

**History and African Studies Seminar
University of KwaZulu-Natal**

Tradition in Transition: the gendered origins of Our Time

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ABSTRACT

This paper was read at a Workshop held by the Law, Race, and Gender Research Unit in the Faculty of Law at the University of Cape Town on 27 January 2010. Apart from a change to the concluding paragraph the original format has been retained. The paper argues that to understand the historical dynamics of colonialism and its aftermath in southern Africa it is necessary to understand the productive processes of its pre-conquest farming societies, hitherto obscured by the ideological pre-conceptions imposed by capitalist modernity. Unlike merchant or capitalist economic systems concerned with the production and exchange of objects, these societies were founded on productive processes which created value in animate objects, that is living things. The implications of this were and are hugely significant. It determined inter alia the nature of the transformation of pre-colonial to post-colonial society, systems of taxation, access to land, administration, and the initiation and the evolution of customary law, the survival and intensification of patriarchal authority, and the very real difficulties germane to the arguments around the nature of traditional leadership and customary law and their implementation as recognized by the Constitution.

inkosi yinkosi ngabantu: “A king is a king because of people”¹

Intonga nge yo mgauli: “A stick belongs to the one who cuts it”²

Mosali ke morena: “Woman is chief”³

“One link [of a chain, a necklace] only sounds because of another”⁴

¹ C.L.S.Nyembezi, *Zulu Proverbs*, (Johannesburg, 1963), p228.

² Killie Campbell Library. James Stuart Collection, Mkotana, file 62, notebook 74 and translated in *The James Stuart Archive*, eds C.deB.Webb and John Wright, II, (Durban and Pietermaritzburg, 1979) 258

³ D.F. Ellenberger, *History of the Basuto. Ancient and Modern* (London, 1912), p 298

⁴ E. Casalis, *The Basutos, or, Twenty-three years in South Africa* (1861),p311

I

Women in pre-conquest societies: the creation of value**History Law and Context**

I've been working for the last few years on a biography of Theophilus Shepstone, Secretary for Native Affairs in the Colony of Natal from 1846 to 1875, and generally credited with laying the foundations for indirect rule, the recognition of chiefly rule and customary law, all of which were to become essential features of colonial, segregationist and apartheid policy. The degree to which he deserves this reputation is debatable but the past lies heavily on the present so in October 2009 it was good to get out of the archives and attend the Workshop organised by Ben Cousins and Donna Hornby on "The land laws of Msinga and potential impacts of the Communal Land Rights Act" "Imithetho yomhlaba yaseMsinga". Now the Msinga area is particularly interesting historically: hot, dry, inhospitable it lay between the Zulu kingdom and the Natal settlers' most desirable winter grazing. It was under the authority of some of Natal's most independent and recalcitrant *amakhosi*, men who were well known from the borders of the Swazi kingdom to boundaries of the eastern Cape, where many had led their people into battle in the upheavals of the earlier part of the century, before coming home to re-establish themselves, but now under colonial rule. They were conservative men, and spent much of their official lives locked in bitter controversy with their voracious settler neighbours, the neighbouring Zulu kings, and Shepstone who in return for their support offered them security in the land and recognised their authority over their people – in order I argue not impose change, but to manage it.

It was therefore fascinating for me to be informed at the Workshop of how the research team perceived Msinga today, one hundred and fifty years on, and of the contemporary continuities with the past – not just in names but in the debates, about land, about law, about the way things should be run, the proper order of things. And not just fascinating, but challenging because, as we all know, things must have changed, they are never just the same. And of course this is just one variant of the pressing debate all around us at the moment on the role of custom and tradition, in contemporary democratic South Africa. Very, very simply: if customary law and traditional leadership are to be implemented under the constitution then they must be changed: but if they're changed how can they be customary?

Now it is in examining this contradiction that I believe that the historian has a special contribution to make. It is summed up in the phrase which overuse has made into a cliché – continuity and change. What I want to do today is to try and give the cliché some life by looking at continuity and change in tradition and custom in south African history in a number of aspects and at a number of levels. But to address the contradiction we have to identify not just what has changed, but what has changed of such significance, that it can be considered fundamental. And in the end this means identifying just what one considers to be central, and what is peripheral, to social existence itself – a point I am not going to expand on!

The October Workshop also introduced me to the work that is being done on Communal Land Rights Act and its antecedent the Traditional Leadership and Governance Framework Act, and the chapters in the multi-authored *Land, Power &*

Custom edited by Aninka Claassens and Ben Cousins,⁵ and the critique of contemporary attempts to initiate legislation in accordance with the Constitution's recognition of traditional leadership and customary law. Now as an historian I am finding it a formidable task not only to get a working familiarity with the legal arena, but to come to terms with the self-referential quality of legal argument: that in order to understand one aspect you are referred to another, in a continuing and from my historian's way of looking at it, a never-ending search for the ever-disappearing principle behind the precedent. So today I am going to speak using a different approach: that is the historian's attempt to nail down the past: to identify not just the linkages between social actions and organizations, but the breaks, the ruptures.

Just to point out where I'll be going:

The first point is about change: I want to assert not just the existence of what Polanyi called the Great Transformation, but the nature of that Transformation, in southern Africa.

This in turn depends on an understanding of what went before – what I call here pre-conquest society. What was unique to south-eastern Africa before conquest I will argue was the primacy of the social and economic role of women, initiated by a set of social processes that the colonial conquerors called marriage.

In the second part I look at some of the implications of this – in relation to power, and to land, and to the law introduced into this system in the name of custom, customary law.

To finish I consider how these ideas might be applied with reference to the legal recognition of custom and tradition in the Constitution and to speculate whether the Constitution provides a way to revive principles of pre-colonial governance as law today.

I said I wanted to nail down the past. Contextualise would be a better way of putting it. Contextualisation embeds history as well as law in the experience of those who lived it and embeddedness is a concept much used in contemporary debates on land rights. It draws attention to the need to see people not as isolated, atomised, individuals, but as members of social networks drawn together by a range of social and economic roles and responsibilities. And it is the latter aspect, the economic, that I feel is insufficiently stressed in the literature. Not economic in the specialised, externalised sense it is generally used today, but as embedded economics if you like, socialised economics, as the range of activities involved in the production of material life.

I want to start on the defensive. The dangers and difficulties of outlining the process of change are many. While working on this paper I was reminded of Chanock's discussion of two influences on the development of customary law. The one included the missionary, the native commissioner, and then the anthropologist all "various brands of white practitioners of the arcane art of native law"⁶: on the other was the legal authority, expert at "the practice of 'finding' principles of law in old and obscure authorities".⁷ I hope I don't fall into either of these categories. I hope also that when

⁵ Aninka Claassens and Ben Cousins (eds), *Land, Power & Custom. Controversies generated by South Africa's Communal Land Rights Act*, (Cape Town, 2008)

⁶ Martin Chanock, *The Making of South African Legal Culture 1902-1936. Fear, Favour and Prejudice* (Cambridge, 2001), 355

⁷ Chanock, 337

treating in summary form the changes from the pre-modern to the modern that I don't give the impression that I have fallen into the trap of social evolutionism. I am aware of the culturally-bound evolutionary ideas of progress implicit in so many of these arguments. I know that in discussing another's culture and tradition there is the danger of creating an Other. I am aware of the unreliable, colonial nature of historical sources. But I also hold the view that there exists in the historical sources evidence which reflect usefully on the pre-conquest history of this country, and if perceived in its dynamic totality, can give pertinent insights into the past and with it contemporary debates. And now at a time when debates on the nature and significance of South African culture is a major item in the popular press,⁸ with a direct influence on political debate at the highest level, and the historical development of law is being revisited under a constitution⁹ which recognises "the institution, status and role of traditional leadership according to customary law" it is interesting, possibly useful, perhaps even necessary, to consider again the origins of southern African law and custom.

The Origins of Our Time

Tradition, law, custom, community are all concepts which raise historical questions of great difficulty. There is emotional interference caused by the tendency to discover in the past better times, times less sullied by a sordid modernity. Working against such counter-evolutionary arguments are the evolutionary ones of progress and civilization heavily marked in colonial contexts with racism. Both these understandings depend upon reductive essentialist arguments – I want to counter them with an argument that selects a number of historical features which in their dynamic interaction reflect on social and economic, not progress, but process.

A book that deals magnificently with this is Karl Polanyi's *The Great Transformation*. Polanyi's book gives an historical explanation of how the idea of the market came to dominate our lives at a very specific moment in history.¹⁰ But it not just the argument, even the title of Polanyi's book is interesting: *The Great Transformation. The Political and Economic Origins of Our Time*. His Great Transformation, industrialisation in its widest sense, is a global phenomenon. South Africa participated in it, but it came from the outside, by force, with colonial conquest. So while participating in the global process, the specificities of southern Africa influenced its particular course of development here, and I would like examine just what was specific to our Origins.

To do this we have to move away from the suffocating idea that custom and tradition can exist outside of time, and try and establish some sort analytical bench-mark. Labour can be seen as the most universal of all social processes, indeed for Marxists the defining one, but merely to state this is to be provocative unless labour is given content and contextualised. So to begin I want to summarise briefly what we know about the geographical, spatial context in which this labour took place in pre-conquest southern Africa. I then go on to argue the thesis upon which these arguments are

⁸ Charles Molele, "Is this culture, or bling-bling?" <http://www.timeslive.co.za/sundaytimes/article264101.ece>, accessed 17 January 2010.

⁹ Aninka Claassens, Chapter 14, "Customary law and zones of chiefly sovereignty.....", in *Land, Power & Custom*. p364.

¹⁰ Karl Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time*, (Boston, 2001).

based: that woman's labour is the key to understanding south-eastern Africa's pre-conquest societies.

Marriage and the CCP

The eastern side of southern Africa, south of the Zambezi river, where the rainfall exceeds 400mm per annum, contained the most densely populated regions of southern Africa. From the beginnings of history it was lived in and dominated by gatherers and hunters until, about two thousand years ago, iron-using farmers began to occupy the region. In the process they left behind a fragmentary record of the households in which they lived and the homesteads by which they organised their lives. The archaeological evidence read together with the ethnographic record and the first historical accounts suggests that the households were the living places of the women and children of the husband and father, that is the male homestead head, the *umnumzane*. These households were built around a kraal into which livestock was driven at night, and together they formed the homestead which contained the different households' living spaces. Attached to each household but spatially separate were the specific areas of land for cultivation. It is widely accepted that the occupants spoke a Bantu language whose related verbal roots and structural similarities suggest a rapid movement into the favourable farming environments occupying the wetter eastern part of the sub-continent concentrating on those places where animal and human diseases were confined by altitude and latitude.

Historians, archaeologists and anthropologists have used a range of features to reconstruct the activities of these farmers, categorise them, and place them in a time frame: for example by their productive activities as agriculturalists and pastoralists; by their metallurgical skills as in the early, middle and late iron ages; by ceramic type; and by the organisation of productive, social and religious space. The dominant idea which emerged from these studies was that, despite the enormous variations in size and material, from the huge royal homesteads of the trading states of Mapungubwe and Zimbabwe a thousand years ago, the towns of the highveld whose intricate stone walls still mark the better watered parts, to the royal homesteads east of the escarpment, whose wooden fences and thatch have gone but which have occasionally left behind their outline and the baked floors of the houses they once incorporated. But no matter how varied in material, situation and extent it is widely accepted that they were all organised around a common spatial paradigm that has been conceptualised as the Central Cattle Pattern (CCP).

The CCP suggests that the homestead was structured around a gendered division of space. Male power was located in the house at the head of the homestead, male political and religious spaces were associated with the cattle kraal, the polygamous structure indicated by the households ranked in an arc on either side of the homestead head, all pointed to a gendered division of labour with women associated with agricultural production and men with livestock.

Although the evidence provided by archaeologists on the CCP has been extremely important I believe that there has been a tendency to stress perceived cultural aspects at the expense of its more obvious material ones. The evidence indicates a metal-using, farming, cattle-keeping economy entering and developing in a healthy, favourable environment, changing it, changing themselves. But cattle as large, clumsy, alien, domesticated creatures, in a hostile environment were vulnerable and to

survive and reproduce they needed human assistance, protected, guarded, day and night. It is these needs that were met, I would argue, by the structures of the homestead, fences, walls and houses surrounding the cattle kraal which determined the essential features which can be discerned in the Central Cattle Pattern.

And this is more than just a rather obvious debating point about the explanatory primacy of material over cultural considerations. It was in these homesteads that production took place in pre-conquest societies. Although they were largely autonomous in terms of production they were linked to more senior homesteads, ultimately to the homesteads of the ruler himself, organised on the same principles. But I want to deal with the horizontal links between homesteads, and the most significant of them all, the links marked by the movement between homesteads of women against the movement of cattle, the process completely inadequately referred to in English as “marriage”.

The basic features of this are well known. In order to found a new homestead, or create new houses within a homestead, the homestead-head (husband) would exchange a number of his cattle for a wife –that is the daughter of another genealogically distinct homestead – whose household would be ranked amongst others around the central cattle kraal. As a father he would in turn supplement his own herds by receiving cattle from another distinct homestead for his daughters. It was the steady, unending, movement of cattle and women’s labour in the control of men, between homesteads, which made up the reproductive and productive cycle upon which these homesteads were founded.

labour power

I cannot overstate the importance of this. The productive process upon which pre-conquest societies were founded can be located in the movement of cattle and women. The point is that this process – marriage, *lobola*, bridewealth, call it what you will - is not just an aspect of pre-conquest societies – but the one which determined and defined it and against which we can measure social and cultural change and I want to spend some time on it.

Beyond the most obvious physical aspects of the transaction what was being exchanged was the woman’s capacity to produce – cattle were exchanged for the woman’s capacity to carry out the agricultural and the domestic work needed to support her household within her husband’s homestead, and to reproduce – her fertility: that is she had to produce and support the children within her household as members of the homestead. If she failed in either of these objectives, production or reproduction, the *lobola* cattle were returned and marriage annulled.

What was being exchanged on what is called marriage was in fact labour power. Labour power is of course not just a Marxist concept, but Marx’s concept – he considered it his most important contribution to economic science and essential to his study of capital. I believe it can be applied very usefully to the study of pre-capitalist societies in southern Africa. Labour power can be distinguished from labour in that it is not observable, enacted, physical work, but a conditional abstraction: it is the potential to work, the capacity to produce – and the conditions under which marriage was arranged, and upon which *lobola* was organised, was just this – a social agreement dependent upon a women’s potential to work productively agriculturally,

domestically, socially and her capacity to found the next generation's homesteads, those of her sons, and also the households in the homesteads of the husbands of her daughters.

It was on such social agreements that pre-conquest societies were founded. The word "marriage" to describe them is a poor and misleading term. It was upon this social transaction that the homestead and the houses within them were created and it was aggregations of the homesteads, brought under the political authority of an *inkosi* which made up the political entities – the chiefdoms – into which the people of southern Africa were organised. And it was production within the homestead upon which these chiefdoms depended: organised by men as fathers and husbands and pastoralists in possession of livestock: and women, in the control of a father or husband, but each with her own household, its fields and its products. It was not for nothing that the so-called Zulu regimental system was founded on the king's control and timing of marriage throughout the kingdom – or that the enormous power given to the king by this control over marriage has been hidden for two centuries by militarism, for marriage although in the control of men signified the mobilisation of women's social force and energy.

Ultimately, what was being produced and reproduced in this process was people. It is widely recognized that in pre-capitalist societies a dominant social goal was to increase the number of people making up a social unit. In southern African societies the number of people under a man's control, as *umnumzane* or *inkosi*, or to put it in terms of social units the *umuzi* or the *isizwe* – or as far as a wife was concerned the *indlu*, the household, was a prime social objective. To move for a moment into the world of historical sources, in 1851 Phakade kaMacingwane *inkosi* of the Mchunu, on being charged with driving away some people accused of witchcraft said:

Phakade wishes the Government to ponder well the circumstances of "Abatakati" he wishes it to be borne in mind that a Chief prizes his men most, that his greatness depends upon the number of them, that consequently they cherish and are always endeavouring to increase them¹¹

This desire for people, is conventionally and inadequately explained as some sort of insurance against old age, spreading risk and so on, but as so often happens when perceptions developed under capitalism are transferred to pre-capitalist societies, such ideas are misleading. It is easier to explain and understand them if we conceptualise the social goal at a higher degree of abstraction, not just as numbers of people but as the accumulation of labour power – that is the creation and the control of the capacity to work – within of course the productive process that I have been describing. The central impulse, the heartbeat of these societies, was provided by movement of women against cattle, in the control of men, and the productive and reproductive forces that this set in motion.

The significance of cattle, as part of the male world from which women were excluded, has always been recognised, in oral sources, from the first travellers' accounts, to Marguerite Poland's recent evocation of the symbolic, visual and literary world of cattle in her book *Abundant Herds*. The role of cattle however has not I believe been understood. Cattle have been seen, correctly, as a store of wealth, but they have been analysed as if they were commodities in a capitalist system, a bank, amenable as a famous contemporary anthropologist once suggested to cost-benefit

¹¹ PAR, Secretary for Native Affairs, 1/7/1, Statement, 26 October 1851

analysis. More often, unable to see the role or significance of cattle outside of a system based on the commodity-accumulation of things, the accumulation of cattle became for analysts, irrational – the notorious “cattle-complex” which dominated so much of the literature. Cattle were indeed the mark and the measure of value, but within a system founded on the productive capacities of women. Within this process material objects (hoes, spears, skins, pots, baskets, beads, ivory) and labour might be bartered or even exchanged as commodities: but ultimately their exchange value was assessed and realised in cattle – because the exchange of cattle was necessary for the reproduction of the fertile and productive women who were exchanged for cattle...., and so the cycle of production within the homestead upon which the society as a whole was structured and depended, continued.

Wealth and Value

Wealth therefore did not lie merely in accumulating cattle or people. To assume this is to transfer the idea of the alienated product, fetishized in societies organised around the production of inanimate things. These were societies based on accumulation, but the accumulation of people in their capacity to produce, they were not based on the accumulation of things to be exchanged for more things. They were organised around the production of animate life – of living things, of cattle and people, the accumulation of which in the hands of men, was the ideal of these patriarchal societies. But this depended on women – their production and reproduction in the households within aggregations of homesteads, – and in the process created not just a household, but a complete, materially self-sufficient, place of production and belonging, a home.

But it was a divided home – as it was a divided society – divided in terms of gender and of age (or more accurately fertility). The labour power of women on which it was founded lay in the control of men – as fathers and as husbands – and it was realised in marriage by the exchange of cattle, and cattle were also in the control of men. And this control was given expression in the CCP’s male space – the cattle kraal at the homestead’s material, historical, political, ritual spatial centre.

Having said this it does not mean we can merely transfer contemporary ideas of oppression and exploitation to our understanding of pre-conquest societies. Nor can we do this with economic concepts. It is only at the most shallow of levels of analysis, although not of course shallow in structures of feeling, that there is continuity between the pre-conquest and the post-colonial. These weren’t societies to which ideas and concepts – buy, sell, marriage, wealth, invest for example – derived unconsciously and uncritically from a capitalist system can be directly applied, except at the most superficial level. These are analogous rather than analytical terms; we have to get through and beyond them, if we are to deepen our understanding of their social role and the structures of the societies in which they were made manifest. The essence of these pre-conquest social formations, their dominating, integrating feature, was the accumulation of living things – human beings and their labour power – which was valued in terms of livestock and realised in the establishment of the homestead as the productive unit. I myself find I find it interesting to think of them as animate modes of production; built on the production and accumulation of warm, physical living things, profoundly, qualitatively, different from inanimate modes of production like capitalism based on the accumulation of inanimate objects – of things. The shift from animate to inanimate modes of production, from embedded to disembedded,

from embodied to disembodied, was profound and although still incomplete and contradictory it was a transformation as radical and as painful as South African history itself.

Now with these concepts in mind, in conjunction I have to stress, interrelated, and working together as parts of process (– the discrete homestead as the unit of production, making up with other homesteads the political community, the gendered division of production, the central significance of production and power over people, exemplified in male control over the homestead in which production took place, the value of women in terms of their agricultural productive and domestic reproductive capacity measured and initiated by the reproducing male asset, cattle –) with all this in mind I come back to my starting point, that pre-conquest Southern African societies were based on productive and reproductive labour which had its creative source in the productive and the reproductive capacity of women; they were societies in which value was created, regularised and set in motion by a set of cultural practices which are called today, inadequately and misleadingly, marriage. These were societies based on the power of women – and for just this reason this power had to be strictly ordered, controlled and contained, by the authority of men.

II

Power and the People in pre-conquest societies: land and the law

embedded societies

So far I have put forward the idea that the productive processes fundamental to southern Africa's pre-conquest societies were carried out by women in labour on the land and in the homesteads, made possible by the exchange of women's productive capacities for cattle which remained in the control of men. I now want to look at some of the historical implications of this.

Firstly, power was created at the place of production, with the people, – it might be situated in a chiefly political hierarchy and expressed in terms of military capacity, patriarchy, deference and ritual but it originated in the organisation of the households and for this women were responsible. And it must be stressed that this was not domestic reproductive labour as an adjunct and peripheral to the dominant centres of production. The homestead and the houses within them were in aggregation the domains of production and reproduction upon which the society as a whole was founded. It is here that any analysis has to begin and end – and of course it is just this domain that is most effectively hidden from history. When it has been studied, – by anthropologists for example – it is too often removed from society as a whole and considered as an alien, manifestation of the pre-modern or the traditional – most famously as a kinship system. Or it is characterised as everything that modernity is not; without private ownership it is seen as communal tenure from which a series of misconceptions follow, including the failure to identify the divisions and the dynamism of pre-conquest societies.¹²

¹² Ben Cousins, Chapter 1, "Contextualising the controversies: dilemmas of communal tenure reform in post-apartheid South Africa", in *Land, Power & Custom*. pp5-6.

Much of the difficulty in identifying what is specifically different about pre-conquest societies is created by the interference of our own experience of societies organised on different principles: this creates an incapacity, even as we articulate the problem, to escape from the ideological constraints of our capitalist history and times, and think in essentially different terms and from different premises. Polanyi's starting point applies – that contemporary economists were so obsessed with market-driven explanations of society, that they saw the market everywhere and in all historical eras. To counteract this Polanyi dealt first with his own understanding of the emergence of political economy in Europe in the eighteenth century, and then extended his reach to ancient history, before looking at examples from Malinowski's work, and then on to West African trading states. From this he was able to argue that people weren't always individualistic, market-driven, cost-benefit calculating, entrepreneurs. The idea of the economy – as something out there, something to be studied, a discipline, determining the lives of people in society was in fact created quite recently – by the classic political economists. Conventional economic thinking was unable to transcend its own history – in fact it was unable to perceive its own transformation.

It was not that these profound changes had been not been delineated before. It formed part of the thinking of Hegel and in the mid-nineteenth century Marx extended it in his critique of political economy. Maine's study of Roman law saw it in the move from the categories of *status* to *contractus*. Ferdinand Tönnies spoke of the difference between community and society, or *Gemeinschaft* and *Gesellschaft*. Polanyi developed the idea of embedded and disembedded economies. In the South African case I am drawn to the idea of the embodied and disembodied. It was a process by which human beings came to believe that they were controlled by disembodied abstract forces – the profit motive, the laws of supply and demand, the self-regulating market. In this way of thinking the economy stands apart from society, external to it, to be analysed as a separate entity identified and driven by autonomous forces. And for Polanyi, writing in the middle decades of the last century it was Malinowski who convincingly demonstrated in his fieldwork that

the elements of the economy are embedded in noneconomic institutions, the economic process itself being instituted through kinship, marriage, age-groups, secret societies, totemic association, and public solemnities. The term 'economic life' would here have no obvious meaning.¹³

My argument is similar – my starting point is different. We are concerned with societies which developed over some two thousand years by farming peoples adopting very successfully to an new environment particularly well suited not just to their crops but to their livestock. Their productive success was realised in a system organised around people – my argument is not a normative humanitarian one but one which draws on the economic concept labour power which I believe has considerable historical and social relevance. Even when the original productive system had gone its consequences continued to reverberate in the present in notions of property, ownership, social obligation, law.

Land, labour and law

Take the matter of land. As with economics we (urban moderns) tend to think of land as out there – something to be possessed, invested in, let out, represented and

¹³ Karl Polanyi *et al*, *Trade and Market in the Early Empires. Economies in History and Theory*, (Glencoe, Illinois, 1957), p70.

exchanged by pieces of paper, all processes not necessarily directly associated with the land as the means of living at all. In pre-conquest times land was perceived differently. Firstly as space, as territory—“it begins in these mountains and stretches to that river”. Territory became land when it was used by people and this can be seen in the way it was described – not the genitive but the locative formation was used – kwaZulu, the place of the Zulu.

Right to land was linked to political authority and defined as a relationship. In siZulu the verb is *ukukhonza* – to **give** allegiance is one aspect of it – to **receive** land is the other. *Ukukhonza* signified a relationship which integrated place, people, production, and power with access to land. Political authority and loyalties were defined not in terms of territory but in terms of a relationship with a person. Land rights were defined in terms of a personal not a territorial relationship.

It was a right to land, and an obligation on the part of the *inkosi* to protect that right, and his subject to use that land productively. This fundamental point was made many times and in many ways in the nineteenth century. I will use Moshoeshoe’s classic statement as an example, made in 1845 when he heard that people to whom he gave “temporary hospitality” as “mere passers by” were dealing secretly in written title amongst themselves:

I could not, according to the custom of my tribe, alienate any portion of my territory without the consent of the people. It would be on my part introducing an unprecedented practice. The people I govern look upon me as being entrusted with the preservation of their country, and I could not forfeit or cede my right to any part of it without being considered as having robbed the community.¹⁴

But even here we have to make sure of our meaning – the chief’s obligation was to protect the territory in which his people worked the land: his people were required to recognise his authority and work the land productively. The pivot which linked these reciprocal obligations was not the occupation of land as an owner of territory, but occupation of land as a means of production – the land had to be put to use, beneficial occupation. Government was based on the provision of land on which the people produced their means of livelihood. A government which did not do this cannot be said just have failed – it negated the concept of government itself. We can hear this even in the weak translation of this statement made to James Stuart in 1902

How is it you come to treat us thus, seeing we are your people? Where is that government or king that owns no land? Why are individuals able to oust government subjects from the soil? . . . Let that land which is government land appear, and let us black people build and dwell thereon, and enjoy some security and rest.¹⁵

Statements like this throw light on the debate on whether colonial governments exaggerated the right of chiefs to grant land. It is not so much a question of over-emphasis, it is a question of misinterpretation. The claim of access to land and the obligation to provide it was not an aspect of government, it **was** government: a concept of government not merely responsible for securing, granting and administering rights to land but one which was premised on the productive process itself. And the term “productive process” is a ruthlessly pared-down abstraction for

¹⁴ Moshoeshoe to the Secretary of Government, 15 May 1845, *Basutoland Records* G.M.Theal, I, (Cape Town, 1883), p 86.

¹⁵ Mkando ka Dhlova, 29 July 1902, in *The James Stuart Archive*, eds C.deB.Webb and John Wright, III, (Durban and Pietermaritzburg, 1982), p155.

people's lives – the homestead, those who lived in it, the gendered divisions amongst them regulating work and access to land and its products, the mobilisation of labour needed to create from the land the means of subsistence and surplus realised in livestock which, as people, was the end in which all activity in these societies was resolved.

Whether we are considering the obligations of the *inkosi* to the homesteads of his people, or the obligations of the homestead-head – the *umnumzane* – to the *umuzi*, we can apply similar principles. It is not merely that a wife had a right to a household and arable land – the concept of wife and marriage contained the home in which to live and the land on which to farm. It is true that it was not held in her own right, but was a consequence of her relationship with her husband as the homestead head. But it is equally true that that land was hers to work, and that she had control over the produce, and that the household was hers.¹⁶ Again, I would argue that this is more fundamental than a right to the land: her access to land and its produce was intrinsic to her relationship with her husband the homestead head. And it was in the households, in these homesteads, in aggregation, that the labour was expended and the produce created upon which the society as a whole depended. From the *inkosi* and the *isizwe* to the *umnumzane* and the *umuzi* the links of authority are male in a patriarchal society. But they were created out of the labour, in all senses, of women.

And this labour, this use of the land, gave rights. A saying not well known but one which I believe to be significant and I think it can be widely applied is *Intonga nge yomgawuli* – a stick belongs to the one who cuts it. Now this links ownership to productive labour. If we extend it to the productive process generally it can be applied to men's work with livestock, and women's domestic and agricultural work and its products, labour giving both a claim to ownership of the product and a claim to compensation if that product was appropriated. Value is created not in speculation, or the entry of the product into circulation through barter or exchange, but in the labour invested in its production. And a claim to the product was measured in the labour consumed in its creation.

I would suggest that the mutual obligations within and amongst homesteads are reflected in the idea of *ubuntu* – not of course in its contemporary manifestation as a management strategy, nor even as an African expression of a universal humanism,¹⁷ at least until the often quoted “*umuntu ngumuntu ngabantu*”¹⁸ is placed more securely in an historical context. It is rather one of a number of sayings¹⁹ like “one link [of a chain, a necklace] only sounds because of another”²⁰ which reflect the proximity and immediacy of pre-conquest economic relations and the reciprocal demands and mutual obligations which must arise in societies in which value lies in people – not forgetting of course that this was achieved by means of a patriarchy in which women were dependent on men.

¹⁶ See the a wide review of sources made by Claassens and Ngubane in 165ff in *Land, Power & Custom*. p364.

¹⁷ Constitutional Court CCT/3/94, *State v. Makwanyana and Mchunu* (1995).

¹⁸ Drucilla Cornell, “uBuntu, Pluralism and the Responsibility of Legal Academics to the New South Africa”. Inaugural Lecture, Faculty of Law, 10 September 2008. Ellen K. Kuzwayo, *African Wisdom*, Kwela, 1998, p15.

¹⁹ For example Nyembezi, *Zulu Proverbs*, p52 “Izandla ziyagezana (Hands wash each other)”

²⁰ See E. Casalis, *The Basutos, or, Twenty-three years in South Africa* (1861)

More historically grounded is a related but very different saying that encapsulates the points I have been making so far is the well known “A chief is a chief by the people, *inkosi yinkosi ngabantu*”. It is open to a number of essentially supportive interpretations all of which I would argue are significant. It establishes the direct relation between power and numbers of people that I discussed earlier. It confirms the creation and control of people as the prime economic, social and political goal. But most important it breaks down the dichotomy between chief and people – it not only unifies them but it makes them mutually dependent. It counteracts the view, a feature of both pre- and post-conquest eras, that gives power and significance predominantly, even exclusively, to the chieftainship. Applied as a constitutional principle it could work towards what Claassens wants living law to achieve:

It potentially widens the making of customary law beyond chiefs and bureaucrats to include the multiple actors who are engaged in ... day-to-day local struggles.²¹

Locating Transformation

For the most part, when capitalism in its colonial form expanded into southern Africa it eradicated the societies it found there. Following the pattern in the rest of the world where settler societies were established the native people were destroyed or removed and the land appropriated as state or private property. But what made South African society unique was the limitation that the demographic and material strength of these metal-using farming people placed on settler expansion. Eradication was not always possible, or even desirable in settler economies seeking cheap labour, and efforts were made by colonial administrations to retain some form of economic and social continuity. As a consequence a significant proportion of those who were forcibly brought under colonial rule were left on the land, under a range of different systems of tenure. Tenancy on private land was one - and tenancy entailed the preservation of the homestead by means of an agreement with the homestead head for the labour of those living within the homestead. The setting up of reserves also left the homesteads intact while different methods were devised to incorporate them into new colonial systems.

I can't go into the details here but I have in mind the system with which I most familiar – what happened in Natal and then Zululand. But at a distance the features are familiar: restriction of access to land, limited recognition of compliant traditional authorities, taxation, labour migration, exploitation through the wage, the entry of money into the rural economy, growing population and inadequate resources, and the exploitative and dehumanising characteristics of racism in its many aspects. But these were consequences coming in the train of the imposition of colonial rule: the first move had already been made; recognition of the significance of the homestead and its simultaneous exploitation. Take the hut tax for example, soon to become a feature in much of colonial Africa but initiated in Natal in 1849. It was the appropriation of women's labour by the colonial administration, imposed on their husbands, assessed on the number of huts, that is households, within his homestead. As a result, in the early years of the history of Natal, colonial and imperial rule was predicated on the productivity of women's household management and agricultural labour.

As significant an instrument was the law, with customary law working towards colonial control by ensuring a certain continuity in a situation of radical change. Most

²¹ Claassens, Chapter 14, “Customary law and zones of chiefly sovereignty.....”, in *Land, Power & Custom*. pp362-3.

bizarre was that formidable creation of the colonial imagination – the Supreme Chief, this colonial Frankenstein who, in a perverse imitation of an African king, was vested with unbounded authority. While at first he was used to legitimise the application of customary law, and statutory law affecting Africans, it was only in 1873 when the prosecution of Langelibalele exposed customary law as a legal farce, that it was shored up with the codification of 1875 and the more substantial code of 1887. Most of the Code was taken up with the details of homestead administration. It confirmed the process which **removed** the autonomy of the homestead while **reinforcing** it as an instrument of control. It contains details of “The Kraal family system” which concentrates on property rights and inheritance within the homestead. But this is done within a patriarchal framework in which the untrammelled powers of the Supreme Chief were delegated to the chiefs he appointed, to their district headmen, and then the kraal heads. Here’s how the code spelt out the legal changes:

71 All the inmates of a kraal irrespective of sex or age, are under the control, and owe obedience to the kraal head.

72 All the inmates of a kraal are minors in law, and are incapable of alienating kraal or house property.....

90 All Natives are either kraal heads, or are subject to a kraal head.

94 Females are always considered minors, and without independent power.....²²

The homestead was still far too significant to ignore, it still structured African lives and had to be incorporated into the colonial state if it was to be controlled and changed. But in so doing the code snapped the structural pivot that unified the chief and the people replacing it with a uni-directional transmission of authority. Instead of political power being situated, no matter how unequally, in a relationship with the people, it was now situated in the colonial state. Women retained productive responsibility for their households, but as legal minors they had lost the authority to control them.

This legislative authoritarianism was exacerbated by the more general, but related developments as industrialisation progressed, demands for cheap labour intensified, the migrant labour system was formalised, and the autonomy of the homesteads reduced further – a process which caused both kraal heads and chiefs to attempt to impose control by coming down even more severely on the people over whom they now had a new authority – no longer chiefs by the people, but chiefs over the people.

Identifying change

Again we all know this story in outline – still unfinished in its many manifestations. The point I want to repeat here is that at some time in our past there has been fundamental change, there has been a transformation, and for analytical, and legislative purposes we have to be able to identify it. If we don’t, we get caught in the trap where south African history is always repeating itself. For 150 years the homestead, however conceptualised – the kraal, the tribe, traditional way of life, the lineage or the domestic mode of production, has been about to come to end not only with pain and suffering as the old order passes, but with a threat to the existing order of things and a dangerous social instability. And yet it continues to exist, miraculously surviving in a state of prolonged imminent collapse. And again, part of this crisis is always seen as being caused by women: they are no longer the moral guardians of the home; they are increasingly disobedient, determined to desert the homestead and take

²² *The Natal Government Gazette*, 22 July 1890, Bill 38 of 1890.

up new and immoral ways in towns. Evidence for this can be found in the historical sources, primary and secondary, for over a century and half. The persistence of such ideas over such a long period of time is the result, I would argue, of the failure to identify the nature of fundamental change and situate it firmly – in the process of production.

This is difficult task, made more so in a context created by political ideologies that have reintroduced and reinforced elements from the past in changed situations in order to demonstrate that things have stayed the same. The analytical problems increase when the participants themselves chose to accept and defend these changes in the name of continuity, community, custom and tradition. Thus the homestead, materially shattered and empty, but as an idea and a memory still socially and politically powerful, can live on. The forms of marriage, polygamy, lobola, the importance of gendered roles remain significant in people's lives but in for different reasons, in a different context, fulfilling very different roles in the way they determine the powers of men and of women, their rights to land and property, and the nature of political authority.

Despite this, it is still not only possible but necessary to know where to look for substantial change even if it is rarely recoverable as a specific, definitive historical moment. To begin we have to consider the process of production and identify its ultimate goal – is the objective the production of people and their equivalents, or is it the production of objects as commodities? Specifically this means – when were cattle no longer required to realise the labour power and the fertility of women in a productive cycle in which the aim and the end was the creation and control of people? When was this, pre-conquest, pre-capitalist, pre-colonial, indigenous, south-east African system replaced by one founded on the production of things – not more people, but more commodities. Or to put the same idea in a different context – when did the homestead change from being an autonomous productive community based on the production of living things, to an adjunct of a wider system based on the production of objects – when did it change from being an embedded to a disembedded system, from an embodied to a disembodied one.

The change won't be found at a particular point in time but discerned as a historical process over time. Various aspects change at different speeds at different places. There are transitional changes – a homestead-head might invest money obtained by the sale of crops or cattle to pay the lobola of his polygamous homestead: another might sell the products of his polygamous households to invest in a savings account: these are all variants on a theme which is apparent only if one considers the productive process as a whole – was the homestead organised around the ultimate goal of producing and controlling more people – or was it part of a system organised to produce more things?

Tradition in Transition

No matter how they are manifested in the present, tradition, custom, and community area all concepts which imply a **historical** legitimacy. They are also concepts given **legislative** legitimacy by sections 211 and 212 of the Constitution. To finish I want to consider whether in pursuit of this it is possible to harmonise these historical and constitutional demands. Can any of the ideas presented here about pre-conquest society be usefully applied to the constitutional injunction that legislation be initiated

which takes cognizance of customary law and traditional leadership in their literal meaning, that is as they existed before colonialism?

Most obviously, I would argue, we could consider the ideas implicit in the saying a chief is a chief by the people, *inkosi yinkosi ngabantu*. It is widespread and well-known and seems to me to establish the principle that, by tradition and by custom, the recognition of a traditional leader has to be demonstrated by popular support. If we gloss *ngabantu* as by the grace of the people²³ it defines political authority and popular support as an interdependent process. It could be argued from this that, according to recorded tradition, chiefly authority cannot be granted unilaterally from above, nor can it be imposed unilaterally on those below: chiefly authority is dependent on the popular support and the people's will – however this is ascertained.

Such sayings cannot be seen as abstract principles (it is often easy enough to find a contradictory one) but as reflections of attitudes whose significance is derived from the context in which they were used. For example it can be argued that chieftainship was hereditary. But historical evidence suggests that while inheritance was a factor it was not an overriding one. As Jingoos pointed out in *A chief is a chief by the people*, there was always a range of candidates from which to choose.²⁴ And to take examples from the pre-colonial histories of the men who became *amakhosi* in the Msinga area, they included the Mchunu *inkosi* who had asserted himself over other claimants in the aftermath of the *mfecane*, and Jobe of the Sithole who was descended from a man selected by the Zulu kings and not from the chiefly lineage. In the 1850s the Sithole *inkosi* came into conflict with the colonial authorities and much of the Sithole land was handed over to the Majozi – whose *inkosi* Ngoza was a commoner who as chief *induna* to Shepstone had become, in terms of the number of people under his authority, the most powerful *inkosi* in Natal, and recognised as such by the neighbouring Swazi and Zulu kings. And although I am concentrating on the pre-conquest era, mention must be made of a man who, at the request of the freehold title-holders of his community became their “Chief” – Albert Luthuli. In fact the KwaZulu-Natal Traditional Leadership and Government Act recognises *iziphakanyiswa* (those raised up to chieftainship) “by virtue of an electoral procedure or appointment”.²⁵

Now all this raises the question of who are the chief's people? Before conquest they were people who recognised his authority and to whom he was therefore obliged to give access to land. But power based on people, the very essence of pre-conquest societies, had to be prescribed in colonial regimes. Colonial administration sought to restrict chiefly authority by defining it in terms of territory and then limiting that territory to specific bounded wards. The shift from the personal to the territorial definition of chiefly authority is one of fundamental significance – but in spite of massive legal and political attempts to enforce it I am not sure that even today the notion that chiefly powers are personal ones has been eradicated. It is perhaps an idea that could be developed in a democratic regime to reinforce the principle that

²³ As is suggested in I. Schapera, “Political Institutions”, I. Schapera (ed), *The Bantu-Speaking Tribes of South Africa: An Ethnographical Survey* Cape Town, 1959, p184.

²⁴ *A Chief is a Chief by the people. The autobiography of Stimela Janson Jingoos*, (London, 1975), p183.

²⁵ Act No.5 of 2005, 29 (1), my italics.

demonstrable popular support is a feature of all political authority – including that of *amakhosi*.

From here the next step is to consider the question of rights to the land generally. Before conquest land delegated to the homestead-head and which he delegated to the households, had to be used productively. Indeed land was not land if it was not used – merely territory. And there is a suggestion that productive use gave prior rights: when in 1905 Mtokana told James Stuart that “A stick belong to the one who cuts it” he added, “This principle operates in land matters, especially where a man is encroached upon by a newcomer.”²⁶ It also implies that a right to the product was vested in the producer, all of which resonates of course with the Freedom Charter: “The land shall be shared among those who work it”.

I think these principles might usefully be kept in mind at a time when, as part of the incorporation of customary law and traditional leadership into a common legal system, land now held by the state is to be passed to the community. Now without entering the seemingly intractable problems of defining a community today, it is useful to consider the community in pre-conquest times as it existed at the level of the homestead. Here the mutual obligations between chief and people, were reflected in the economic relations between husband, wives, and children. Just as the chief’s authority was dependent on the people, so a husband’s was dependent on his wives. They were not wives unless they were productive and they could not be productive unless they had access to land and control over the product. It is impossible to conceive of a wife without land, and without her household, under her control. Of course the homestead was a patriarchal institution, but it was built on women’s productivity and even within a profoundly patriarchal context this gave women access to land, control over its product, and therefore power. In aggregate the households within the homestead were the foundation of the society as a whole: it was here that the people and their labour power was created, accumulated, organised and transferred; it was in the exchange of women for cattle between homesteads that male power was based. Nonetheless a woman’s right to land on which to labour and to build her household and to retain the produce of her labour was foundational in pre-conquest societies. This right was first exploited, and finally denied by colonial customary law and replaced with male authority imposed from above.

To end – it is argued in these postcolonial times that in the search for custom and tradition we should turn away from the binaries of the pre-colonial and the colonial and give support to a living law – created by people, usually poor people, out of conditions forced on them, but that they were able to a degree to turn to their own advantage and upon which they depend in the course of their daily existence. It is law created by practice in difficult circumstances, relevant to the existing situation, accessible, and sufficiently flexible to accommodate change. However, it seems to me that in a world of intense debate and controversy legal flexibility without principle is vulnerable to opportunism. Nor is it possible without historical evidence to question the judgements of those who argue in terms of their access to culturally closed systems.

²⁶ *The James Stuart Archive*, II, p258. cf. Claassens, Chapter 14, “Customary law and zones of chiefly sovereignty”, in *Land, Power & Custom*, p375.

This paper by drawing on and generalising from historical research, attempts to show ways in which living law might draw on pre-conquest law, but pre-conquest law not conceived so much as law that has **survived** from earlier times, but liberated law, law **revived** by the application of the freedoms and requirements of the Constitution. The Constitution has given customary law life, changed a moribund, inflexible, authoritarian, deceptive legal system into a living one with the capacity to change and mature, removing what is damaging and inapplicable, and reinforcing those features we want to see reaffirmed and developed today. In sum, the paper suggests that we could apply precedents from pre-colonial African history that insist upon the popular aspects of chieftainship; on the right of men and women to the land they work; and to the products of their labour. This does not mean that these societies were in their nature harmonious. Indeed history shows continual conflict just where it should be expected – in the homesteads between fathers and daughters over husbands, and amongst brothers within chiefly homesteads over popular leadership. But such conflict does not deny the strength of the mutual bonds within and between homesteads as the productive units out of which political entities were constructed – indeed it points to their significance.