

AFRICAN INDIGENOUS LAND RIGHTS IN A PRIVATE OWNERSHIP PARADIGM

WJ du Plessis*

SUMMARY

It is often stated that indigenous law confers no property rights in land. Okoth-Ogenda reconceptualised indigenous land rights 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 the access and use of land.¹ He offers a different understanding of indigenous land rights systems by looking at the social order of communities that create "reciprocal rights and obligations that this binds together, and vests power in the community members over land". 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: who may have access to the land (and what type of access)² and who may control and manage the land resources on behalf of those who have access to it?³

There is a link with this reconceptualisation and the discourse of the commons. Ostrom's classification of goods leads to a definition of the commons (or common pool of resources) as "a class of resources for which exclusion is difficult and joint use involves subtractability".⁴ The questions this article wishes to answer are: would it firstly be possible to classify the indigenous land rights system as a commons, and secondly would it provide a useful analytical framework in which to solve the problem of securing land tenure in South Africa?

* Elmién du Plessis. BA (International Relations), LLB, LLD (US). Senior Lecturer, Department of Public Law, Faculty of Law, University of Johannesburg. E-mail: elmiendp@uj.ac.za.

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

2 See Ben Cousin's comments and examples in Cousins "Characterising 'Communal' Tenure" 122.

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

4 Feeny *et al* 1990 *Human Ecology* 4.

KEYWORDS: Indigenous law; African indigenous land rights; property rights; African indigenous land tenure; the commons