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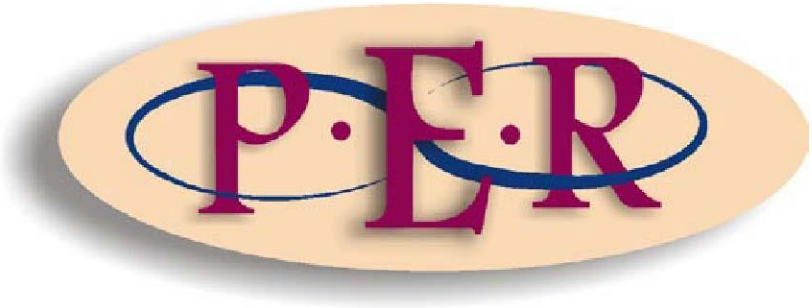

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AFRICAN INDIGENOUS LAND RIGHTS IN A PRIVATE OWNERSHIP PARADIGM

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1 Introduction

Section 25(6) of the *Constitution of the Republic of South Africa*, 1996 entitles persons or communities "whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices" to tenure which is legally secure. Section 25(9) commands parliament to enact legislation to provide for such tenure security. The subsequent *White Paper on Land*[1] highlighted some principles with regard to the security of tenure, and made specific reference to tenure security in the former homelands,[2] where African indigenous land tenure[3] was held in trust by the government that issued permits to black people in these homelands.[4] The idea is that ten-

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1 *South African Land Policy White Paper* (1997).

2 The apartheid government issued various laws in the hope of segregating the different groups in South Africa. The first of the so-called "land acts" was the *Black Land Act* 27 of 1913 which provided for the areas where occupation was restricted to black persons only. In the urban areas, segregation was driven by the *Natives (Urban Areas) Act* 21 of 1923; the *Blacks (Urban Areas) Consolidation Act* 25 of 1945; and the *Black Communities Development Act* 4 of 1984. The *Black Land Act* was succeeded by the *South African Development Trust and Land Act* 18 of 1936 which provided for "released areas", also restricted to black people. On the other hand, the *Group Areas Act* 41 of 1950 regulated the acquisition, alienation and occupational rights to land and provided for four independent nation states, the so-called homelands (Transkei, Bophuthatswana, Ciskei and Venda), and six self-governing territories (KwaNdebele, QwaQwa, Gazankulu, Lebowa, KwaZulu-Natal and KaNgwane). The segregation of people and the division of land was made possible by legislation authorising the (forced) removal and the eviction of the people from their land. Every area had its own specific regulations and town planning rules. By the time of the advent of the new South Africa, about 17 000 statutory measures had been issued to segregate and control land division, with 14 different land control systems in South Africa. Before the change an estimated 3,5 million people had been displaced by apartheid land law, and 80 percent of the people in South Africa lived on 18 percent of the land (South African History Online Date Unknonw www.sahistory.org.za). For a more detailed discussion see Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 256 and Claassens 1993 *SAJHR* 422.

3 The term "African indigenous land tenure" is preferred to "traditional" or "customary" land rights in this paper, since the author is of the view that the terms "traditional" and "customary" may be too restrictive.

4 The system was more complex than can be elaborated on in this article. The 1913 *Land Act* is usually regarded as the first of the spatial segregation acts, and permitted Africans to live only in certain areas (7 percent of the land). The 1936 *Land and Trust Act* added another 6 percent to

ure reform must move towards rights and away from the permits that were in place during apartheid. The aim is also to unify the system of land rights and to get rid of the second-class system for black people that was developed during apartheid. There was also a call in the *White Paper* that people should be allowed to choose the tenure system appropriate to their circumstances (that would include group and individual rights, or a combination of these), provided that the system adheres to the *Constitution*'s commitment to basic human rights and equality. A rights based approach was proposed for this - one that also recognises the *de facto* rights in law.[5]

The problem, however, is *how* to recognise and secure tenure rights. Should tenure be secured in the private ownership paradigm, or should indigenous forms of land tenure be fully recognised and thus protected.[6] Due to the domination of private property in the officially recognised laws of South Africa before the advent of constitutional democracy, the inclination is towards protection in the private ownership paradigm. The success of such an approach is questionable, and in the recent case of *Tongoane v National Minister for Agriculture and Land Affairs*[7] the Constitutional Court declared the Communal Land Rights Act,[8] which was meant to be the legislation securing indigenous land rights, unconstitutional.[9] The problem therefore remains: how do we secure indigenous land rights?

This contribution does not purport to provide an answer to this complex question. Rather, it investigates whether or not the African indigenous land tenure system can be analysed within the framework of the commons. It aims to investigate whether the framework of the commons can provide different insights, or perhaps a different vo-

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the land that Africans could occupy. This land was held in trust, and Africans could hire, purchase or occupy this land. Legislation was passed (the *Native Administration Act* 38 of 1927; the *Bantu Authorities Act* 68 of 1951; and the *Black Areas Land Regulations* (Proclamation R.188 of 1969), to name a few) that drastically reduced a landholder's ability to alienate, transfer or bequeath land. The allocation of land was dependant on White officials who followed strict regulations that did not accommodate African indigenous land tenure systems. See Cousins "Politics of Communal Tenure Reform".

5 For the principles see para 4.18 *South African Land Policy White Paper* (1997).

6 Claassens and Cousins pose this question in Claassens and Cousins (eds) *Land, Power and Custom* 9.

7 *Tongoane v National Minister for Agriculture and Land Affairs* 2010 6 SA 214 (CC).

8 *Communal Land Rights Act* 11 of 2004.

9 The Constitutional Court focused only on the procedural aspects of the adoption of the Act, and not on the substantive issues raised.

cabulary, whereby indigenous land tenure can be secured in the current ownership paradigm[10] without African indigenous land tenure losing its unique character.

This article will do this by first looking at pre-colonial land tenure to investigate the root of contemporary indigenous land holdings and the characteristics of such tenure. Thereafter it will discuss the development of indigenous land tenure and the colonial and private property right influences on tenure, and the linguistic problems that developed in describing African indigenous land tenure. A brief overview of the commons will follow, after which the applicability and the usefulness of the discourse of the commons for African indigenous land tenure will be assessed. The conclusion will discuss the possible usefulness of the framework of the commons for securing land rights.

The background with which the indigenous land rights section of this contribution should be understood requires a brief explanation of what the commons entails.[11] In the commons framework property rights are divided in two main groups: use rights (that is the access to a resource, withdrawal from a resource or exploitation of a resource for economic benefit) and control or decision-making rights (rights to management, exclusion and alienation). In the commons model, several individuals or groups can have different rights over the same resource. This means that even if the state, for instance, has the control rights over a resource, a community can have the use rights, and different segments of the community can have different use rights.[12] The framework of the commons allows for multiple rights in the same resource to be acknowledged and protected, and provides an organisational framework on how such rights and the conflict between the users of the rights can be managed. The framework of the commons recognises communities' own ability to organise themselves and the various rights in the resource without relying on the traditional property law model of ownership. The term was popularised in the late 1960s when Har-

10 Whether or not it *should* be protected in an ownership paradigm is a separate debate all together, one which is beyond the scope of this article. For the purposes of this contribution it will therefore be assumed that protection in an ownership paradigm is the most viable route at the moment. At a recent colloquium on "Development, Pluralism and Access to Resources" held at the University of Cape Town, Pope asked if indigenous law land rights *are* in fact insecure. See Pope "Indigenous law land rights". Likewise the scope of this contribution will not look into that debate, and will assume that in the ownership paradigm, indigenous law land rights *are* insecure.

11 See para 3 for a more detailed discussion.

12 CAPRi *Resources, Rights and Cooperation* 9.

din advocated that allowing individuals free and unlimited access to a form of commons would lead to a tragedy. The tragedy lies in the individuals' seeking to maximise their gains and exploit the commons, since they gain directly by exploiting, but share the costs of such exploitation amongst the other users. The solution to this, according to Hardin, is privatisation and regulation.[13]

2 The history of African land tenure

2.1 Pre-colonial African indigenous land tenure

In pre-colonial times the indigenous peoples of South Africa had abundant land, with farming and herding being the predominant economic activities.[14] Environmental factors such as rainfall, topography, soil and the availability of water influenced the economy of the indigenous peoples. In KwaZulu-Natal this meant that the patterns of residence and political authority were largely limited to independent homesteads.[15] The existence of these independent homesteads resulted in a relatively decentralised structure of political authority, with every unit having access to abundant resources allowing for a self-sufficient existence.[16] On the Highveld the situation was different. The sparse water and harsh climate meant that homesteads were concentrated around whatever water was available, and also meant that political authority was centralised and concentrated in villages which comprised of up to a thousand inhabitants. Due to the climate, agriculture was difficult and risky and therefore not intended to create wealth. The focus was on livestock, the farming of which was less risky and labour intensive.[17]

Cattle were most valued and often used in ceremonies and celebrations to establish or re-confirm social relations.[18] Despite the exchange of cattle and other products there were no regular traders and marketplaces. Material possessions had more social and ritual importance than economic value.[19]

13 Hardin 1968 *Science* 1244.
14 Bennett *Customary Law* 371.
15 Bennett *Customary Law* 371.
16 Bennett *Customary Law* 371.
17 Bennett *Customary Law* 372.
18 Bennett *Customary Law* 372.
19 Bennett *Customary Law* 373.

Cousins elaborates on the communal land rights system, emphasising the political and social embeddedness of land rights.[20] He sketches a picture of pre-colonial land tenure, when "[l]and tenure was both 'communal'[21] and 'individual', and can be seen as 'a system of complementary interests held simultaneously'".[22] He then proceeds to sketch how colonial rule changed it.[23] This often entailed the colonial state's trying to retain a form of "communal" land tenure that might suit its interests.[24]

The concept of "ownership" was therefore limited in pre-colonial South Africa and more often embedded in status relationships. Put differently, African indigenous law in property was more concerned with people's obligations towards one another in respect of property than with the rights of people in property. The relationships between people were more important than an individual's ability to assert his or her interest in property against the world. Entitlements to property were more in the form of obligations resulting from family relationships than a means to exclude people from the use of certain property.[25] Property in pre-colonial Africa can thus be said to have been "embedded" in social relationships rather than giving rise to an individual's exclusive claim over it as private property.[26]

In 1989 Okoth-Ogendo remarked that studies on African indigenous land tenure are mostly descriptive, without much regard to the theories that underlie such systems.[27] This influenced the discussion on land reform in that the descriptive analysis was always done within the theoretical framework of Roman law, with a predominance of the doctrine of ownership, rather than the property itself becoming the focal point.[28] It

20 Cousins "Characterising 'Communal' Tenure" 110.
21 Earlier in the chapter he notes that "communal" and "customary" are not synonyms. Communal land rights systems that do not derive from customary law nor are dependent on a traditional authority for the management of the tenure also exist (Okoth-Ogendo "Nature of Land Rights" 110).
22 Cousins "Characterising 'Communal' Tenure" 111.
23 Cousins "Characterising 'Communal' Tenure" 111.
24 Cousins "Characterising 'Communal' Tenure" 111. In the Cape Colony the *Glen Grey Act* 25 of 1894 (C) attempted to individualise customary tenure by allowing only one arable plot per married man, and only the titleholders were allowed to graze their cattle on the commonage. This system, however, reverted to 'communal' tenure (Cousins "Characterising 'Communal' Tenure" 111).
25 Bennett *Customary Law* 373.
26 Cousins "Characterising 'Communal' Tenure" 60.
27 Okoth-Ogendo 1989 *Africa* 6.
28 Okoth-Ogendo 1989 *Africa* 7.

may therefore be useful to investigate African indigenous land rights in the theoretical framework of the commons.

2.2 African indigenous land tenure today

2.2.1 Introduction: the language barrier of the common law

African indigenous law had limited scope to develop at its own pace and based on its own principles, as the colonial conquest introduced a market economy and African indigenous law was, at least officially and as far as property was concerned, replaced by common law.[29] Common law brought with it a new vocabulary that made it difficult, if not impossible, to interpret African indigenous law land tenure.[30] The concept of "ownership" is particularly problematic, as is the idea that *before* "ownership" all things were held in common with everybody having equal rights to the same thing,[31] or belonged to nobody. Bennett asserts that "[i]t is more likely that, before the concept of individual ownership emerged, only rights of use were protected".[32] This implies that for short periods of time, while a resource was in use, other people could be excluded, and protection was needed for short terms only. The need for longer-term protection arose only with the move from a nomadic lifestyle to a more settled lifestyle.[33] With the settlement of people on land and the cultivation of such land and the herding of cattle, resources became more scarce. With the increased scarcity of resources, the need for the regulation of access and the protection of

29 Bennett *Customary Law* 373. The "common law" terminology can be confusing. Roman-Dutch law is based on Roman law, a statement that implies that the history of South African law has a Roman law foundation, a heritage South Africa shares with Western Europe. "Common law" as a term refers mostly to Roman-Dutch law as it was adapted and developed in South African case law and custom. "Common law" is usually distinguished from other sources of law such as legislation and customary law. Law, as developed in case law in England, is also referred to as "Common Law". This "Common Law" forms the basis of law in Anglo-American law and was scarcely influenced by Roman law. The law of equity, however, plays a significant role in the English "Common Law". To make things somewhat more confusing, the South African common law was influenced by the English Common Law. See Du Plessis *Introduction to Law* 19-20. To simplify things, when reference is made to the Roman-Dutch common law it will be written in the lower case, while if reference is made to the English Common Law, the letters will be capitalised.

30 Bennett *Customary Law* 374.

31 Bennett *Customary Law* 374.

32 Bennett *Customary Law* 374.

33 Bennett *Customary Law* 375.

rights arose.[34] The control of land therefore became a monetary advantage, and competition to control it grew.[35]

With the introduction of commerce, an exchange value had to be attached to a commodity, and in this context ownership provided the answer to securing the property.[36] With ownership came the idea of "absoluteness", which implied that one person could hold all of the entitlement in a certain property and dispose of it at free will.[37] This differs remarkably from the pre-colonial era where different interests in the same property could vest in different holders,[38] and where furthermore these interests are flexible and ever changing.[39]

The colonists assumed that the language of ownership was universally applicable and also assumed that the concept of "ownership" was applicable only to "civilized" societies. The colonists also "assumed that land must have an owner, even where rights had never been defined".[40] The fact that "ownership" was a strange concept to indigenous groups meant that the government could appropriate this "unowned" land.[41] If a dispute arose between Africans about land, common law was used to resolve the dispute instead of the court's developing African indigenous law to fill such gaps.[42] Some people attempted to overcome the problem of indigenous land tenure and its incompatibility with the notion of "ownership" by stating that land was "com-

34 Bennett *Customary Law* 375.
35 Chanock *Land, Custom and Social Order* 231.
36 Bennett *Customary Law* 375.
37 For a discussion of the concept "absolute ownership" in the African customary land tenure context, see Allot 1961 *Journal of African Law* 99; Simpson 1961 *Journal of African Law* 145. Allott's discussion of the problem is based on the English law that requires registration of title to land and a limited choice of title that can exist in respect of land. In the absence of an adequate vocabulary to describe and therefore register certain interests under customary law, the risk remains that such interests and the land in which such interests are held would be unowned.
38 Bennett *Customary Law* 375. See also Allot 1961 *Journal of African Law* 100 where Allot discusses the practical implications of this with registration. He asks how the official who needs to register title in a piece of land will handle the problem of the chiefs that claim paramount control over the lands, families claiming to be owners of lands, and the re-parcelled sections of land being handed to individuals. Who must he register? For criticism see Simpson 1961 *Journal of African Law* 145.
39 Allot 1961 *Journal of African Law* 100.
40 Chanock *Land, Custom and Social Order* 232.
41 Bennett *Customary Law* 375.
42 Bennett *Customary Law* 377. See Chanock *Land, Custom and Social Order* 232 for a discussion of how this worked in practice.

mon to all people"[43] and "communal",[44] or that communities as "corporate entities" should make the decisions regarding access to and the use of land.[45]

However, the use of the term "communal" is problematic.[46] Bennett[47] sums up the problem by stating that the popular use of the word "suggest[s] that groups of people, who are closely bound together by common interests and values, share land for purposes of subsistence" rather than the more unobjectionable idea that all members of the community have equal claims to land, that "membership of a political community is the basis of an individual's entitlement to land" or that an individual is not free to dispose of land at will.[48] The idea that land is farmed collectively and that the produce is then shared is erroneous.[49] The legal concept "communal" is also confusing. On the one hand it can mean that a right is held by a group jointly (one property, inseparable title), while on the other hand it can mean that it is held by a group in common (one property, separate but with the same title in land). The latter term is useful only insofar as the right to pasture and natural resources is concerned, but not as far as African indigenous tenure is concerned. [50]

Likewise the term "trust" was also used in an attempt to describe African indigenous tenure. This means that the bare title vests in the indigenous group, with the chief as the trustee, and "usufructuary" rights being granted to the individuals that enjoy beneficial occupation. The use of the word "trust" is also problematic, since the "usufructuary" rights granted to an individual do not amply describe the interest in African indigenous law, nor do these people have a remedy against the traditional leader as trustee, as they would have under trust law.[51]

Okoth-Ogendo regards the insistence on using common law concepts to explain and define African indigenous land tenure as "more than just an intellectual error" and part of the bigger design of the colonial authorities to justify expropriation of land, as

43 Bennett *Customary Law* 377.
44 Bennett *Customary Law* 377.
45 Okoth-Ogendo "Nature of Land Rights" 99.
46 Okoth-Ogendo "Nature of Land Rights" 99.
47 Bennett *Customary Law* 377-378.
48 Bennett *Customary Law* 378.
49 Bennett *Customary Law* 378.
50 Bennett *Customary Law* 378.
51 Bennett *Customary Law* 379.

land in this framework is regarded as "dead capital".[52] One of the consequences of this is that tenure insecurity is the reality in most areas of land held under African indigenous law, as is evident in South Africa.[53] This is not because African indigenous law property systems are inherently insecure, but rather due to "the dislocation of these systems from the social and institutional context that defines and sustains them" and the application of the indigenous law in the colonial legal framework.[54] How should African indigenous land tenure be understood, then? This question will be answered by looking at the characteristics of African indigenous law land tenure before providing an alternative vocabulary for understanding African indigenous land tenure.

2.2.2 The characteristics of indigenous law land tenure today

The previous paragraphs argued that customary law cannot be described in common law concepts, since the concepts used are culturally specific and foreign to indigenous law.[55] Bennett instead uses the words "right", "power" and "interest" to describe African indigenous land tenure.[56] He bases this on Allott's analytical scheme, which first seeks to identify the status of the interest holder,[57] secondly to look at the content of the interest,[58] and lastly to look at the uses of particular land in order to determine what rights and powers can be exercised over the land.[59] When one uses this scheme, one can understand that it is possible for two or more interest holders to simultaneously exercise rights and powers on the same piece of land. "Allott's

52 Okoth-Ogendo "Nature of Land Rights" 98.
53 Okoth-Ogendo "Nature of Land Rights" 98.
54 Okoth-Ogendo "Nature of Land Rights" 98.
55 Bennett *Customary Law* 379.
56 Bennett *Customary Law* 380.
57 Bennett *Customary Law* 380. People acquire interest in land by belonging to a political unit such as a family, ward or nation.
58 Bennett *Customary Law* 380. One looks at the interest to determine what a holder may and may not do, and what limitations and affinities are contained in their interests. These interests are divided between "benefit" (the right to use and enjoy land) and "control" (the power to decide who may benefit).
59 Bennett *Customary Law* 380. The uses to which land is put determine the rights and power that are attached to it. For example: while dry grassland is set aside for the grazing of herds belonging to the members of a community, fertile land is reserved for individual cultivation of land.

scheme", Bennett states "frees us from the ownership paradigm"[60] where tenure seems to be "a system of complementary interests held simultaneously".[61]

Okoth-Ogenda reconceptualises indigenous land rights systems by debunking the myth that indigenous land rights systems are necessarily "communal" in nature, that "ownership" is collective and that the community as an entity makes collective decisions about access to and the use of land.[62] He offers a different understanding of indigenous land right systems. For him, the social order (ie how people relate to each other rather than an individual to his property) creates "reciprocal rights and obligations that binds together, and vests power in the community members over land".[63] To determine who will be granted access to, or exercise control over, land and the resources, one needs to look at these rights and obligations and the performances that arise from them. This will leave only two distinct questions unanswered: who may have access to the land (and what type of access)[64] and who may control and manage the land resources on behalf of those who have access to it?[65]

In African indigenous law land tenure, land structures social relations.[66] Okoth-Ogendo describes the structure as an "inverted pyramid", where the tip is the family,

60 Bennett *Customary Law* 381.

61 Bennett *Customary Law* 381. Okoth-Ogendo "Nature of Land Rights" 96-98 highlights five juridical fallacies that underlie the colonial and post-colonial doubt about the applicability of indigenous law in general. Firstly, early anthropologists did not regard indigenous law as "law" at all. Secondly, it was believed that indigenous law conferred no property in land. Thirdly, the conviction that radical title could only vest in the sovereign. Fourthly, the belief that indigenous communities had no juristic personality and lastly, the assumption that "indigenous and social governance institutions were incapable of, or unsuitable as, agents for the allocation of land and the management and resolution of disputes relating to land". One of the main consequences of these fallacies is that the nature and content of indigenous land rights are misrepresented and distorted, and the clear distinction in indigenous law between the individual and collective land rights is continuously denied. This review focuses on the second and last fallacy, and how a better conception of the conditions that give rise to the fallacies might help solve the problem.

62 Okoth-Ogendo "Nature of Land Rights" 100. See chapter 5, where Ben Cousins lists this as one of the problems with CLARA (Cousins "Characterising 'Communal' Tenure" 132).

63 Okoth-Ogendo "Nature of Land Rights" 129 complements Okoth-Ogendo's chapter in providing examples that fit Okoth-Ogendo's conceptual framework. He also analyses the customs of various people in South Africa in order to point out distinctive features of "communal" tenure regimes in South Africa, based on Okoth-Ogendo's conceptual framework, that highlights the social embeddedness and inclusive nature of African indigenous land rights and the distinction between access to land and control of land. This further echoes Singer's idea that property law reflects and shapes social relations. Property "is an intensely social institution. It implicates social relationships that combine individualism with a large amount of communal responsibility" (Singer *Edges of the Field* 3).

64 See Cousins' comments and examples in Cousins "Characterising 'Communal' Tenure" 122.

65 Okoth-Ogendo "Nature of Land Rights" 100.

66 Bennett *Customary Law* 381.

the middle is the clan lineage, and the base is the community.[67] It is one's standing in the group that provides access to land, and social relations are therefore more important than a relationship with the land itself.[68] One's situation is determined not only by present-day social relations but also by a connection with the past,[69] as it is believed that the ancestors are attached to the land.[70] The fact that those who control the land have a transgenerational obligation to preserve the land also means that the ability to alienate the land from people outside the group is limited.[71]

The control of access to land should be viewed in the context of social relations.[72] Since traditional leaders derive their legitimacy from the founding fathers and are seen as a direct channel to communicate with the ancestors, they have certain powers with regard to the land.[73] They have power to allot the land, to regulate the use of common resources, and expropriate and confiscate land in certain circumstances.

When the chief allots land, he not only allocates land to families but also dedicates certain lands for grazing and agricultural use.[74] Such decisions are not made collectively but they are made with reference to the common values of each level of the pyramid as discussed above.[75] Even though the scarcity of land means that the chief's role in allocating land is diminishing, he still plays an important role in confirming the transfer of land that takes place in practice. In doing so he has a duty to "act like a father" in making sure that the land is distributed fairly between households.[76] The allocation of land was traditionally free, while today it is common to offer some form of payment as a thank-offering.[77]

67 Okoth-Ogendo 2005 www.plaas.org.za.
68 Chanock *Land, Custom and Social Order* 231.
69 Okoth-Ogendo1989 *Africa* 11.
70 Okoth-Ogendo 2005 www.plaas.org.za.
71 Okoth-Ogendo1989 *Africa* 11.
72 Bennett *Customary Law* 382.
73 Bennett *Customary Law* 382. Some traditional leaders view themselves as "owners" of the land because of this, and sold the mineral rights or rented the land. This is, according to Bennett, due to a misunderstanding of the principles of traditional leadership, which require a traditional leader to always govern for the benefit of the nation.
74 Bennett *Customary Law* 383. See also Bennett's comments that this is not so prevalent today due to the scarcity of land and the fact that most people settle on land on a relatively permanent basis.
75 Okoth-Ogendo 2005 www.plaas.org.za.
76 Bennett *Customary Law* 384.
77 Bennett *Customary Law* 384.

Traditionally, exercising the power to regulate the resources entails that the chief decide when and how these resources are used. When formulating the rules pertaining to access, he must exercise his discretion for the public good.[78] In the 19th century the colonial powers tried to and in some instances succeeded in breaking down the chiefly power, replacing the chief with (white) magistrates. The lack of the recognition of African indigenous law in the formal structures introduced by the magistrates helped play a role in undermining the chiefly powers.[79] The apartheid laws and structures broke chiefly power down even further, often grouping people together that had no historical ties with one another, and appointing traditional leaders who would advance the apartheid government's policies.[80] African indigenous systems of land tenure "managed" by the chiefs were replaced by government regulations that only allowed for quitrent (where annual rent was paid to the state) and permission to occupy was granted by the state.[81]

As an individual you also have certain rights and duties with regard to the land. You have a right of avail,[82] that is, to receive land to build houses coupled with access to the commonage;[83] and you have a right to residential sites and arable fields and grazing.[84] The right of avail is restricted to the extent that access to land is dependent on an affiliation with the ward where the land is situated.[85] The right to residential sites and arable fields usually implies that a member of the community will have two plots – one for housing and one for farming. The holder of both these plots will have

78 Bennett *Customary Law* 385. This means that the chief must consider the people's welfare especially in connection with the environment. For instance: the killing of animals may be prohibited if the animal species borders on extinction. Likewise, the burning of grass may be prohibited when it is dry. The problem with effective action at environmental protection is that there are no coherent policies due to the decentralised nature of the political set-up; human needs are given priority over the environment and due to poverty and overpopulation in the modern state, environmental concerns are sometimes elided. See Bennett *Customary Law* 385. See also Delius "Contested Terrain" 221.

79 Delius "Contested Terrain" 221.

80 Cousins "Politics of Communal Tenure Reform" 62. Of course it was more complex than its description here. A more detailed historical account can be found in Du Plessis and Pienaar 2010 *Fundamina* 73-114.

81 Cousins "Politics of Communal Tenure Reform" 56; Delius "Contested Terrain" 225. One of the substantive objections to the *Communal Land Rights Act* 8 of 2004 was that it would re-enforce the apartheid boundaries and the apartheid system of land governance, and that the traditional power of chiefs would not be seen as legitimate by the community.

82 Bennett *Customary Law* 388.

83 Bennett *Customary Law* 391.

84 Bennett *Customary Law* 398.

85 Bennett *Customary Law* 391. It is possible to get access to land even if you are not a member of the ward, but there are strict rules that regulate such access.

exclusive rights over the land and is protected from trespass, but the rights are restricted to the extent that the uses of the plots are restricted to the cultivation of crops for domestic consumption.[86] Members may also graze their stock on the commonage. As far as the commonage is concerned, no individual may claim exclusive use of the land.[87] Again, access to the commonage is based on socially-defined membership that is reinforced and managed within the group, based on the reciprocal obligations of the members in the social hierarchy.[88]

The rights in these lands can also be taken away.[89] Since land cannot be inherited rights are also lost at the death of the holder.[90] Traditionally land could not be alienated by sale. The pre-colonial concept of land was that it is god-given and cannot be appropriated. With colonialism came a real estate market, the common law concept of ownership, property law and contract. Land is also a scarce resource, and individuals are more inclined to assert exclusive rights over the land. The ability to alienate African indigenous land is furthermore restricted by the *Upgrading of Land Tenure Rights Act.*[91] The fact that it could not be alienated by sale and acquired only through membership of a group is an indication that property has more of a social function than a transition of wealth.

2.3 Preliminary analysis of African indigenous land tenure

The characteristics of African indigenous land tenure are firstly that land is held as a transgenerational asset, secondly that it is managed on different levels of the social organisational structure, and lastly that it is used in function-specific ways.[92] Access to and the control of land depends on an individual's place in the social order of the community.

86 Bennett *Customary Law* 392. Commercial farming is generally not allowed. Land assigned to residential housing normally includes space for a garden where some crops are planted. See Bennett *Customary Law* 394.
87 Bennett *Customary Law* 398.
88 Okoth-Ogendo 2005 www.plaas.org.za.
89 Bennett *Customary Law* 399. Before colonisation abandonment was probably the most common way of losing rights, but due to the scarcity of land and the more settled lifestyle it is debatable whether this still happens often.
90 Bennett *Customary Law* 402.
91 Sections 2(1), 3(1), 19(2) *Upgrading of Land Tenure Rights Act* 112 of 1991.
92 Okoth-Ogendo 2005 www.plaas.org.za.

It has been shown that the natural development of the traditional African indigenous system of land tenure was stunted by the colonial ideological framework of private ownership, which was perpetuated by the post-colonial governments. African indigenous land tenure was interpreted in this framework in such a way that the people's relationship with the land was not recognised, and the land held in terms of indigenous tenure was often declared *res nullius* due to its not being "owned" in the common law sense.[93] These lands were then converted into individualised private property, in accordance with a system, as indicated above, foreign to African indigenous land tenure,[94] often managed by legislation or interpreted in the common law legal framework. It is when African indigenous land tenure is seen from the perspectice of the common law legal framework that it seems to be insecure. The question then is: is there an *alternative* framework that can accommodate the unique characteristics of African indigenous land tenure within the common law ownership framework that can help secure these rights? This is where the framework of the commons might be helpful.

3 Discourse of the commons as an analytical framework for African indigenous land tenure?

3.1 A short introduction to the commons

There is a link between this reconceptualisation and the discourse of the commons.[95] The term "commons" is often equated with the phrase "public domain" and thought to mean "a given right, a non-assigned right, an unclaimed right or an unmanaged resource".[96] One problem with defining the commons is that it does not neatly fit into the conventional private/public dichotomy. It is often referred to as the private property of a group, although this might not always be accurate because in many in-

93 Okoth-Ogendo 2005 www.plaas.org.za.
94 Okoth-Ogendo 2005 www.plaas.org.za.
95 In Hardin 1968 *Science* 1244 the social and economic consequences when individuals are allowed free and unlimited access to a form of commons are explained. The tragedy is that individuals will rationally seek to maximise their gains and exploit the commons, because they can benefit directly while costs are distributed among all the users of the commons. Hardin concludes that "[r]uin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all" (Hardin 1968 *Science* 1243, 1244). For Hardin, the solution to this problem includes privatisation and regulation.
96 Hess and Ostrom 2003 *LCP* 114.

stances, commons regimes also recognise the rights of transient resource users (such as grazing or foraging) on an equal footing.[97] The problem of classification is solved somewhat by Hess and Ostrom, on whose classification this review article relies. She identifies four broad classes of goods, as illustrated in the table below.

		SUBTRACTABILITY	
EXCLUSION		*Low*	*High*
	Difficult	Public goods (e.g. Sunset / common knowledge)	Common-Pool Resources (e.g. Irrigation systems, libraries)
	Easy	Club goods (e.g. Day-care centres/ country clubs)	Private goods (e.g. Doughnuts / personal computers)

This classification leads to a definition of the commons (or common pool resources) as "a class of resources from which exclusion is difficult and joint use involves subtractablity".[98]

Excludability is about the control of access, while subtractability implies that the exploitation of the resource by one user affects the ability of the other users to exploit the resource.[99] The difficulty of exclusion implies that means should be devised to prevent the free-rider problem; that is, to keep unauthorised users from benefiting from the resource.[100] National, regional or local governments, communal groups, private individuals or corporations can all be "owners" of a common-pool resource.[101]

97 Meinzen-Dick, Mwangi and Dohrn 2006 www.capri.cgiar.org.
98 Feeny *et al* 1990 *Human Ecology* 4.
99 Feeny *et al* 1990 *Human Ecology* 3.
100 Hess and Ostrom 2003 *LCP* 120.
101 Hess and Ostrom 2003 *LCP* 120.

3.2 African indigenous land tenure as a commons?

Would it be possible to classify the indigenous land rights system as a commons? Okoth-Ogendo touched on this issue in a previous paper[102] where he defined commons as "ontologically organised land and associated resources available exclusively to specific communities, lineages or families operating as corporate entities". This can relate back to the two questions that Okoth-Ogendo asks,[103] namely: who may have access (excludability) to land and who may control and manage the land resources (subtractability).

Does the classification of Hess and Ostrom[104] help in this regard? Excludability, according to Hess and Ostrom,[105] is difficult when it is impossible (or really hard) to develop physical or institutional means to exclude beneficiaries.[106] This creates a risk of exploitation if means are not devised to prevent unauthorised users from benefiting, leading to the free rider problem.[107] In the traditional African indigenous land law systems were in place to prevent the free-rider problem. This means that excludability from land was managed within groups. Excludability became difficult once resources became scarce, but pre-colonial African land tenure provided mechanisms within the political and social structures of communities to prevent the free-rider problem. An ownership paradigm, however, emphasises the rights of owners in relation to land, based on the information in the Deeds registry. When the Deeds registry is silent on who the owner is, or if the owner is the state, as is the case in big areas in the former homelands, the rights of the non-owners that might occupy the land under a different system are threatened. Such non-owners will have difficulty in an ownership paradigm to exclude others legally from the land. Despite this, some communities have been effective in managing access to and the control of land.

When subtractability is high, this means that the use of one person subtracts from the quantity available to others. If subtractability is not limited or managed properly,

102 Okoth-Ogendo 2005 www.plaas.org.za.
103 Okoth-Ogendo 2005 www.plaas.org.za.
104 Hess and Ostrom 2003 *LCP* 111.
105 Hess and Ostrom 2003 *LCP* 111.
106 See Cousins' comments on the problems attendant on the system of common pool resources in rural areas, in chapter 5 (Cousins "Characterising 'Communal' Tenure" 122).
107 When people benefit alone from using the resource, but share the burden.

then this will create problems of over-use.[108] Again, when land was abundant in pre-colonial times, subtractability was not such a big problem. However, with 80 percent of the population living on 17 percent of the land by the time apartheid came to an end, land became a scarce resource, and the use of land by one person subtracted from the amount of land available to others.[109]

From this categorisation it can therefore be argued that African indigenous land is a type of common-pool resource (or commons), in that 1) it is difficult to devise rules to exclude, especially from the point of view of an "ownership paradigm",[110] and 2) that the use of the land by one person does in fact subtract from the amount land available to others.

4 The usefulness of the commons discourse in securing African communal land tenure

Is communal land an unsolvable problem? Asked differently, is the commons necessarily tragic? Common-pool resources (as Hess and Ostrom refer to them) should not be confused with open-access regimes, "where no one has the legal right to exclude anyone from using a resource".[111] In fact, many common-property regimes do sometimes control access to resources, even if the authority to control such access is not formally recognised.[112] African indigenous land tenure would be such an instance. This is especially true for groups the members of which know one another well and interact well. These groups are likely to be tied together by family, geogra-

108 Hess and Ostrom 2003 *LCP* 123.

109 Even though access to land is, theoretically, available to all since the demise of apartheid, the author is of the opinion that this remains largely theoretical due to embedded practices inherited from the apartheid system, and as an effect of the poverty of the rural population.

110 Singer refers to it as the "ownership model". He criticises this approach by saying "[i]f property means ownership, and if ownership means power without obligation, then we have created a framework for thinking about property that privileges a certain form of life – the life of the owner". He further criticises the notion of property on the basis that property rights are not bundled together and owned by one person (as is the case in indigenous land right systems in Africa), and that property rights describe not only the relationship between a person and a thing, but also relationships between people. (This is also relevant for the indigenous land right system in Africa). See Singer *Entitlement* 3, 5.

111 Hess and Ostrom 2003 *LCP* 121.

112 Hess and Ostrom 2003 *LCP* 123.

phy and so forth and are generally very effective in establishing effective property regimes.[113]

Okoth-Ogendo confirms Hess and Ostrom's statement that access to the resources is often regulated. Okoth-Ogendo proclaims that the African (land) commons are managed by an inverted social hierarchy pyramid – with the top presenting the family, the middle the clan and lineage, and the base the community. However, decisions on each level are not made collectively, but rather individually with common values and principles taken into account on each level. On the community level decision-making entails the protection of the territory on behalf of the whole group, which means that radical title belongs to the members of the group across generations.[114] Access to resources of the commons, on the other hand, is open only to individuals and groups that qualify on the basis of their membership of a specific group. (This correlates with what Rose said). This is based on the existence of reciprocal obligations within the group. The quantum and quality of this right of access will depend on the "membership category".[115]

Access to land in African indigenous land right systems is controlled through membership (of a family, lineage or community), and individuals can acquire this access on account of their membership.[116] This access is specific to the kind of resource it aims at managing. Access is maintained on the basis of production,[117] and therefore has clearly defined internal rules. The nature and content of such an access right is therefore multiple, making it impossible for various people to hold a right in or right of access to the same particular piece of land.[118]

Management of the resource, on the other hand, is within the community's power,[119] and is exercised by the political authority in a society. This sovereignty is based on an "inverted hierarchy" where, as was pointed out above, the tip of the pyramid is the authority of the family unit (usually over cultivation and residence), the next layer the

113 Rose 2009 *Social Philosophy and Policy* 5.
114 Okoth-Ogendo 2005 www.plaas.org.za.
115 Okoth-Ogendo 2005 www.plaas.org.za.
116 Okoth-Ogendo "Nature of Land Rights" 100.
117 Okoth-Ogendo "Nature of Land Rights" 100.
118 Cousins "Characterising 'Communal' Tenure" 112-113.
119 Okoth-Ogendo "Nature of Land Rights" 101.

clan or lineage (usually with authority over grazing, hunting or the intergenerational distribution of resources), and the base the authority of the community (usually relating to defence, dispute settlement and transport facility maintenance). It is therefore clear that control and management of land resources are not the responsibility of one authority (the state) alone. This structure facilitates the individual's right of access to the land by virtue of membership of the community.[120] The right to access and power to manage the resources do not fit in neatly into the ownership paradigm in which they are often forced to operate, as no one person or group has exclusive control over the access to land, or the management of the resources. Social organisation plays a key role in granting access to a resource as well as security of tenure. As Okoth-Ogendo states: "rights of access under these systems are indeed 'secure' as long as they are being asserted; individuals have real rights under those systems; and indigenous social structures are able to manage land resources sustainably".[121] Law and social organisation are therefore equally important in securing indigenous land rights.[122]

5 Conclusion

This contribution has shown that pre-colonial and present-day African indigenous land tenure is unique and struggles to fit into the common law notion of "property" and "ownership". It has also been argued that the commons (or common property resources, as Ostrom termed it) might be a more comfortable fit for the African indigenous land tenure system. The commons is a framework that at least needs to be considered more closely when analysing African indigenous land tenure. It offers an explanation of how it is possible that various people can have a claim or similar claims to the same property. At the very least it offers an alternative vocabulary to describe African indigenous land tenure in a common law legal framework.

It has been argued that the language of ownership creates particular problems in circumscribing African indigenous land tenure. The problem is solved to an extent by

120 Okoth-Ogendo "Nature of Land Rights" 101.
121 Okoth-Ogendo "Nature of Land Rights" 101.
122 See also chapter 5, where Cousins states that "[p]eople often view land rights as underpinning the continuity of social units as well as securing access to the basic conditions of human existence. Tenure security derives in large part from locally legitimate landholding rather than the law" (Cousins "Characterising 'Communal' Tenure" 113).

asking "who owns what interest in land" instead of who owns the land.[123] Since this question is still based on the notion of ownership, it is probably better to ask, in "commons" language, "in whom, for what purposes and for how long should an allocation of power in respect of particular aspects of land be made?"[124]

What is clear is that access to land and control over the land are more complex than in common law, where an owner is regarded as having both powers. In African indigenous land tenure, a number of persons can each hold a power or a combination of powers in the same piece of land. The level of control will differ in each case, depending on the socio-political organisation of the group.[125] The discourse of the commons, although not fully elaborated on here, provides for such possibilities.

The problem is still: how do we formalise African indigenous land tenure in the registration system, or indeed whether or not we should. The problem is that the South African registration system does not allow for the registration of African indigenous land rights, but rather classifies rights in terms of the common law notion of "ownership". Moreover, a study by Kingwill has shown the effect of titling on tenure security in two communities in the Eastern Cape in South Africa, and found that in black freehold areas "property relationships between various associated members of families or lineages are more relevant in defining ownership than the currency of title deeds".[126] Therefore, even in cases where rights or tenure are titled, people still evaluate their rights and security in tenure in the social context rather than relying on who the "title deed" owner is. Pienaar proposes a land information system that works parallel with the deeds registry system, recording the various interests in land.[127] If the formalisation of land rights is found to be the only route to secure tenure, this seems like a viable option. In this context, the framework of the commons might help by providing a vocabulary or mechanism through which to do it. Such formalisation should aim to recognise existing occupancy of the land and should include a wide spectrum of rights, not just ownership as favoured in common law. This is where the vocabulary of the commons might prove to be helpful.

123 Okoth-Ogendo 1989 *Africa* 9.
124 Okoth-Ogendo 1989 *Africa* 9.
125 Okoth-Ogendo 1989 *Africa* 11.
126 Kingwill "Custom-building Freehold Title" 185.
127 Pienaar "Land information".

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List of abbreviations

LCP	Law and Contemporary Problems
SAJHR	South African Journal of Human Rights