to prevent or end any situation which may cause a risk to public health, including the prevention of the use or occupa-

200 See Olivier, Pienaar and Van der Walt 1988 sv "Onregmatige okkupasie" 15-16.
201 Section 11. Compare the analysis of Olivier, Pienaar and Van der Walt 1988 sv "Onregmatige okkupasie" 16-32.
202 Section 15.
203 Section 25.
204 Section 26.

tion of premises.[205] It does not require much imagination to see how these acts can be used to supplement the powers granted under the Prevention of Illegal Squatting Act 51 of 1952, even though their use and social value under normal non-racial circumstances are obvious.

4.5 Forced and "voluntary" removals

One of the saddest aspects of apartheid land law which is intimately connected with criminalized forms of land tenure is the removal of smaller or larger groups of people from one area to another. It is estimated that a total of more than three and a half million people, most of them black, have been subjected to forced removals of this kind between 1960 and 1983.[206] Wilson and Ramphele[207] classify these removals into five main categories, which reflect the kind of legislation which was used in each case:

(a) Removals in terms of group areas legislation, which usually entails a removal from one part of an urban area to another, in order to segregate the race groups more satisfacto-

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205 Compare Olivier, Pienaar and Van der Walt 1988 sv "Onregmatige okkupasie" 32-35.

206 Wilson and Ramphele 1989 216. Compare Platzky "Relocation and poverty" Second Carnegie Inquiry (n 1) Conference paper no 73; Claassens "The myth of 'voluntary removals'" Second Carnegie Inquiry (n 1) Conference paper no 74; Donald "Removals of a quiet kind: removals from Indian, coloured and white-owned land in Natal" Second Carnegie Inquiry (n 1) Conference paper no 75.

207 1989 216-224.

rily. The most obvious examples of this kind of removals are the destruction of Sophiatown in Johannesburg and of District Six in Cape Town; both in order to redevelop the areas in question for white occupation.

(b) Removals from urban to rural areas were mostly effected through the pass laws before 1986, but there are examples of forced removals of larger groups of people as well.

(c) In the rural areas the removal of so-called "black spots" is the most widely known. This kind of removal involves the wholesale relocation of groups of people who occupy, and usually own, land within what used to be called "white South Africa". The controversy over the removal of the Mogopa in Western Transvaal is still raging, and demonstrates how the community can be destroyed by such a removal from land where its ancestors are buried.

(d) The fourth category of removals was effected through the pass laws before 1986, and was a result of agricultural mechanization on the one hand and the homelands policy on the other; thereby forcing farm labourers who have lost their jobs back to the rural areas.

(e) The last form of removals were instituted through so-called "betterment planning" in the rural areas, in an attempt to consolidate people in rural areas into villages.

While at least some of the pre-1986 removals in terms of the

anti-urbanization policy then in vogue have ceased with the acceptance of the positive urbanization policy, removals as such are not yet something of the past. Officially the government has accepted that forced removals should be discontinued,[208] and they now rely upon what is euphemistically referred to as "voluntary removals". Research has shown, however, that the government follows a set pattern in persuading groups to accept removals, and that the pattern involves an escalating use of force. While most communities "crumble" in the early stages of the process, removals can be presented as being voluntary instead of forced.[209]

4.6 Conclusion: reform of criminalized tenure

Various forms of tenure, and especially residential tenure in urban and peri-urban areas, have been criminalized in terms of the aims and objectives of apartheid land law. It is undoubtedly true that land tenure must be criminalized in certain circumstances, especially as far as health law and public welfare are concerned, but in South Africa criminalized land tenure has become a function of apartheid, and that cannot be accepted or justified in terms of the social function of the law.[210] The reform of land law is, therefore, perhaps easier in the field of criminalized

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208 Compare Platzky 6; Claassens 1.
209 See Claassens 2; as well as her analysis of the process of persuasion 3 ff.
210 Compare Lewis "The modern concept of ownership of land" 1985 Acta Juridica 261: "These justifications of apartheid are plainly logically and morally untenable."

land tenure than in any other: social justice demands the abolition of all legislation that criminalizes any form of land tenure on the basis, either exclusively or in part, of racial considerations. That, however, is not sufficient.

Apart from the abolition of the legislation in question, many of the historical legacies of criminalized tenure require more positive reform in the form of affirmative action. The exact nature and scope of what is needed and possible in this field will ultimately have to depend upon individual circumstances, but it is clear that certain forced removals (such as District Six or Sophiatown) and related effects of the criminalization of land tenure can and must be rectified, albeit it in part or even merely symbolically, through affirmative action.

Secondly, and apart from affirmative action, positive steps are needed in order to address some of the socio-economic problems ignored, exacerbated or caused by the criminalization of land tenure. In this respect it is very important that the establishment and development of informal settlements should be investigated in order to determine whether it could be used to alleviate the results of urbanization and poverty to some extent. If and when necessary the structuring and control of informal settlements should allow for divergence from the normal standards and procedures in connection with planning, building and services.

5 DEVELOPMENT OF COMMON LAW TENURE

5.1 Introduction: common law and racism

The enormous increase of all kinds of discussions and publications concerned with the emergence of a new social, political and economical order in South Africa introduced an idea that rather startled both traditionalist and revisionist lawyers within the system: a debate about the future of Roman-Dutch common law in post-apartheid society. All of a sudden lawyers have to cope with the fact that the merit and the survival of the common law tradition are not taken for granted any more, and that many people, especially those who have borne the brunt of apartheid, view this tradition with distrust, and that they do not necessarily share the value system that makes it acceptable to those with a western background.[211] The question whether the common law tradition should be retained, reformed or abolished in the process of reform is inspired on the one hand by the idea that common law is part and parcel of the legal system which formed the backbone of the apartheid era, and on the other because the value system re-

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211 This theme has emerged in many forms during a number of recent conferences. Examples are the conference on the future of the common law system in Harare (February 1989), the conference on a new constitution for post-apartheid South Africa in Cape Town (August 1989) and the conference on a new jurisprudence for a new South Africa in Pretoria (October 1989). The last-mentioned conference was opened by Van der Westhuizen with a paper entitled "Is Justitia an African?".

presented in it is not shared by the majority of the population. Other considerations include calls for codification, which would entail the abolition of at least the tradition if not the substance of common law, and for the (at least partial) reinstatement of customary law in the place of common law.

One of the areas in which the abolition of common law is the subject of a particularly heated debate is land law. It is often argued that the present land law is so thoroughly permeated by the spirit of apartheid on the one hand, and so desperately in need for radical change and development on the other, that land reform could just as well take the shape of the abolition of common law, coupled with the introduction of a completely new land code. This approach is usually countered by the opponents of codification, who argue that the abolition of apartheid should entail no more than the scrapping of all apartheid legislation, while retaining the basic principles of common law, which are inherently suited to the protection of the individual. Proponents of this rather simplistic theory usually accept that the mere abolition of apartheid legislation, being the form in which apartheid was introduced and enforced, would rid land law of apartheid and allow the renewed enjoyment of basically good and just common law principles, assuming that legislation may be seen as some kind of external addition that can be added to or removed from common law in a rather mechanical fashion without affecting common law prin-

ciples in any way. This view is, of course, not only unduly optimistic but also fundamentally wrong. A brief analysis of its two main errors will serve to illustrate the point:

(a) The fundamentally mechanistic view according to which common law is left untouched by legislation is not acceptable in any modern legal theory. Common law is a body of legal principles that were, in essence, derived from the Roman-Dutch tradition as it existed during the seventeenth and eighteenth centuries, but it is also a living part of contemporary South African society, responding to and reflecting the needs, values and circumstances of that society. Apartheid and racial prejudice have been essential elements of that society for a long time, and common law must have absorbed at least some influence from it. In fact the common law principles of justice and equality have obviously been forced into retirement as far as their application with regard to apartheid legislation is concerned.

(b) Specifically with regard to land law it must be added that apartheid legislation has not merely made a number of unwanted additions to common law principles, but has changed its content fundamentally by the virtual abolition of certain common law values (such as equality) and the introduction of new ones which are irreconcilable with common law as it ussed to be. The racial requirements introduced by

group areas legislation are examples of such additions which changed the face of common law. Moreover, apartheid legislation has not only changed common law principles with regard to land law, but has replaced it to such an extent that common law was not allowed to develop naturally over the last decades, thereby preventing the emergence of what would possibly have been extremely important developments. The abolition of apartheid land law will leave South African law with a void which should have been filled by the natural development of common law principles since the eighteenth century. Therefore, even if common law is retained, it will require creative and imaginative thinking to replace the time which was lost during the apartheid era. Dlamini[212] illustrated this point very well when he compared the development of a new jurisprudence to the planting of a tree: it requires care and hard work to make it grow. Common law in general and land law in particular have remained undeveloped during the era of racism, and can only be retained if the void left by the removal of the cancer can be filled with healthy new tissue that will respond to treatment.

In order to make a sensible contribution to the debate it is ne-

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212 "What do I expect from a future legal order?" paper read at the conference entitled "A new jurisprudence for a future South Africa" at the University of Pretoria October 1989.

cessary to consider the nature and development of common law land tenure, and to ascertain whether it is possible to retain common law in this area, and what should be done to improve it for present and future needs.

5.2 The "absoluteness" of common law ownership

Landownership in South African law has become a very popular topic for discussion over the last few years, not only in the context of socio-political land tenure reform but also with regard to the nature of landownership as such. It has become very fashionable to analyze various fields in which the concept of landownership has been "eroded" by legislation, thereby reducing "absolute" or "individualistic" landownership to a socially and morally more respectable institution. This exercize has been undertaken with regard to new forms of landownership such as sectional title, property time-sharing and ownership of air space,[213] and restrictive legislation such as town planning and environmental restrictions and mineral laws,[214] and it has inspired some authors[215] to conclude that these measures have eroded or limited

213 See especially Cowen "New patterns of landownership: the transformation of the concept of ownership as plena in re potestas" lecture read at the University of the Witwatersrand April 1984; Pienaar "Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 TSAR 295-308.

214 See Lewis 1985 Acta Juridica 241-266; Milton "Planning and property" 1985 Acta Juridica 267-288; Rabie "The impact of environmental conservation on land ownership" 1985 Acta Juridica 289-313; Van der Walt "The effect of environmental conservation measures on the concept of landownership" 1987 SALJ 469-479.

215 Notably Cowen, Lewis and Pienaar: see previous two footnotes.

what they mistakenly perceive to be the common law concept of unlimited ownership. Over the last few years[216] this argument has, however, consistently been rejected by European authors,[217] who argue that ownership was never an absolute or unlimited right in common law,[218] and that the so-called restrictions have not really increased either in number or in cumulative effect. It is accepted now, albeit more commonly in Europe than in South Africa, that ownership was not and is not an absolute or unlimited right, and that it can and should be subject to inherent restrictions and limitations which reflect the values and needs of the society in which it functions.[219]

A firm and final rejection of the historically misinterpreted and morally unacceptable view of ownership as a right which is basically[220] absolute or unlimited[221] should go a long way towards making the common law institution of ownership more acceptable to a large part of the community, and should also make it much more suited to the needs of post-apartheid society.[222] It is the very absolute and individualistic concept of ownership, which lends

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216 Beginning with Derine Grenzen van het eigendomsrecht in de negentiende eeuw 1955.
217 See Van Maanen Eigendomsschijnbewegingen: juridische, historische en politiek-filosofische opmerkingen over eigendom in huidig en komend recht 1987; Van den Bergh "Schijnbewegingen: hercodificatie en eigendomsdefinitie" in Liber amicorum John Gilissen 1983 398. Compare Van der Walt 1988 De Jure 25-26 28 324-325.
218 Compare Visser 1985 Acta Juridica 39-52.
219 Compare Van der Walt and Kleyn 258-260.
220 Even though it may be limited to a greater or lesser extent in specific instances.
221 Such as is still found in textbooks: see Van der Merwe Sakereg 1989 170-176.
222 Van der Walt and Kleyn 260.

itself to be abused for the excesses of capitalism, against which most of the criticism has been levelled. At the moment there is a growing awareness of the social duties and responsibilities of owners, especially of land, which require that the exercize of owners' rights be seen in the context of its social function and implications. Interestingly enough this awareness is not only propagated by critics of South African apartheid land law, but also by authors on the modern western European law of ownership. It seems, therefore, as if the emerging characteristics of modern ownership in the common law tradition can also satisfy at least some of the needs of post-apartheid society in South Africa. In fact, modern western European law seems to be developing towards the recognition of a concept of ownership which is limited by the very kind of societal land ethic that was described as characteristic of customary land law above - a consideration that provides a strong argument for the retention and development of customary land law. Should South African common law be allowed to follow the same course of development that is evident in Europe, it is possible that common law and customary law may converge and meet at a point where the nature of land tenure would reflect the beneficial aspects of both traditions.

Another consideration that should be taken into account is the fact that a number of recent socio-economic and legal developments and changes have tended to decrease the extremely high so-

cial and psychological value attached to ownership during the nineteenth century. In what has become a consumer society it is perhaps obvious that ownership will lose some of its importance, while various rights to use property becomes more important. Developments that tend to stress this tendency are leasing (which usually has tax benefits compared to ownership) and property time-sharing on share block or club basis. The tendency to replace ownership with use rights is the result of a shift in societal values which does not only bring western ownership closer to customary tenure, but also serves to make common law ownership more acceptable to its critics from both traditions.[223]

5.3 "New patterns of landownership"

The apparant paradox posed by the simultaneous existence of customary land tenure, informal urban settlements and highly developed forms of landownership such as sectional title ownership, property time-sharing and ownership of air space units should not be overlooked as a source of valuable information that may benefit the process of land tenure reform.

Sectional title ownership was introduced by the promulgation of the Sectional Titles Act 66 of 1971, which came into operation in 1973. The act has since been replaced by the new Sectional Titles

223 See in this regard Van der Walt Die ontwikkeling van houerskap unpublished LL D thesis 1986 chapter 20.

Act 95 of 1986, which came into operation on 1 June 1988.[224] The introduction of these acts resulted in quite a substantial modification of common law principles[225] in order to allow individual sectional title owners to obtain individual ownership of a section of a building such as a block of flats or offices - something that was impossible before. In the past fifteen years this concept has become familiar to South Africans, and sectional title ownership has become a common part of the land market. The same may be said with regard to the more recent introduction of property time-sharing, especially with regard to holiday accommodation. Soon it may also be possible to acquire ownership of air space units, allowing institutions such as the Department of Transport Services or local authorities to develop the air space over their properties.[226]

These developments or "new patterns of landownership"[227] are still quite new, and they involve substantial departures from what have been accepted as basic tenets of land law for a long time. The changes were the result of innovative and creative legislation that was introduced in order to provide for a specific need in the community. It is interesting to note that sectional title ownership was specifically designed to alleviate

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224 See Olivier, Pienaar and Van der Walt 1989 54 ff.
225 Such as the maxims superficies solo cedit and cuius est solum eius est usque ad coelum, see Olivier, Pienaar and Van der Walt 1989 54.
226 Such as railyards or street surfaces.
227 As Cowen 1984 calls them.

part of the housing crisis[228] - an aspect of land law that will still bear further improvement. The point is that these developments, with all the innovative thinking and deviations from established principles and procedures[229] they involved, can surely be repeated in order to solve new and other problems. The question is whether a legal system that is capable of developing ownership of air space units can be incapable of developing a satisfactory scheme for the retention of customary land tenure in rural areas or for the registration of rights on unsurveyed land in informal settlements. Similarly the abrogation of the superficies solo cedit maxim may be used as an example for the development of principles that allow for the movable character of the kind of housing structure that is typical of informal settlements. Creativity and acceptance of new ideas should not be reserved for the development of the upper market only.

5.4 "Duplex dominium": the divided concept of ownership

The historical development and significance of the concept of divided ownership, a topic of some historical importance which is

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228 Compare Van der Merwe "Die Wet op Deeltitels in die lig van ons gemeenregtelike saak- en eiendomsbegrip" 1974 THRHR 113-132; Van der Merwe and Butler Sectional titles, share blocks and time-sharing 1985 chapter 1; Cowen 1984 51-67; Pienaar "Eiendomstydsdeling: die aard van die reghebbende se reg" 1986 Tydskrif vir Regswetenskap 1-14.

229 Such as survey and registration procedures, which are often seen as the most problematic aspects of a solution for land tenure reform.

currently enjoying renewed interest in European legal literature, was recently introduced to the land reform debate in South Africa.[230] The authors in question, having traced the historical roots and development of divided ownership from Roman law to nineteenth century German law, investigate a number of legal institutions before concluding that the concept of divided ownership is not currently accepted in South African law, even though it disappeared from South African law much later than is commonly believed.[231] They also state that the "new" discussion concerning ownership in South Africa has been limited to an analysis of the various beneficial statutory limitations of ownership, while new developments[232] are interpreted so as to conserve the basic unity of ownership. It is unlikely that the fragmentation of ownership according to subject, which would imply that more than one person could be owners of the same object simultaneously, will be accepted in future, but it possible that a fragmentation of ownership according to object will be accepted in future. This concept is of some interest for present purposes.

The fragmentation of ownership according to object is not at all strange to either the Roman-European common law tradition or the customary law tradition, and it is part and parcel of Anglo-American land law. It simply means that the concept of ownership is not unitary, allowing for different kinds of ownership, especial-

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230 Van der Walt and Kleyn 213-260.
231 Van der Walt and Kleyn 258.
232 Such as sectional title ownership; compare Van der Merwe 1974 THRHR 113-132.

ly with regard to different kinds of object. One division of ownership that is obvious to all three traditions mentioned above is that between movables and immovables, and modern developments seem to indicate that a return to such a division might well be in order. That would mean that at least two kinds of ownership, that may differ from each other quite substantially, would be distinguished, and that the owner of movables would not have the same duties and entitlements as would the owner of land. More specifically the fragmentation of ownership would imply that the characteristics, purpose and social function of land will determine the content of landownership.

Van der Walt and Kleyn[233] state that considerations of socio-economic justice may well enter into the land reform question once it is accepted that there are different kinds of ownership, and that the nature and social function of the object may determine the nature and content of the right. The need for such a development is obvious from the fact that socio-political change is to a large extent dependent upon the development of land law, while the development of the law relating to movables is of lesser importance. Once this fact is accepted in legal theory and allowed to influence the development of land law, it becomes possible to shape the nature and content of land rights according to the social value of land. A scarcity of agricultural land may determine that speculation with agricultural land must be disallowed, while the cost of surveying in certain areas may require new

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233 At 260.

developments in the requirements with regard to surveying and registration. The acceptance of this principle makes it easier to introduce the idea, which is already well-known in European law, that ownership of land implies certain social and ecological duties, which may cost the owner money or trouble, but which serve the interests of society. The development of this concept will require effort and ingenuity, and developments in western Europe and elsewhere should be studied in order to save time and effort.

5.5 Conclusion: a new perception of common law landownership

A number of new developments with regard to the common law concept of ownership should be encouraged and investigated in South African law, since these developments might make the common law institution more acceptable to the majority of the population. Such developments should strees the movement away from the absolute or unlimited view of ownership, and the movement towards a concept which is more socially responsible. This kind of approach could only benefit from a study of the societal land ethic which was described as characteristic of customary law in a previous section of this article. Developments of common law will probably not solve all problems concerned with land reform, but certain aspects could be addressed by way of selective ad hoc legislation in order to amend or complement common and customary law.

The mere abolition of common law must inevitably result in codification, since the void left by common law must be filled somehow. Customary law cannot possibly provide the material for a complete replacement, and the European experience tends to suggest that codification means nothing but the constitutional mummification of present values. It is possible that the abolition of common law will result in the codification of at least some of the very principles that are currently perceived to be the origin of the land crisis. If, however, the beneficial developments of customary and common law which were discussed above are encouraged, they could form the backdrop for well-considered and innovative ad hoc legislative reforms that promote the aims of land reform.

Land and ownership of land are not only important because of its obvious value for agricultural production and housing, but also because land provides the most visible and the most tangible evidence of the power relations inherent in all forms of ownership. Land and landownership provide social, economic and political power - that much is clear to those who have been on the receiving end of the power during the apartheid era. At the moment the development of a new deal requires more than the mere dismantling of the old power relations. What is needed is a system in which the power acquired through ownership, especially of land, can be limited to power over things and not power over people. There is

a clear need for a concept of landownership that reflects the high value currently attached to the social responsibilities of ownership. The fragmentation of ownership with reference to its object will allow for the emergence of a special concept of landownership which reflects this social need, regardless of developments concerning movables or personal property. At the same time the ways in which legislation has been used in the recent past to provide for new forms of landownership must be studied in order to provide ideas and concepts that might stimulate new developments which can solve current problems.

6 HUMAN RIGHTS AND LAND RIGHTS

6.1 Background: the Freedom Charter and the Olivier Commission

It is often taken for granted that the Freedom Charter is in favour of the more equal redistribution of individual common law ownership of land, whereas in fact the Charter does not say anything about the protection of common law ownership. The Charter was intended to address the question of redistribution of land, but it is much more concerned with access to land (land use rights) than with ownership of land.[234] The African National Congress' Constitutional Guidelines for a Democratic South Africa, which was published in 1988 in order to stimulate comment, criti-

234 Compare Zulu "The inadequacy of reform: land and the Freedom Charter" in Towards freehold (n 3) 47-49.

cism and recommendations towards the conversion of the Freedom Charter from a vision for the future into a constitutional reality,[235] do not mention ownership as one of the basic rights and freedoms that are to be protected constitutionally,[236] and only the protection of ownership of property for personal use and consumption is guaranteed.[237] The sections on the economy and land reform make it quite clear that this protection does not include ownership of land.[238] The Freedom Charter does provide expressly for the right to obtain adequate housing or shelter.

The report of the Olivier Commission on a bill of rights,[239] on the other hand, includes a guarantee of private ownership in its draft bill of rights, while nothing is said about the right to proper housing.[240] The omission of housing rights is clearly the result of the Olivier Commission's effort to avoid the pitfalls that follow upon the introduction of second and third generation rights.[241] To put it very simply, the Commission did not want to tangle with the obvious and very complex confrontation situation that must surely result from the constitutional guarantee of both ownership and a right to adequate shelter.

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235 See 1989 South African Journal on Human Rights 129-132. Compare Van der Vyver's comments at 133-153.
236 See clause (1).
237 Clause (t).
238 Compare clauses (o), (q) and (u).
239 See South African Law Commission project 58: Group and human rights, working document 25.
240 The draft bill of rights is contained in chapter 15; compare section 15.
241 See the report chapter 14.9.

The difference of approach in these two documents raise the question whether a process of land tenure reform should include the constitutional protection of any land right.

6.2 Constitutional protection of landownership

The first question is whether ownership, especially landownership, should be protected by a bill of rights. Various answers can be given to this deceptively simple question,[242] but ultimately the correct answer must be determined by what is required of land reform. The European example has proven that codification - and the entrenchment of ownership is nothing if not the codification of the law of ownwership - usually results in the permanent mummification of what is perceived to be the law at the time of codification.[243] More particularly codification in western Europe has led to the enshrinement of those socio-economic values that were regarded as inviolable during the eighteenth and nineteenth centuries: liberalism, individualism and capitalism. A brief view of recent literature shows that much of the current debate in those systems revolves around efforts to nullify or rectify that situation, especially from the social democratic point of view.

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242 See the report chapter 14.8.
243 Compare the Dutch analyses of the results of codification and recodification; see n 217 above.

The example embodied in the draft bill of rights proposed by the Law Commission proves that the inclusion of a property clause in a bill of rights will constitutionally enshrine the same basically capitalist-liberalist concept of ownership that was embodied in the European codes.[244] It will also result in the constitutional protection of that concept of ownership against the social, economical and environmental criticism levelled against it in recent literature. It will, more importantly, stifle all beneficial and progressive development in the theory and practice of ownership, and push the law of ownership back into the nineteenth century. To name but one example: the property clause as suggested by the Commission will undoubtedly rule out all possibilities for the kind of natural development that was discussed above: a more limited perception of the owner's rights; a more socially responsible perception of the owner's duties and a functionally divided concept of ownership cannot develop once the current perception of ownership is enshrined in such an important constitutional instrument. The constitutional protection of ownership in a classic bill of rights will, in fact, be a major stumbling block in the way of progress towards a new land law that is characterized by social justice.

6.3 Socio-economic rights

The second question is whether the right to housing should be protected in a bill of rights. While such protection would at

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244 Compare Van der Walt 1988 De Jure 24-28 34-35.

least show evidence of progressive social thought, it might well prove to be a bad idea. Nobody will deny the importance of this socio-economic right, but its problematic character might prove to be its undoing. It is highly unlikely that a bill of rights will, as the Freedom Charter does, protect the right to shelter but not ownership. The controversy surrounding the protection of second and third generation rights and conflicts with first generation rights such as ownership might well prove to be a major stumbling block in the way of reform. Developments here and abroad[245] indicate that the courts and legal discussion might prove to be the best agents for the development of this kind of right. In the Netherlands and Germany a right to housing is in the process of development, even against the odds of a codified system. The same considerations imply that the development of a right to housing in South Africa should not be attempted by way of a bill of rights, but rather through the natural development of common law, supported and supplemented by selective legislation. More research on this topic is imperative.

6.4 Conclusion: a vote against codification

In conclusion it seems as if neither ownership nor other land rights should be protected by a bill of rights. The inclusion of any of these rights in a bill of rights may have negative results

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245 See Van der Walt and Kleyn 215-216 nn 18-21.

for land reform, because it could entrench negative aspects of existing law on the one hand and stifle beneficial new developments on the other. Reforms should rather be reached by way of natural developments in customary law and common law, supplemented by selective ad hoc legislation.

7 CONCLUSIONS: ISSUES FOR DEBATE

By way of summary some of the most important conclusions are listed, but then as issues to be discussed rather than a programme of solutions.

The first question to discuss involves the abolition or retention of customary tenure, especially in the rural areas. An important consideration to be taken into account in this regard is the fact that customary tenure seems to fulfil a useful social security purpose, and that the societal land ethic that characterizes it may well offer the very kind of land use restriction that western lawyers have been looking for over the last years. Given a chance this societal land ethic may develop in the same direction that common law seems to take at the moment, bringing the two traditions closer together.

The second question is concerned with the reform of urban tenure, especially for residential purposes. It seems clear that the statutory forms of land tenure that were devised over the years as an alternative for black landownership in urban areas must be abolished and converted to full ownership. Apart from that certain areas of urban land law must be reformed with a view to the

elimination of historical imbalances and injustices. Unwarranted discrimination and unnecessary duplication of principles and procedures with regard to town planning, land rights and the provision of housing must be abolished and replaced by a unitary system based upon equality and social justice.

The third question involves the abolition of legislation and administrative procedures which criminalize certain forms of tenure, especially for residential purposes. It is clear that the legislation in question must be abolished, and the main problems in this regard are to determine what should be done to effect affirmative action with regard to forced removals, and to find solutions for the problems of poverty and informal residential settlement.

The fourth question is whether common law should be abolished or not. Indications that were discussed show that the mere abolition of common law must inevitably lead to codification, which cannot be beneficial, while certain developments and ad hoc legislative reforms can make common law very useful for the purposes of land reform. Current developments tend to move the modern concept of landownership in a direction which is not dissimilar from the customary law position as far as the social ethics of land rights are concerned.

The last question is whether ownership and the right to housing should be protected in a bill of rights. The evidence which is available seems to suggest that such a form of constitutional codification of either right would inhibit sound developments

that should rather be encouraged, and that specifically the protection of ownership in a bill of rights would mummify and enshrine the very concept of ownership which lies at the root of the problem.

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