

Introduction

Swaziland is an alluring place to do research. The tranquil beauty of green pastures and fertile farmlands mesmerizes the newcomer, yet scarcely hints that land disputes are boiling in many parts of the countryside. Such disputes are ripe for research exploration: they have been granted little attention in several major land tenure studies that have been conducted.¹ Even the customary legal forums in which land disputes are fought out have not been adequately described in the literature.²

Good fortune was with me during the early weeks of my anthropological field work when my research assistants unwittingly tantalized my curiosity with half-told tales of struggles over land. I seized the opportunity to redesign my planned study of Swazi customary law as a specialized study of land disputes. My luck continued when an unusually hospitable chief supported my interests, allowing me to attend public sessions of his court where land was a frequent topic of debate. Unfortunately, soon thereafter, when I began to attend such sessions, the promise of my early successes began to deteriorate: my Swazi hosts began to suspect and resist my research effort. Clearly, my probings were exposing some hidden and delicate developments in customary land law. As I gradually delved into the reasons for my hosts' resistance, I came to understand that their land disputes revealed much more than rules of land law; in fact, such disputes were an important although often cloudy mirror of the changing social and political order.

Confrontation with research difficulties

My research, which extended over eighteen months during three separate visits to Swaziland between 1983 and 1986, involved several activities: investigation of archival material; interviewing scholars, customary court members and government officials; attendance at customary court sessions; and analysis of a questionnaire. Despite the enormous possibilities of this exploratory research, I soon despaired that my research goals might not be met. I confronted many difficulties in data collection that are commonly described by field workers in Africa – such as comprehending indigenous

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Laurel L. Rose

Excerpt

[More information](#)

Introduction

concepts, locating reliable assistants and knowledgeable informants, and finding transportation to distant research sites. In particular, I confronted difficulties peculiar to anthropologists of law, who have noted that African informants are bothered by questions about disputing behaviour, and particularly by questions about land disputes (Brokensha and Njeru 1977: 2; La Fontaine 1979: 99; Richards 1939).³ My difficulties in data collection were exacerbated by gender-related frustrations: as a woman, I had difficulties gaining full access to male-controlled Swazi institutions – in this case, to the Chiefs' Courts, in which men dispute about land rights (women are usually represented by a male agnate or affine), and to beer-drinking groups, in which men informally discuss land disputes.

Although my research difficulties had clearly been experienced by investigators in many parts of Africa, I gradually came to believe that my predicament in Swaziland was somewhat extreme. Local authorities refused to cooperate without government authorization, while government authorities either claimed ignorance about sponsorship requirements or referred me back to local authorities; I thus found myself uncomfortably wedged in a no-win situation. Swazi elders, who were my intended informants, admonished me that land disputes were no concern of 'outsiders'. Some potential informants even denied that land disputes existed, dismissing my inquiries with testy remarks such as: 'We Swazis are not permitted to fight over land because it belongs to the King!' The only persons who unreservedly aided me were members of the European-influenced legal system – lawyers, magistrates and prosecutors. Unfortunately, such persons played almost no role in Swazi customary land matters.

The reluctance of Swazi elders to speak about land disputes frustrated me, but I reasoned that the causes of my difficulties could be determined and resolved. I pinpointed two sources of difficulty. First, Swazis are generally reluctant to tell foreign researchers about any customary law matters; for example, a major foreign-funded customary law research project had been rejected by government officials shortly before my arrival. Consequently, I believed that if I wanted to investigate land disputes, I would have to inquire initially into related topics – for example, methods of boundary demarcation and fencing practices. Secondly, Swazis were particularly reticent to speak with foreign researchers at the time of my arrival since political circumstances in the country had deteriorated after King Sobhuza's death in 1982. Pamphlets and oral directives of uncertain origin were being widely circulated, warning Swazis not to speak to unknown persons or attend unauthorized meetings. As I was a newcomer, I needed to spend many months cultivating friendships with numerous people at different kinds of social functions, such as funerals, weddings and beer-drinking gatherings.

My primary investigative strategy evolved into a search for the deeper roots of my research difficulties than common cross-cultural constraints.⁴ I realized that the widespread secrecy about land disputes presented a curious paradox: Swazis denied or downplayed the existence of land disputes when making

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Laurel L. Rose

Excerpt

[More information](#)

Introduction

ideal statements about customary law but nonetheless knew full well that land disputes constituted a major and prolonged type of litigation coming before customary legal institutions. I became convinced that denials about land disputes were a clue that important, although hidden, land tenure developments were occurring in Swaziland.

Exploration of the paradox posed by Swazi land disputes

By the end of my study, I concluded that my research difficulties, as in many parts of Africa, were linked to tensions arising from decades of stressful land relations between an indigenous African population and European settlers. At the same time, I believed that my extreme difficulties arose from the particular character of Swazi institutions – kingship and associated political ideologies – that have made Swazi sensitivity about and responses to land matters notable. Unlike other places in Africa, Swazi traditional authorities (members of the ruling Dlamini clan, dominant clans and chiefs) have not only succeeded in gradually augmenting their customary authority over land after colonial incursions, they have succeeded in expanding areas controlled by customary land tenure. My final analysis focused upon explaining why and how Swazis have protected and reinforced to an unusual extent their customary system of land law – even though it shares many rules and procedures in common with other African systems.

The answer to this question lies in an intriguing combination of geographical, historical and political factors. Swaziland, located next to the eastern edge of South Africa, was not significantly affected by land-hungry European settlers penetrating the southern part of the continent until the late nineteenth century, at which time the Swazi King granted land to the settlers. The Land Partition of 1907 interpreted these land transactions as permanent concessions rather than temporary loans, thereby granting Europeans about two-thirds of the territory and the vast majority of Swazis only one-third of the territory. A succession of Swazi rulers in the early 1900s reacted to what they perceived as outside land transgressions by several brilliant tactics: for example, by encouraging commoners to contribute wages obtained from migrant labour towards land buy-back efforts and by acquiring considerable control of government administrative organs which plan and implement land policy – the most significant manoeuvres occurring after Independence from Britain in 1968. Importantly, Swazi rulers persuaded commoners that all Swazis should display harmonious behaviour, and thus cooperative and conciliatory behaviour, if they, as Swazis, wanted to avoid further intervention in their affairs.

Following Independence, Swazi rulers wisely realized that if they were to expand customarily tenured land as well as augment their control over such land, they needed to ward off new and multiple threats to customary land tenure – namely, both foreign development agents/landowners, who threatened extensive changes, and those Swazi commoners (for example, an

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0521024684 - The Politics of Harmony: Land Dispute Strategies in Swaziland

Laurel L. Rose

Excerpt

[More information](#)

Introduction

expanding group of new elites and increasingly dissatisfied women) who felt that national commercial productivity or social equity, among other things, were inhibited by such tenure. As in much of Africa, foreign and Swazi critics commonly argued that customary land tenure should be abolished or reformed in favour of freehold tenure. Swazi rulers, as a contrast, who were well aware that their hereditary power was closely linked to customary land control (see also Gluckman 1955, 1965b, 1969; Schapera 1938), rejected many land reforms out of fear that such reforms represented the first step towards abolition of customary land tenure and thus loss of their power-base. Nonetheless, true to their conciliatory philosophy, Swazi rulers voiced support for development initiatives when foreigners were their audience but often criticized such initiatives when Swazi ears were listening.

A significant threat to Swazi rulers' customary land control was posed by land disputes. Such disputes, which could easily be construed by critics as indications that customary land tenure was not working and should be replaced by freehold tenure, needed to be downplayed or hidden. To prevent unfavourable interpretations by critics, Swazi rulers effectively used harmony ideologies in public rhetoric to disguise the disruptiveness of land disputes for individuals and groups and to promote an image of unity. In their turn, Swazi commoners generally supported their leaders against a common enemy that was believed to have caused land shortages through the Concessions and Partition. The commoners widely acknowledged that harmony in behaviour, if not always in beliefs, would protect and enhance valued cultural traditions.

While Swazi traditional elites and commoners are in agreement about the need to maintain appearances of harmonious relationships in national land matters, they are engaged in a push and pull struggle in specific land cases: disputants are concerned with protecting or promoting their land use interests, and authorities are concerned with maintaining their relative power and control over subjects. Thus, disputants seek power to achieve favourable outcomes in individual land cases, whereas authorities seek to secure more general power in local and national legal processes. In an effort to promote their own interests, while simultaneously producing defensive images of harmony, both authorities and commoners involved in specific land cases develop disputing styles which are characterized by strategies. These strategies, derived from ideologies about harmony, are based upon their status and circumstantial opportunities relative to other participants in the land dispute process. The strategies maintain continuity of the customary land tenure system and associated social/political unity, although manipulating it to secure individual interests.

The strategic tug-of-war in land cases between litigants and between litigants and authorities continually moulds the pliable borders of land use rules and practices. Sometimes rules and strategies remain distinct; the rules define the established 'traditional', and the strategies mould the political 'situational'. At other times, rules and strategies merge; the strategies define ideologies underlying new rules. In the latter scenario, change in both the

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Laurel L. Rose

Excerpt

[More information](#)

Introduction

theoretical interpretation and practical implementation of customary law is achieved, even if 'reform' in the sense of change in a written legal code has not been achieved.

The irony about Swazis' defence of customary land tenure against external or internal incursions is that land disputes, which are commonly interpreted by both Swazi and foreign critics as indications that changes in customary land law are needed but inhibited, might also be correctly interpreted by all Swazis as indications that change is under way. Therefore, land disputes may inhibit change through reinforcing social boundaries and reaffirming traditional values, but they may also promote change through reforming old rules or creating new rules, devising new consensual understandings and adjusting interests between competing individuals and groups (see Coser 1956; Simmel 1955). This means that land disputes need not inevitably be interpreted by 'traditionalist' Swazis as a weapon which 'developers'⁵ will use to foment change disruptively, but also as a tool which Swazis can apply to achieve change incrementally. In this way disputes, like the strategies used within them, have contradictory sides – both discouraging and encouraging change: Swazis may use disputes conservatively to stabilize customary law or innovatively to adapt it to changing conditions. But critics of customary land tenure seem more inclined to emphasize the change-inhibiting function rather than the change-producing function of land disputes.

In effect, land disputes can be either 'good' or 'bad' from the perspective of traditional Swazi elites, because elites can use them either positively to shore up their status positions relative to foreigners and other Swazis, or negatively to diminish such positions. Elites try to remove uncertainty from disputing processes, directing such processes towards fulfilment of their general administrative interests, by strategically propagating harmony ideologies. Elites allow deviations from procedural rules and new interpretations of practices when 'justice' would best be served and when their control is not threatened. At the same time, disputes can be either 'good' or 'bad' from the perspective of Swazi commoners, because they can be either empowering or disempowering in specific cases. Commoners strategically respond to customary land tenure rules, which elites have cloaked within harmony ideologies, with their own disputing strategies. Commoners' strategic deviations from 'recognized' procedures and rules solve their dilemmas and promote their interests on a case-by-case basis.

Despite common arguments in the Africa development literature that customary land tenure and authority structures inhibit change (at least changes sought by non-African development agents), evidence indicates that some Swazi land practices are slowly changing – in the direction of enhanced social equity and national productivity – under elite direction. In specific cases, Swazi dispute participants' strategic manipulations, which are both produced by and producers of Swazi customary legal rules, collectively provide a piecemeal momentum towards larger developments in customary land law. In each case, clever strategies preserve images of harmony and at the

Introduction

same time lead to new interpretations regarding, for example, rules about fencing, about women obtaining land through minor sons, or about elites collecting monetary tributes for performing land administration functions. Swazis share information across customary courts and territories about small rule interpretations effected in land cases, thereby contributing gradually to changes in shared beliefs and practices in land tenure.

In several of my cases, Swazi chiefs, similar to what Schapera (1970) has reported for Tswana chiefs, established new land rules or tentatively followed precedent reported elsewhere. For example, in one case a procedural rule of evidence was restated by the chief when a female disputant used documents from the 'modern' District Commissioner's office, rather than testimony from her in-laws, to substantiate her land request. The chief allowed this deviation, stating that justice would best be served. In another case, a customary rule regulating land access procedures was transgressed when a chief's council permitted a woman, who was severely disadvantaged by her inability to obtain land according to customary protocol, to receive land in the name of her infant son rather than a mature son. The chief based his action upon similar actions reportedly taken by chiefs elsewhere. From an analytic perspective, a problem arises in that such changes remained invisible to all but the closest observers due to the regionally variant, temporally incremental and uncodified nature of customary law. Compounding the 'invisibility' problem, Swazis did not report or even acknowledge such changes. When I asked people in interviews, for example, about women's land rights or about elites' acceptance of monetary tributes, they inevitably related conservative, ideal rules rather than actual practices, as I had observed.⁶ Clearly, Swazis believed that land reforms were a cultural matter and should be directed and acknowledged solely within customary institutions.

Swaziland's customary land disputes: comparison with other African polities

As mentioned, Swaziland shares much in common with other African polities. As a result, investigation and comparison of similarities in land development practices and political responses can be enlightening. At the same time, investigation of apparent differences – such as the unusual continuity of Swazi customary land law and secrecy regarding land disputes – are instructive.

Swazi land disputes are analysed in this study according to contextual strategies rather than exclusively in terms of customary land tenure norms; this way, both individual and class interests that compete to define ideologies underlying these norms are explained. The disputes are also analysed as processes within which norms are not absolute 'givens' but rather continually evolving variables. Finally, disputes are analysed as personal and political struggles to define in theory and to convey in practice the ideological variables underlying norms – particularly the variable of 'harmony'. In effect, local land dispute processes are characterized by a 'politics of harmony' which influences the politics of the emerging Swazi state.

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0521024684 - The Politics of Harmony: Land Dispute Strategies in Swaziland

Laurel L. Rose

Excerpt

[More information](#)

Introduction

Swazi customary land disputes point to the interrelationship between geographical, historical, social and political circumstances and everyday manifestations of land tenure norms. They display theatrically the structural stresses in a customary system of land law that must accommodate an imposed foreign legal system and expanded commercial interests. At the same time, they demonstrate the growing confusion among Swazis regarding legal norms and institutional avenues of legal protest. Individuals can strategize to clarify or to use to their own advantage such legal (normative) and institutional confusion. In Swaziland, as elsewhere in Africa, nearly everyone is concerned about allowing a 'play' in the land tenure system which permits minor case-by-case adjustments and occasional major changes in land practices, but they are also concerned about how norms are played with: traditional elites are concerned that land disputes might produce changes which deprive them of some land administration prerogatives; new elites and women are concerned that changes must currently occur through disputing processes in a sometimes frustrating and hidden (strategic) manner; while 'developers' are concerned that changes occurring through customary institutional processes are not sufficiently rapid or certain to benefit national productivity.

Questions about land norms, interests and changes arise. One question about land norms asks whether land development can proceed within a customary normative and administrative structure and still successfully balance private use rights with development interests in national productivity. A second question about land interests asks whether development initiatives can be taken away from traditional leaders without such leaders moving against land reform, and whether development initiatives will not be promoted by such leaders if left under their control. A final question about changes in land law asks whether and how customary land norms can change through disputing processes in individual cases. It also considers whether land tenure changes can be sufficiently rapid, broad and open to satisfy both commoners, such as women and new elites who are calling for increased social equity, and developers who are calling for increased economic productivity. In addition, it debates whether the changes are slow enough to guarantee a peaceful, negotiated transition which does not rupture social and political relationships.

This study of Swazi customary land disputes does not provide definite answers to these questions, but it does offer Africanists, social scientists, legal specialists and development specialists a model for comparison. The Swaziland data indicate that land development is proceeding within a customary land tenure framework, that traditional leaders are promoting land reform within this framework and that land norms are changing within this framework. Contrary to expectations based on the literature, the data indicate that a customary legal system as apparently conservative and resilient as that of the Swazis is subtly adapting to changed conditions. Unfortunately, 'developers' – even when they recognize and acknowledge processes of change

Introduction

in customary land law – downplay or ignore such changes, in contradiction of their awareness that fundamental characteristics of customary land law are flexibility and adaptability. Many ‘developers’ also downplay ‘certainty’ and ‘security’ in customary law, arguing that customary law proceeds according to random, unpredictable processes. They promote legislation, as in other parts of Africa, in the belief that changes are too slow, uncertain and circumstantial (linked to particular leaders and regions) to satisfy many Swazis and foreign ‘experts’.⁷ Perhaps they fail to comprehend or they underestimate developments in Swazi customary land law when such developments conflict with their conceptual models and interests.

The model of Swazi dispute strategies presented in this book addresses inaccurate conceptions on a case-by-case basis. Thus, it demonstrates not only how traditional elites are directing adaptations of customary law according to recognized status relationships, but also how commoners are playing a role in developments. In other words, it shows how Swazi customary land law is ordered in a way which outside observers cannot easily recognize: a flexibility and adaptability that are perpetually caught in the tug-of-war between individual use interests and elite political prerogatives. But importantly, it argues that Swazi elites must judiciously balance competing interests; they maintain prestige, which blossoms from the seeds of hereditary power, through both command and consensus.

The development agent and legal specialist in Africa are advised to conceptualize multi-layered customary law processes according to cultural vocabularies embedded within indigenous analytic models. Regardless of one’s perspective and goals in a land tenure study, the Swaziland data demonstrate that land reforms, in order to be widely accepted by an indigenous African population, must emerge from within, rather than parallel to, the octopus of customary law that extends its tentacles into all of life’s arenas.

Chapter organization

The book is divided into two parts. The first part presents geographical, historical, political, social and legal data in the national and local settings, whereas the second part presents the theoretical model and data analysis (case studies). Some readers may find that there are a great many cases and that some cases are described in considerable depth. Nonetheless, the cases selected demonstrate both different and important principles of Swazi customary land law as well as associated patterns of social/political organization. In addition, the more lengthy case descriptions provide an important record of events for Swaziana specialists.

In Part I, Chapter 1 provides material on Swaziland’s history, geography, political structure and social system. Chapter 2, which focuses upon the dual legal structure, describes Swazi customary disputing forums and associated personnel, illustrating how they operate according to dissimilar interpret-

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0521024684 - The Politics of Harmony: Land Dispute Strategies in Swaziland

Laurel L. Rose

Excerpt

[More information](#)

Introduction

ations of political harmony. Chapter 3 describes the two primary research communities. In Part II, Chapter 4 develops the theoretical problem, which is characterized in terms of political harmony in land disputes. Chapter 5 provides dispute cases in the framework of several dyadic confrontations about customary land rights. All dyadic confrontations between disputants are characterized in terms of authorities' strategies of political harmony and litigants' manipulative disputing strategies. Chapter 6 focuses upon women's disputes about land use rights, and Chapter 7 focuses upon new elites' disputes about land administration rights. Women and new elites use disputing strategies which are shaped by gender or class interests. Chapter 8 offers conclusions about the nature of harmony, the ways in which harmony becomes political in Swazi land disputes, and the continually evolving role of harmony in Swazi land disputes processes.

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0521024684 - The Politics of Harmony: Land Dispute Strategies in Swaziland

Laurel L. Rose

Excerpt

[More information](#)

Part I

National and local settings