

# **Gender, Place and Land Tenure**

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## PREFACE

The Law, Race and Gender Unit (LRG) was established in 1994 by Christina Murray and Kate O' Regan as a research and training unit in University of Cape Town's Faculty of Law. Since that time the goal of LRG has been to produce excellent socio-legal research that informs evidence-based advocacy and training, while contributing to our theoretical understanding of the challenges inherent in delivering justice to all in a diverse and democratic society. One of the ways in which we have done this is through research that illustrates the "lived realities" of South Africans, especially those who are most vulnerable and marginalised.

*Issues in Law, Race and Gender*, a series of occasional papers produced by LRG, provides us with a means of disseminating important research and generating debate on key issues of law and policy. Contributions are of the highest quality and are subject to a double-blind review by leading scholars in the field prior to publication. Previous papers in this series on the functioning of the family advocate's office, the divorce courts, unrepresented accused, lay assessors, domestic violence, HIV and sexual offences, and access to the courts for people who are hearing impaired, have all had – and, in some cases, continue to have – a substantial impact on our understanding of barriers to justice in South Africa.

There can be no doubt that the issue of women's access to land and securing their rights to productive resources remains a critical challenge for law- and policy-makers. Tara Weinberg's paper in this series provides us with a historical lens through which to understand contemporary struggles for women's land rights and contestations about the meaning of customary law. She illustrates how the imposition of "official" customary law was used to undermine women's tenure security and access to land, and that "official" versions of customary law were robustly contested at the time – as they often are now – where they failed to reflect actual practice, and "living" customary law.

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### Introduction

This article explores how government interventions to restrict African access to land in the Ciskei between 1930-1960 impacted disproportionately on women. It focuses on events unfolding in three districts, Fort Beaufort, Keiskammahoek and Peddie, making use of archival research to show how African people, and particularly women, responded to government interventions that progressively boxed them in and rendered them landless. Its primary focus is on the way in which the state used codified versions of customary law both to justify and structure interventions that restricted women's access to and inheritance of land. It shows how African people continuously challenged the versions of customary law being imposed on them as disconnected from actual practice and "living law", which provided for stronger access and inheritance opportunities for women. The records of Bunga Council meetings offer a perspective on the inexorable pressure on land resulting from racial laws and practices, and also that women bore the brunt as land

shortages increased. The records show council members' attempts to protect women and younger men's land access against the State's "one man one lot" policy. The article is divided into two time periods: that of United Party rule from 1930-1948; and the post-1948 apartheid era. There are important continuities in relation to racial land policy between the two periods, but also key differences as the National Party stamped down on African freehold and quitrent ownership in the area.

### 1930-1948: The state further curtails Africans' land access

The districts of Fort Beaufort, Keiskammahoek and Peddie make up part of the 'patch-work quilt' that was the 'Ciskei' between 1930 and 1960. The towns of the same name are located roughly within a 50km radius of each other. The growth of the migrant labour system, combined with Africans' diminished access to arable land, had significant effects on the gendered division of labour in all three areas.<sup>1</sup> The 'traditional' model of men as family 'patriarchs', who would preside over the household and tend to the cattle, while women cultivated the land, had been disturbed. Men were away

<sup>1</sup> SAB. NTS, 1914, 147/278. Annual Report of the Department of Native Affairs, for the years 1935 and 1936.

from home for long periods and women took over many affairs of the household.<sup>2</sup>

The United Party continued along the trajectory of the 1913 Land Act, which concentrated Africans into 7% (expanded in 1936 to 13%) of the country's land mass and set aside the rest of the land for the white minority population. It built upon a long history of colonial interventions to control Africans' access to land. It also drew on the 1927 Native Administration Act, which crystallised certain aspects of customary law which excluded women from access to land. The 1936 Native Trust and Land Act recognised that the reserves were "congested, denuded, over-stocked, eroded, and for the most part, in a deplorable condition"<sup>3</sup>. However, it attributed the root causes of shortfalls in agricultural production to African peasants' "bad farming" methods and to an excess of cattle-ownership.<sup>4</sup> The 1936 Act slightly expanded land available to Africans in the reserves, making available certain plots of 'Trust' land in anticipation of the arrival of those removed from white land.<sup>5</sup> While Africans could pay

<sup>2</sup> WCA 1/FBF 11/1/11, 'Native Interviews and Disputes', 3 August, 1948; M.E. Mills and M. Wilson, *Keiskammahoek Rural Survey, Volume IV: Land Tenure* (Pietermaritzburg, 1952), p. 44.

<sup>3</sup> C. De Wet, *Moving Together, Drifting Apart: Betterment Planning and Villagisation in a South African Homeland*, (Johannesburg, 1995), p. 40.

<sup>4</sup> De Wet, *Moving Together*, 41.

<sup>5</sup> A. Mager, *Gender and the Making of a South African Bantustan: A Social History of the Ciskei, 1945-1959* (Portsmouth, NH / Oxford / Cape Town, 1999), p. 3.

an annual fee to use 'Trust' land, the government saw the land as owned by the South African Native Trust (SANT). As a result, Africans could not sell or rent Trust land.

During this period, under the pretext of defending Africans from "white intrusions on the land,"<sup>6</sup> combating congestion, poverty, soil erosion and over-stocking, and improving agricultural production, the government suggested a 'rehabilitation' programme known as 'Betterment'.<sup>7</sup> Betterment was accompanied by a string of government interventions. The state expected headmen, as government 'employees', to implement its Betterment schemes. But 'Trust' and Betterment policies had little effect on reducing poverty, congestion and landlessness in the reserves; if anything, they accelerated the process. In the Ciskei region, "the Trust became synonymous with [administering] the Native Affairs Department's rehabilitation strategy and the squeezing of people and livestock into densely packed spaces".<sup>8</sup>

During the 1930-1948 period, government interventions were piecemeal in the sense that the state allowed for the existence of

<sup>6</sup> M. Chanock, 'Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure', in Roberts and Mann (Ed.s), *Law in Colonial Africa* (Portsmouth, NH / London, 1991), p. 76.

<sup>7</sup> De Wet, *Moving Together*, 41.

<sup>8</sup> Mager, *Gender*, p. 73. Mager remarks that in some districts in the Ciskei, there were more than 100 people per square mile. Mager, *Gender*, p. 4.

certain institutions that gave Africans some 'political' and 'economic' leeway. Africans were permitted to own freehold land, although the government sought to establish a ceiling on how much they could accumulate. In the Cape, African property-owners were enfranchised, until they were removed from the voters' roll in 1936. 'Bunga' councils, forms of representation elected by "local tax and/or quitrent payers",<sup>9</sup> were established for eight districts in the Ciskei area in 1934. While unsuccessful in effecting major changes in government policy, the Bunga Councils were nevertheless an important forum for discussion. The majority of Bunga Councillors were educated men, members of a wealthier elite, who often distanced themselves from the headmen and other "reds".<sup>10</sup> The Native Affairs Department referred to the Bunga councillors as "rational men."<sup>11</sup> However, their overall attitude remained paternalistic and condescending, with Native Commissioners regularly lecturing Bunga Councillors on their lack of ability to grasp particular concepts, rapping them over the knuckles for being 'disrespectful' towards the government, or directing them to consult books written by white men, in order to better understand customary

<sup>9</sup> SAB. NTS, 1914, 147/278, Annual Report of the Department of Native Affairs, 1935 and 1936

<sup>10</sup> Mager, *Gender*, p. 108. The term given to people who were less educated and more 'traditionalist' in orientation.

<sup>11</sup> Mager, *Gender*, p. 108.

law.<sup>12</sup> Many Africans viewed the Bunga not as “leaders of the people” but as “yes-men”.<sup>13</sup> However, during meetings many Bunga Councillors raised the problem of land shortages, questioned why white farmers had such disproportionately large plots of land and contested the government’s understanding of customary law.<sup>14</sup> It was in this context that debates occurred around the legal position and material realities of women with freehold titles. Several Bunga Councillors lobbied specifically for freeholders to have greater control over their land.

Despite the continued existence of freehold and quitrent status, after 1927 the government sought to compress Africans spatially and socially. It reversed the process of class stratification, limiting the potential for the development of an African middle class. It was

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<sup>12</sup> National Library, Cape Town, MF. 702 (2.1.1), Ciskeian General Council Proceedings, 1934-1955 (King William’s Town: King Printing, published annually), p. 72. Hereafter referred to as CGC Proceedings. In 1935, during a discussion on whether or not the ‘custom’ of “ukukhetha” (restoration of dowry) should be abolished, Native Commissioner Whitfield directs Councillor R. Time to consult Whitfield’s own book, “South African Native Law’, where he will find the safeguards provided for the evils against which he complains. He will find prescribed therein under what circumstances Native Law provides for the restoration of lobola. Having acquainted himself with Native law and custom, he will find that the custom of ukukhetha is a good one...”CGC Proceedings, 1935, p. 37.

<sup>13</sup> Mager, *Gender*, p. 110.

<sup>14</sup> Mager, *Gender*, p. 78.

against this backdrop of compression and restriction that Africans and the SANT clashed over chronic land shortages.

One of the effects of the government’s land tenure system and its Betterment policies was women’s increased exclusion from access to land. In dealing with land shortages, the government saw women as ‘necessary casualties’. Unwilling to acknowledge the reality of unequal distribution of land between blacks and whites in the country as a whole, a problem of its own making, the state looked to address land scarcity and congestion by excluding some Africans from access to land in the reserves, on the basis of highly gendered criteria.<sup>15</sup> Native Commissioners defended the exclusion of women from access to land on the grounds that it was not “customary” for women to inherit land, nor was it “customary” for them to have too much access to land. Native Commissioners appealed to codified “customary law”, in paternalistic ways, to support its exclusion of women from access to land. In 1936, the Chief Native

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<sup>15</sup> The state’s criteria for who should access land were gendered in ways that affected men, as well as women. Unmarried men, like unmarried women, were considered by some Native Commissioners to be “irresponsible” and to be relinquishing the task of providing for their family. For example, in Fort Beaufort, an unmarried man who had sought to obtain land under communal tenure, found his request shot down by the headman and the Native Commissioner. He implied that it was not “customary” for a man to attempt to run a household without marrying his partner. SAB. NTS, 3002, 335/305 Illegal occupation of land at Ngwevu (1936-42).

Commissioner argued that requests for women to access land through inheritance struck "at the very root of old established principles of succession according to Native law and custom".<sup>16</sup>

### **Africans struggle to 'hold their ground': Women's access to land in the 1930s and 1940s**

Residents of Keiskammahoek told Monica Wilson's survey team that in the early part of the 20<sup>th</sup> century, and further back in time, it was not out of the ordinary for women to receive areas of land held under communal tenure from their fathers or their husbands.<sup>17</sup> In Chatha, in Keiskammahoek, where only men could *inherit* land under customary law, "according to traditional custom",<sup>18</sup> women were not excluded from land *transfers* while the holder of communal land was still alive. It was, however, not possible for this process of land allocations to women to work smoothly in the context of land shortages and congestion that characterised the United Party's reign. By the 1930s, when around 19% of married men were landless, fewer women were obtaining land through their fathers and husbands.<sup>19</sup> Women, in particular, explained that their access to land

<sup>16</sup> CGC Proceedings, 1936, p. 75.

<sup>17</sup> For example, daughters were given land by their fathers and married women were given fields of their own when they married. Mills and Wilson, *Land Tenure*, p. 17.

<sup>18</sup> Mills and Wilson, *Land Tenure*, p. 17.

<sup>19</sup> Mills and Wilson, *Land Tenure*, p. 44.

was particularly insecure upon the death of the landholder. In Chatha, people complained that "no-one can be certain of his successor to the land",<sup>20</sup>

Women whose families held land under freehold tenure (which they could acquire, unlike communal land, through inheritance) and quitrent tenure (which could not be transferred by will but had to be re-allocated by the Native Commissioner) were also struggling to access land in their own right<sup>21</sup>. Members of the Bunga Council cited numerous occasions where even women married under common law, rather than customary law, found their attempts to inherit freehold land impeded by Native Commissioners and male relatives, in the context of greater land shortages.<sup>22</sup>

Widows and single women were particularly hard hit. In Chatha, people argued that, "in the past", it was regular practice for a widow to retain her husband's land after he had died, and to look after it until one of her children was old enough to take it over.<sup>23</sup> However, Mills and Wilson found that from the 1940s onwards the Native Affairs Department encouraged headmen (and Native

<sup>20</sup> Mills and Wilson, *Land Tenure*, p. 26.

<sup>21</sup> Mills and Wilson, *Land Tenure*, p. 52.

<sup>22</sup> CGC Proceedings. For example, Bunga Councillors raised problems of women's diminished access to freehold and quitrent land almost every year; for example: meetings of 1935, 1938 and 1947.

<sup>23</sup> Mills and Wilson, *Land Tenure*, p. 17.

Commissioners who authorised communal land allocations) to reallocate communal land to a man's family upon his death, rather than leave it in his widow's possession. It was frowned upon by the community in Chatha if the husband's family did not pass on land to his widow's children.<sup>24</sup> These widows lost access to land in their own right, although the possibility remained for them to retain a 'hold' on the land through their children. Widows were also obliged to pay hut tax or else forfeit their land<sup>25</sup>. Some widows could not afford to pay taxes, or had no sons. Such families were at a disadvantage. For example, in Fort Beaufort, throughout the 1930s and 40s, mention is made of widows who were "starving, with no sons to work for them".<sup>26</sup>

There was recognition by Bunga Councillors and government officials in the 1930s and 40s that daughters were no longer inheriting freehold or quitrent land at the (admittedly fairly minimal) rate they had been previously. Mr Hartley, chair of the Committee on Land and Legal Matters, told the 1936 Ciskeian General Council meeting that he knew of instances where a man holding freehold land had died, leaving only daughters and they had received none of

<sup>24</sup> Mills and Wilson, *Land Tenure*, p. 17.

<sup>25</sup> Mills and Wilson, *Land Tenure*, p. 143.

<sup>26</sup> WCA 1/FBF 12/1/1, Fort Beaufort: Native Affairs – Minutes of Meetings, 13<sup>th</sup> March, 1945; SAB. NTS, 3002, 335/305 Illegal occupation of land at Ngwevu (1936-42).

his land.<sup>27</sup> However, he argued that there were "hard things in every walk of life,"<sup>28</sup> implying that daughters' diminished access to land was a state of affairs that people were experiencing more generally and should accept. In response to the continued scepticism of several Bunga Councillors, he added that soon a man would come along and marry those women, so they would not be destitute for long.<sup>29</sup> All women felt the pinch of the gendered criteria for land access set up by the government and by some African men. However, poorer women found it harder to access land than women who were better-educated and whose families already had access to some land.

Bunga Councillors' queries indicate that most of the ten Native Commissioners in the Ciskei at this time were guided closely by the government's line that excluding women from the land was necessary in order to deal with land shortages. Bunga Councillors from Peddie and Keiskammahoeck regularly demanded that quitrent land should devolve by will, independently of the Department of Native Affairs.<sup>30</sup> This implied that they saw Native Commissioners and government laws as stumbling blocks when it came to women accessing land. Mills and Wilson's evidence from Keiskammahoeck

<sup>27</sup> CGC Proceedings, 1936, p. 75.

<sup>28</sup> CGC Proceedings, 1936, p. 75.

<sup>29</sup> CGC Proceedings, 1936, p. 75.

<sup>30</sup> For example, CGC Proceedings, 1936, p. 72, 75; CGC Proceedings, 1938, pp. 70-72.



reinforces the notion that women often struggled to access land when the transfer process entered into legal or government spheres: "If the matter is not taken to the Administration or to lawyers for settlement, some of these women succeed in obtaining a share (of land)".<sup>31</sup> They argue that Native Commissioners in Chatha, from the 1930s onwards, were particularly reluctant to allocate use rights to communal land to young, single women.<sup>32</sup>

While the percentage of women obtaining land under communal tenure was small, it was not altogether unheard of it. Many brothers and sons recognised their female relatives' practical need to access land, in that lack of access signalled, among other things, inability to grow food. Furthermore, families could overcome the "one man, one lot" limitation if other family members had access to land holdings in their own right.<sup>33</sup> In Chatha, widows who could not afford to pay hut tax, had land registered in their sons' or brothers' names. However, they preferred, where possible, to retain communal land in their own names. Often married men lived with their widowed mothers. This way, both could contribute towards the taxes and both could hold land under communal tenure.<sup>34</sup> While this gave land access to men and women who might not otherwise have obtained it,

<sup>31</sup> Mills and Wilson, *Land Tenure*, p. 52.

<sup>32</sup> Mills and Wilson, *Land Tenure*, p. 24.

<sup>33</sup> Mills and Wilson, *Land Tenure*, p. 20.

<sup>34</sup> Mills and Wilson, *Land Tenure*, p. 143.

it simultaneously modified the roles that men and women played in relation to land.

### **Bunga Councillors defend women's access to freehold and quitrent land**

Women and men whose families had ownership of freehold or quitrent land fought particularly hard for women and younger sons to gain greater access to and control over such land. Bunga Councillors from Keiskammahoeck and Peddie were among those who lobbied for women to inherit quitrent land and for the criteria making it difficult for women to access freehold land to be investigated. In 1936, Councillor Jabavu proposed that the 1927 Native Administration Act be amended so as to allow women to inherit property not only under common law, but also under customary law, when there were no direct male descendants. Women could not inherit freehold land under customary law at the time. If they or their parents were married under customary law, then the land was considered to devolve according to male primogeniture.<sup>35</sup> The Chief Native Commissioner moved for Jabavu's motion to be abandoned immediately, saying, "you will have to say definitely whether or not you want Native law and custom. You cannot have

<sup>35</sup> H.J. Simons, *African Women: Their Legal Status in South Africa* (London, 1968), p. 204.

two systems of law mixed up together.”<sup>36</sup> Some councillors agreed with him. Others, such as Councillor Kwatsha, from Keiskammahok, stood firm. He said there were cases where a man married under customary law had no sons and wished to pass his property on to his daughter. He argued that there were also instances where the eldest son looked after only his own interests. He said that it was contrary to customary law for the eldest son to “eat the inheritance alone”<sup>37</sup> in this way. Yet the procedure for inheritance, as it was codified in the 1927 Act and practised in the magistrates’ courts, allowed the eldest son to do so in the name of customary law.<sup>38</sup> Kwatsha argued that men and women in the 1930s lived differently from how they had lived in the past; there had been shifts in daily life. For example, women sought to maintain and look after households while their male family members were away working. It would be more in line with customary law, Councillor Kwatsha argued, for a younger son or a daughter to inherit the land.

Councillor Kwatsha’s argument was not unusual. Villagers from Fort Beaufort were also opposed to land being concentrated in a single person, especially if he was the eldest son, although they did

<sup>36</sup> CGC Proceedings, 1936, p. 75.

<sup>37</sup> Quoted by Mills and Wilson, *Land Tenure*, 51; Mills and Wilson argue that in Chatha in the 1950s, young men who inherited use rights to communal land over their mothers were often considered unpopular.

<sup>38</sup> CGC Proceedings, 1936, p. 75.

not go so far as to advocate for women to inherit land. They felt that the policy of land going automatically to the eldest son was not practical in the context of land scarcities and the reality of migrant labour, which meant the eldest son was often away working in towns or cities for long periods of time. Assigning land only to the eldest son was declared by this group of villagers to be “contrary to Native Custom”.<sup>39</sup> Instead they said that it was “customary” for the land to go to someone who “would be responsible for the rest of the family.”<sup>40</sup> In Fort Beaufort in 1930, Headman Sigila and Advocate Stuart also took aim at the 1927 Act, saying that it “wanted to uproot natives from the land and introduce insecurity of tenure and gave power to the Government to take commonages from Native lot holders. This Act must be wholly repealed.”<sup>41</sup> The arguments made by Fort Beaufort residents and by Bunga Councillors, that it was not necessarily “customary” for the eldest son to inherit, is supported by data that Mills and Wilson provide in relation to Rabula in Keiskammahok. They showed that, over successive generations,

<sup>39</sup> WCA 1/FBF 12/1/1, Fort Beaufort: Native Affairs – Minutes of Meetings, 21 April, 1932.

<sup>40</sup> WCA 1/FBF 12/1 pe/1, Fort Beaufort: Native Affairs – Minutes of Meetings, 21 April, 1932.

<sup>41</sup> SAB. NTS, 8364, 34/355: Investigation under Section 8 of Act 38 of 1927 Native Administration Act, 1930. Bunga Councillors and headmen often differed, both in terms of their views on the state and in their views on women’s access to land. However, this particular headman was in agreement with the Bunga Councillors that the 1927 Act had reduced Africans’ access to land.

freehold land was regularly passed to the youngest son as well as the eldest.<sup>42</sup>

In attempts to allow for women to access quitrent land more easily, Bunga Councillors also appealed to “living”<sup>43</sup> customary law. They lobbied for quitrent land to devolve by will upon the holder’s death, rather than revert back to the Native Commissioner – a process which they implied often prevented women from obtaining land.<sup>44</sup> Some Councillors requested that if the Council was not in favour of quitrent land owned by a woman devolving by will, then it should devolve instead “according to Native Custom”.<sup>45</sup> Mills and Wilson

<sup>42</sup> Mills and Wilson, *Land Tenure*, p. 55.

<sup>43</sup> Simons and Chanock argue that *living* customary law (incorporating customs practiced in daily life), in contrast to codified customary law, was liable to small amendments if the situation (for example, material conditions, such as *lobola* payment in cash rather than cattle) demanded it. Simons, *African Women: Their Legal Status*, pp.52-3; M. Chanock, ‘A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Colonial Africa’ in *The Journal of African History*, 31(1) (1991), p.66. Chanock adds that while law was not necessarily flexible, custom (and therefore *living customary law*) often was. M. Chanock, *The making of South African legal culture, 1902-1936: fear, favour and prejudice* (Cambridge, New York, 2001), p.22. “Living” customary law is also a term that occurs frequently in current debates on customary law. While the term itself was not actually used by Bunga Councillors, they capture its gist in their own words.

<sup>44</sup> Mills and Wilson note that there was no legislation preventing women acquiring quitrent land (by purchase) but it was the “policy of the Administration to prevent such acquisition”. Mills and Wilson, *Land Tenure*, p. 148.

<sup>45</sup> CGC Proceedings, 1938, p. 72.

note that one of the reasons Native Commissioners gave for fewer allocations of quitrent land to women was that there was “confusion” as to how quitrent land should devolve when a woman holding it died.<sup>46</sup> Bunga Councillors’ requests implied an attempt to clarify this process in the hope that ‘cleaner’ transfers of quitrent land would make allocation to women more likely. Whether the land devolved by will or by customary law, it was less subject to interference by the Native Commissioner, who might re-allocate the quitrent land outside of the family.<sup>47</sup> In this sense, the Councillors’ argument was an attempt for both women and the family to hold onto land.

Arguments made by Bunga Councillors for women to have greater access to land implicitly supported a notion of “living” customary law, as distinguished from customary law codified according to the 1927 Act and recognised by magistrates. Councillor Kwatsha was not rejecting the system of customary law as a whole; rather, he demanded a more dynamic, flexible version of customary law that took into account changing circumstances. The demand for more flexible criteria that would allow women to inherit freehold land was tied up with requests for younger sons also to inherit at a greater rate – it was part of a larger expression of dissatisfaction with

<sup>46</sup> Mills and Wilson, *Land Tenure*, p. 148.

<sup>47</sup> CGC Proceedings, 1938, pp. 70-72.

magistrates' rigid interpretations of customary law, which tended to concentrate land in one person.

### 1948-1960: "Our government is putting us into a box alive"

Although the National Party came to power in 1948, it was not until the early 1950s that shifts in the nature of government interventions on the land began to take effect. The saying "one man, one lot"<sup>48</sup> flags two central features of apartheid policy on land tenure: the state's attempts to limit the extent to which Africans could expand their landholdings and its framing of inheritance as a 'customary' male prerogative. Also, while the United Party had tolerated the existence of a very small, dependent 'middle-class' who owned freehold land, the apartheid government set about restricting the extent to which this group could accumulate land. Politically, the state saw Africans' (particularly African women's) demands for greater access to freehold and quitrent land as undermining the authority of the chiefs and headmen, key to the apartheid government's policy of indirect rule through tribal authorities. Such requests were framed as contrary to customary law and therefore as illegitimate.<sup>49</sup> As the state moved towards the creation of the Bantustan system, it closed down political opportunities that had

<sup>48</sup> Mills and Wilson, *Land Tenure*, p. 20.

<sup>49</sup> Chanock, 'Paradigms', 63.

been available to Africans in the period prior to 1948. In the eyes of the apartheid government, the Bunga Councils ran counter to the system of 'tribal authority'. The Council was dissolved in 1955. Bunga Councillors spoke out against the Bantu Authorities Act at their final meeting in 1955. Their views were echoed by some headmen in the years that followed. At a meeting with chiefs, headmen and ordinary villagers from the Fort Beaufort district in 1963, headman Harry Matikinca remarked, "Bantu Authorities are like graves, people in graves smell, and the people of Healdtown do not want Bantu Authorities".<sup>50</sup> This pronouncement was met with rapturous applause from the floor.

The closing down of political spaces was concomitant with closing down economic spaces. The state attempted to limit the extent to which Africans could expand their landholdings. This meant that even those with the capital to purchase another plot of freehold land were legally forbidden from doing so. It also meant that the government checked the growth of an African elite which had emerged from mission-school backgrounds, and who aspired to markers of 'status' such as Christianity, education and ownership of freehold land. An example from the early 20<sup>th</sup> century illustrates how access to freehold tenure was also tied up with political rights. In

<sup>50</sup> WCA 1/FBF 12/1/1, Native Affairs – Minutes of Meetings, 7 August, 1963.

1907, an attorney, N.L. Goldschmidt of Queenstown, wrote to the Attorney General that the issue of women inheriting land by process of succession was “particularly dear to Native registered voters”, by which he meant Africans who owned enough property for them to qualify for the Cape franchise, which remained in place until 1936.<sup>51</sup>

The apartheid government invoked ‘customary law’ to justify its land policies. Chiefs and headmen became the pillars of the apartheid government’s mechanism of indirect rule in the reserves. In justifying its ‘trusteeship’ of communal, Trust and quitrent land (post-1927, all requests for quitrent land went through the Native Commissioner), government officials often claimed that their system was in line with customary law. At a Bunga Council meeting in 1952, Native Commissioner Pike likened government policy to customary practices of communal land tenure, arguing that the Minister of Native Affairs had replaced chiefs in the role of ‘traditional’ land ‘trustee’. Upon the death of the person with access to communal and Trust land, the land reverted to the Administration, which had the jurisdiction to re-allocate it. Pike remarked that “the law is simply perpetuating what is Native custom and that is that on

<sup>51</sup> <sup>51</sup> WCA AG 1782/11919, Part 1, Discussion on Intestate Succession Act: Goldschmidt to Attorney General Sampson, 22 July 1907. Klug also makes this link clear. H. Klug, ‘Defining the property rights of others: Political power, indigenous tenure and the construction of customary land law’ in *Journal of Legal Pluralism and Unofficial Law* (35, 1995), pp. 141-2

the failure of male heirs, the Chief takes his estate and then the Chief gives it to whoever he thinks should receive it. Now with quitrent lands we have the same provision. The land goes back to the Minister and then the Minister inquires as to what person has the best claim to it.”<sup>52</sup> Implicit in Pike’s statement was a paternalistic attitude which held that while the land in reserves might ‘belong’ to the African people, only the state could be trusted to administer and monitor this land.

The apartheid government’s attitude to land ownership, cloaked in the language of ‘protecting Africans’ interests’, is also embodied in the words of Mr Young, the Under-Secretary for Bantu Areas, addressing the final meeting of the Bunga Council in 1955:

“The land there (in the Glen Grey district) does not belong to the Bantu people; it does not belong to the Government either. It is land held in Trust for the Bantu people who live there today, for the generations to come.”<sup>53</sup>

Young elaborated that ‘Trust’ land, which would in his opinion enable Africans to “progress”, was to be buttressed, under the Bantu Authorities Act, by the rule of chiefs and headmen, acting on behalf of the government. He added that if there were no chiefs, “they

<sup>52</sup> CGC Proceedings, 1952, p. 59.

<sup>53</sup> CGC Proceedings, 1955, p. 20.

could always be created”<sup>54</sup>. Such a statement lays bare the apartheid government’s willingness to invent ‘traditional’ structures, where those already in existence did not serve their ends.

### Women's efforts to access land after 1948

The coming to power of the National Party ushered in a change in patterns of women’s access to land. Between 1930 and 1948, women’s access to land had already been severely limited. In the 1950s, the pressure on land access increased even further. In particular, fewer women in Fort Beaufort, Keiskammahoek and Peddie gained access to land held under communal tenure than in previous decades. However, women who attempted to obtain freehold and quitrent land, also found their access to this land curtailed. As had been the case in the period 1930 to 1948, some women, such as those who were widowed or unmarried, found it more difficult to access land than others.

The apartheid period saw the onset of more extreme congestion in the land and shrinkage of land available. About 50% of married men in Chatha were landless.<sup>55</sup> The land problem was felt by people all over the Keiskammahoek district. The situation led residents of

<sup>54</sup> CGC Proceedings, 1955, p. 20.

<sup>55</sup> Mills and Wilson, *Land Tenure*, p. 44.

Chatha to declare to the Secretary of Native Affairs: “our magistrate is putting us into a box alive”.<sup>56</sup> Women’s lack of access to communal land was a symptom of the broader land crisis. As Mager writes, “while patriarchal charity might once have allotted single women the use of a portion of a field, by 1945, every corner had been taken up. If married men remained landless, single women could no longer be spared starvation.”<sup>57</sup> As before, widows were particularly vulnerable to having their access to land whittled away. In Mills and Wilson’s sample of 111 people from Chatha in Keiskammahoek, only 10% of those entitled to communal land were widows, compared with 41% in their fathers’ generation (roughly twenty-five years previously).<sup>58</sup> In Chatha, between 1949 and 1950, only one woman was allocated new land by the headman and village council.<sup>59</sup> In the same village, “much adverse comment was raised” when the Native Commissioner refused to allow a widow to take over her husband’s land.<sup>60</sup> This trend was even further removed than in the 1930-48 period, from patterns of land allocation in (what Chatha villagers described as) “the past”, where even “divorced,

<sup>56</sup> SAB. NTS, 195, 1/40 Headmen: Chatha location, Letter to Secretary for Native Affairs, by residents of Chatha, 27/03/1950.

<sup>57</sup> Mager, *Gender*, p. 76.

<sup>58</sup> Mills and Wilson, *Land Tenure*, p. 44.

<sup>59</sup> Mills and Wilson, *Land Tenure*, pp. 34-5.

<sup>60</sup> Mills and Wilson, *Land Tenure*, p. 17.

unmarried and widowed women were often given land by their parents".<sup>61</sup>

Meanwhile there was a significant increase in the number of grievances raised by Bunga Councillors related to women whose efforts to obtain freehold land had been thwarted. The issue of women's diminished access to freehold land recurred almost every year and was discussed at great length by the Council.<sup>62</sup> As had been the case in the period 1930 to 1948, some women found it more difficult to access land than others. Unmarried women were one of the worst affected groups. In Rabula, fewer daughters (roughly 9%) were inheriting or owning freehold land in the early 1950s than in the previous generation (around 14%).<sup>63</sup> Freehold land sales were rare in Rabula, so for most people, inheritance was the only means

<sup>61</sup> Mills and Wilson, *Land Tenure*, pp. 34-5.

<sup>62</sup> For example, particularly lengthy discussions over women who were blocked from purchasing or inheriting freehold land occurred in 1949, 1952 and 1954. In 1954, the Chief Native Commissioner, J.M. Brink, remonstrated that this matter had "come before Council several times". CGC Proceedings, 1954, p. 26.

<sup>63</sup> Between 1949 and 1950, of all those surveyed who inherited land, nearly 9% were daughters who inherited land from their fathers. In the previous generation, 14% of those inheriting had been daughters and in the generation before that, 15%. Women who owned freehold land constituted just over 9% of the land-owning population, compared with 18% in the previous generation, and 19% in the generation before that. Mills and Wilson, *Land Tenure*, pp. 52-3

of obtaining this land.<sup>64</sup> In this context, women's increased exclusion from land inheritance was particularly detrimental to their livelihood.

After 1948, the difficulties women experienced in obtaining quitrent land not only persisted but grew.<sup>65</sup> Councillor Majola from Keiskammahoek made particular reference to women in his district who had failed to acquire quitrent land.<sup>66</sup> According to Mills and Wilson, these problems were also present in Burnshill in Keiskammahoek, where the government administration's policy was to "prevent"<sup>67</sup> women from acquiring quitrent land, despite the fact that they were legally allowed to purchase it. In practice, widows in Burnshill tended to occupy their husband's quitrent land after his death and avoided applying for the land to be legally transferred to them.<sup>68</sup>

The government's role in excluding single women from quitrent land is particularly evident in a statement made by the Chief Native

<sup>64</sup> Mills and Wilson, *Land Tenure*, p. 50.

<sup>65</sup> For example, instances where women had applied for quitrent land but had failed to obtain it were brought before the Council every year between 1949 and 1954 (the year before the Council was dissolved). CGC Proceedings, 1949-1954.

<sup>66</sup> CGC Proceedings, 1949, p. 3; 68; 70.

<sup>67</sup> Mills and Wilson, *Land Tenure*, p. 147.

<sup>68</sup> Mills and Wilson, *Land Tenure*, p. 147.

Commissioner at a Bunga Council meeting in 1953. In response to a request by Bunga Councillors for the law to be amended so that unmarried daughters could be given usufructuary (use) rights to their late fathers' quitrent land, the Native Commissioner dismissed the motion, saying that it would result in unmarried women being "practically out of control".<sup>69</sup>

However, some women continued to struggle fiercely for a 'hold' on the land. Those whose families had lost land or who were landless found alternative ways of obtaining access to land, through share-cropping and taking land on loan, in the context of communal and freehold tenure. Share-cropping was common in Chatha, where several widows entered into sharecropping arrangements with other men in the village.<sup>70</sup> The practice was rarer in Rabula than in Chatha, but it nevertheless occurred, in this instance on freehold land<sup>71</sup>. Sharecropping was particularly useful for women who were struggling to access land or who needed help with ploughing the land they had, but had few male relatives around to do this work. The practice was mutually beneficial in that it acted as a means of overcoming several government restrictions on the land. It was a way of circumventing the "one man, one lot" restriction, by allowing

<sup>69</sup> A.M. Blakeway, CGC Proceedings, 1953, p. 15.

<sup>70</sup> Mills and Wilson, *Land Tenure*, p. 28.

<sup>71</sup> Mills and Wilson, *Land Tenure*, p. 60.

people who were stuck with land that was small or infertile to farm additional land that was more suitable than their own.<sup>72</sup>

In Chatha, a communal land zone, renting and squatting was considered a last resort, taken up by people who could not acquire land through communal land allocations. Although the state saw it as illegal to rent land held under communal tenure,<sup>73</sup> renting of land in Chatha nevertheless occurred, albeit on a small scale. Villagers in Chatha did not view the practice of renting as "wrong or contrary to custom".<sup>74</sup> Rather, they saw it as a means for people with very little access to land to produce food.<sup>75</sup>

**Using "living" customary law to 'land a blow':  
The Bunga intercedes on behalf of 'educated' and  
'responsible' women**

In practice, a small number of women were also accessing quitrent land. A Bunga Councillor, Mr. Maku, made reference to fathers leaving quitrent land to their unmarried daughters in King William's Town in 1952, despite the law forbidding the transfer of such land

<sup>72</sup> Mills and Wilson, *Land Tenure*, p. 28.

<sup>73</sup> The state saw communal land as conferring 'use rights' only, and not ownership – hence it outlawed renting of communal land. Renting land in a freehold area was legal, Mills and Wilson, *Land Tenure*, p. 30.

<sup>74</sup> Mills and Wilson, *Land Tenure*, p. 32; 59.

<sup>75</sup> Mills and Wilson, *Land Tenure*, p. 30.



by will.<sup>76</sup> This suggests that there was a disjuncture between what was understood and implemented by the magistrates and land practices on the ground. Several Bunga Councillors implied that practices on the ground allowing for women to inherit land more easily would actually be in line with customary law. They appealed to a more “living” version of customary law that differed from codified customary law. For example, at a Bunga meeting in 1949, Councillor Majola from Keiskammahoek argued that if women faced difficulties inheriting land, this was “bad custom” and inconsistent with “present conditions”<sup>77</sup>:

“Almost every week one encounters the same trouble caused by these old laws... It is an undisputable fact that we are far advanced in civilisation. Our old customs are in conflict with present conditions. They used to be all right long ago, but today they are oppressive.”<sup>78</sup>

Majola was also opposed to land going directly to the eldest son. His objection was not that the eldest son should never inherit via customary law; rather he felt that the table of succession, and the law

<sup>76</sup> CGC Proceedings, 1952, p. 59. For example, Councillor Maku mentions that Councillor Zondeki’s older brother’s quitrent land went to his unmarried daughter. There were complications to quitrent land devolving intestate. Upon the death of the owner of quitrent land, the land reverted back to the Native Commissioner, who would then reallocate it.

<sup>77</sup> CGC Proceedings, 1949, p. 70.

<sup>78</sup> CGC Proceedings, 1949, p. 70.

of male primogeniture which had been crystallised in the 1927 Native Administration Act, was being too rigidly enforced.<sup>79</sup> In the years that followed, several other Bunga Councillors took up the thread of Majola’s argument that it was not necessarily contrary to “customary law” for women or younger sons to inherit land. In 1952, more than fifteen years after Councillor Kwatsha had proposed that women inherit land under customary law, the majority of councillors voted in favour of such a motion. Councillor Mateza spoke eloquently on their behalf. While he recognised that it was “unusual” in customary law for women to inherit land, he argued that in many cases, they were more educated, more responsible than men, and more likely to use the land to benefit the family’s “children”.<sup>80</sup> Mateza argued that in some cases, therefore, women were more deserving of taking control of the land. He argued that it was “custom that a person who has looked after a parent should get the land”<sup>81</sup> and that often this person was a woman. Councillors Sisilana, Mzazi, Mankanzana, Lutseke and Zondeki agreed with Mateza, although some felt women should be able to inherit regardless of the situation, while others felt this should only happen if there was no male heir. Councillor Zondeki remarked, “because the children are females they suffer” and such a situation would

<sup>79</sup> CGC Proceedings, 1949, p. 70.

<sup>80</sup> CGC Proceedings, 1952, p. 59.

<sup>81</sup> CGC Proceedings, 1952, p. 59.

cause him "not to stay very well".<sup>82</sup> The most important criterion for land inheritance, the Bunga Coucillors implied, was supporting the children and looking after the family. In other words, land should go to a man or woman who was most 'responsible'. Councillor Sisilana added that even single women could be 'responsible' for the land and the family: "It does not matter whether she gets married or not. She must get her father's possessions."<sup>83</sup>

While Councillor Mateza's request, like Kwatsha's nearly two decades previously, remained couched in a discourse that stressed the legitimacy of customary law, both implied that this rigidity was not intrinsic to customary law. Councillor Mankanzana said:

"Mr. Chairman, it is a great pity that Native custom is not strictly adhered to today. Some of these Native laws are made by people we do not know at all. That is what has caused the misunderstanding. It is quite true that according to our custom a woman is there to inherit her parents' assets. Today people are not applying Native custom in the way they should."<sup>84</sup>

Bunga Councillors raised many disputes about the diminished opportunities for 'respectable', 'educated' and 'responsible' women to access land. For example, in 1954, a female teacher from the

<sup>82</sup> CGC Proceedings, 1952, p. 63.

<sup>83</sup> CGC Proceedings, 1952, p. 59.

<sup>84</sup> CGC Proceedings, 1952, p. 59.

Herschel district approached her local Councillor, Mr. Mateza, to take up a case for her. She had been denied freehold land<sup>85</sup> by the Native Commissioner and asked Mateza to raise the case with the Bunga, in order to illustrate the difficulties women faced accessing land. Mankanzana described how two women had cared for their father and therefore deserved his land. However, he pointed out that "the man has an estranged younger brother. If he gets the land, the family will not be looked after." Councillors emphasised they were advocating specifically that 'responsible' women inherit. 'Responsible' women were defined as "civilised" and "educated"; they are women who "look after their parents".<sup>86</sup> The model of a 'responsible' woman was established in opposition to other women, described as "fancy women" and "loose women" who lived on the outskirts of town, brewed beer and engaged in multiple relationships.

The model of a 'responsible' daughter and 'responsible' son was part of a continued appeal to a more flexible, 'living' version of customary law. Councillors argued that the notion of the oldest son always inheriting failed to get at the heart of the customary law of inheritance. The purpose of the "living" customary law of land

<sup>85</sup> It is not clear whether she wished to buy freehold or quitrent land, but as quitrent was harder to acquire, it was probably the former.

<sup>86</sup> CGC Proceedings, 1952, p. 59.

inheritance, they said, was to make sure the family was provided for, a role that 'responsible' daughters, as well as sons, could fulfil. Bunga Councillors' contestation of customary law was part of their attempt to lobby for more secure inheritance rights for certain women. However, there is an important qualification here. The Councillors were not necessarily suggesting a complete overhaul of gendered roles. By tying women to the land as 'responsible' people, some Councillors implied they should remain in the domestic sphere, where they could cultivate the land and care for the children.<sup>87</sup>

## Conclusion

The destruction of African freehold and quitrent land in the Eastern Cape together with land shortages and congestion, began to eat away at 'class' divisions between different African families and different African women. Closing down the Ciskei Bunga stamped out the possibility of a middle-class voice. Africans living in the 'homelands' became more vulnerable to poverty, government interventions and corrupt tribal authorities, and more dependent on their incomes from wage labour than ever before. In this context, women (whose access to land was largely dependent on men) were most vulnerable. Women who owned freehold land and whose

<sup>87</sup> Mager, *Gender*, p. 8.

families were relatively well-off fell upon hard times. Poorer women were pushed to the periphery of the rural economy. The state increasingly used rigid applications of customary law and the tribal authorities as means to buttress its gendered land interventions.

Critical land shortages put a great deal of pressure on men as well as women. Both men and women attempted to navigate the reality of decreased land access. Some women found alternative ways of obtaining land through share-cropping and taking land on loan. Other more marginalised women accessed land through renting land illegally from communal landholders. Those who wanted to obtain 'freehold' and 'quitrent' land lobbied for easier processes of inheritance and transfer. Since the arenas in which women could voice their issues were limited, men sometimes articulated these issues (albeit in a mediated form), when the interest of a woman who approached them coincided with their own. Bunga Councillors appealed to a "living" form of customary law in attempts to win greater rights to inheritance of land for women and younger sons. They positioned their children as 'responsible' daughters and 'responsible' sons. In doing so, they presented an alternative to male primogeniture. This objection to aspects of rigid customary law was one of the ways in which women and their Bunga interlocutors challenged the state's policy on land tenure. In a context in which the state frequently used the language of 'African custom', in

distorted ways, to justify its land policies, men and women contested not only the restraints on Africans' access to land, but also the nature and content of customary law.

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