

Comments on the Communal Land Rights Bill

Legal Entity Assessment Project (LEAP)
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1 Introduction

The Legal Entity Assessment Project (LEAP) is a project that falls under the Midlands Rural Development Network with a steering committee made up of national and provincial DLA officials, NGOs and academics. LEAP was established in KwaZulu-Natal in 1999 in response to concerns about the functioning of communal property associations (CPAs) and land trusts set up under land reform. The project has worked closely with DLA, NGOs and service providers to develop a better understanding of what affects the functioning of land reform communal property institutions (CPIs) and the effects of malfunctioning on the achievement of constitutional and land reform objectives.

LEAP provides a body of work that allows the sector to draw lessons from the rich experience of implementing land reform in South Africa over the past eight years. In particular, the lesson that land reform CPIs have not managed to secure the tenure rights of many beneficiaries is highly relevant to the Communal Land Rights Bill.

LEAP has developed a framework to map the components of common property tenure. This is based on concepts that have been used in the field to work with complex realities and includes indicators for assessing tenure security. The framework has been used to assess and intervene in specific CPIs, and has helped assess whether policy is likely to secure tenure in common property situations.

In summary, secure tenure is about:

- Defendable rights and enforceable duties to property and benefits flowing from it.
- Rules, procedures and systems for managing these property rights and duties.

Tenure is secured through an effective land administration system, which requires:

- Clarity about who holds what rights where.
- Clear, known and used processes of application, transfer, adjudication, recording and land use regulation.
- Clarity about where authority in these processes resides, that it is not disputed and that it is known and used.
- That these processes do not discriminate unfairly against any person or group.
- That there are accessible, known and used places to go for recourse in terms of these processes.
- That there is not a contradictory gap between law and practice in terms of these processes.
- That benefits and services are as available to people living in communal systems of land administration as to any other system of administration.

2 Summary of our arguments

The Communal Land Rights Bill should establish a legal framework that enables the creation of a coherent communal land administration system. This system should apply to all communal property situations in order to achieve consistency of administration, which is the basis for securing tenure.

We therefore agree with the Bill's attempts to:

- Secure the tenure of communities, households and individuals.
- Give legal recognition to existing communal tenure systems.
- Provide for the administration of land rights in communal areas.

To do this effectively, however, the components of a workable land administration system need to be thoroughly thought about.

An effective land administration system for communal property would have to provide:

- A clear legal definition of land rights and who holds them
- A public record of land rights and who holds them
- A sustainable public system for managing these rights, which should include accessible and affordable records management, adjudication and recourse.

Work with a number of case studies tells us that administrative structures and community rules, like CPAs and constitutions, do not, by themselves, create a land administration system that will secure the tenure of members of groups. Similarly, DLA's experience with land titles adjustment shows that recording systems based on expensive, centralised registration procedures tend to lapse.

The following principles, derived from experience of what works and doesn't work, should therefore underlie tenure reform:

- *Adapt from existing practices and institutions rather than attempt to replace them.* Replacement of tenure regimes is a very expensive exercise and it is often not a successful one. In addition, tenure is secured socially as well as legally, so attempting to replace practices and institutions can result in overlapping de facto rights and management structures. This undermines tenure security.
- *Seek to bridge customary and statutory law and practice.* Colonial and apartheid heritage has created a legal dualism that underpins the tenure systems in the country. Adaptive intervention means acknowledging this dualism and finding legal and other mechanisms to connect the systems.
- *Seek legal, technical and institutional coherence.* Tenure is secured (and undermined) by multiple factors, including consistency between laws, relationships between different levels of decision-making and authority and the alignment of specific mechanisms and procedures. Interventions aimed at adapting tenure regimes should therefore aim to create consistency between existing regimes and only introduce new mechanisms that relate consistently to what exists.

The comments and proposals we make are based on and seek to make real these principles.

3 Land tenure rights on communal land

3.1 Assessment of the Bill

We welcome the attempt in the Bill to provide for the recognition and protection of de facto rights. However, there are critical flaws.

- The Bill is ambiguous about whether people's de facto rights are recognised at enactment or at registration.
- The Bill's automatic application is too narrow to provide secure rights to all the people living in communal systems.
- The Bill assumes community can be simply defined and bases key mechanisms on this assumption.
- The Bill assumes that the user of land and therefore the rights holder is easy to identify.
- The Bill does not distinguish between procedural rights, which are about governance and substantive rights, which relate to the content of land rights.

3.2. Proposals

Immediate cover:

People's de facto land rights should be legally recognised at enactment. The creation of land tenure rights for all communal land residents should not be conditional on registration of either the communal land or the land tenure right. The land tenure right should therefore vest in the user of the land, with immediate effect on enactment.

This would clarify legally who holds the right and the exact moment when that right vests. It would also help clarify where there are contested overlapping rights that need to be redressed. This would clear up the ambiguity in the Bill and provide a legal base from which to determine who should be involved in decisions about what constitutes the community or group.

Application:

Land tenure rights must exist for all members of all communal systems. This should include Communal Property Associations (whether the result of a restitution claim, labour tenant, ESTA or redistribution application), TRANCRAA communities, land trusts and residents on Ngonyama land. At the moment, members of these communal systems only have rights in terms of the Extension of Security of Tenure Act or the Interim Protection of Informal Land Rights Act, which are weak personal rights.

Problems of community definition/membership:

There are no ready answers to the problems of defining community, as nearly a decade of land reform legal entity establishment demonstrates. Rights dependent on such definitions can be contested and uncertain. This is the key reason why the land tenure right must come into existence at enactment and not after registration so that it is prior to and not dependent on membership.

Where the definition of either membership or community is difficult, careful investigations based on clear adjudication principles need to be undertaken. These investigations should adopt an incremental approach that builds on learning, and must not be pressured in order to meet political deadlines.

Identifying holders of de facto rights

Defining the users of the land is not simple because land use is mediated by social structures, such as household, clan and tribe, which are changing as a result of various pressures. The rights of users are also not always exclusive or continuous and they may also overlap with other rights such as mineral rights and various servitudes, which are not always accessibly recorded.

While we agree that the land tenure right should derive from use, we would like to indicate some of the areas of complexity that the Bill needs to take into account.

- There are different types of use. Use can include: residential, arable fields, household and community gardens, grazing, natural resource harvesting, business (for both

members such as tuck shops and external investors such as hotels) and public purpose (roads, paths, water sources). Each use requires its own definition of rights and duties and its own regulatory system.

- Use can include or exclude other members of the group. Residential, home gardens and business sites tend to be exclusive rights while grazing, natural resource harvesting and benefits accruing from external investment can be inclusive.
- Rights to use can be sequential. Certain rights to use are only valid at certain times of the year, such as the right to graze cattle on other people's arable fields after harvesting.
- Users need not always be members of the residential group. Different parts of the country are known for their particular natural resources, such as reeds and mud. Users of these resources are not always limited to the de facto group owners of the land. Communities with boundary conflicts may also have fuzzy boundaries, with the area being used by members of both groups only for livestock grazing.
- Users can be sub-groups of the de facto owning group, such as community gardens and irrigation schemes.

Specific agreements about who can use what land, when and how, need to be based on local practice. Land tenure rights will have to reflect this diversity and records of different types of use rights will have to be constructed around the specific type of use.

Proper identification of de facto rights holders based on local practice would also need to take into account that multiple levels of decision-making can affect who uses land and what their rights to that land are. For example:

- A single woman's access to land may involve those men viewed as having primary responsibility for maintaining her and her children.
- A single or widowed woman may not have rights to alienate her land unless her children or their potential custodians agree.

The Bill must establish clear adjudication principles for determining who can decide to alienate land tenure rights. These principles must provide for the inclusion of all users of the land and not only customary decision-makers. This is at the heart of equitable tenure security. A balance must also be sought between equity and transactability, which requires that there should not be too many decision-makers.

Distinguishing between governance and land rights

A useful distinction can be drawn between procedural rights, which inform the parameters of communal land governance, and substantive land rights, which refers to the content of land tenure rights. If this distinction is absent, the answers to the question 'who can exercise what rights?' are unclear in implementation, which gives rise to ambiguous constitutions or community rules.

Procedural rights –

The Bill must define who has procedural rights, such as right to participate in meetings, the right to information, the right to be elected to decision-making structures etc. Experience in communal property institutions suggests that procedural rights should belong to all adult members of the group.

Substantive rights -

The Bill should define the minimum content of exclusive and inclusive land tenure rights.

This should include that holders of exclusive land tenure rights have the right to use and benefit from their land holdings, and to sub-divide, bequeath or donate this land. This is consistent with practice in communal systems. The decision to include additional content to the rights, such as sale and mortgage, should be subject to a group decision. Sales and mortgages of land tenure rights should be further restricted to those parcels on which there are no boundary disputes and uncertainty about who holds what rights on the parcel.

Holders of inclusive land tenure rights should at least have the right to use and benefit from the land holding subject to regulations from community and other levels of government. The Bill should require that any limit to use and benefit from inclusive land tenure rights be clearly communicated to all holders of these rights.

Adjudicating overlapping rights

Municipalities cannot develop service infrastructure and deliver services without a public record of "clean tenure".

The Bill should provide for a public adjudication process to determine and clear up any underlying rights for any person/s wishing to register exclusive land tenure rights, particularly if the community does not take ownership of the outer boundary.

4 Creating public records of holders of land rights

4.1 An assessment of the Bill

The Bill allows for transfer of ownership of land from the state to the group living on the land, and a possible option for individuals to take transfer of his or her individually used portions of land. The Bill also allows for the registration of individual land tenure rights.

We welcome this attempt to bring communal land into the mainstream land administration system and to provide a public record of rights to communal land

However, rights cannot be registered unless a holder of the right can be defined, the boundary surveyed and the nature of the right determined, and as noted above this is often not simple.

Moreover, given the shortage of state resources for tenure reform and the tendency of formal tenure to default, it doesn't make sense to force people to protect their rights through registration.

Furthermore, as mechanisms for recording rights and transactions in them, transfer and registration have very serious limitations.

Reflection on CPIs shows us that:

- Transfer into ownership does not provide a ready platform for development, for there are questions about service delivery on privately owned land.
- Group ownership does not secure the tenure of members because members only have personal rights with little state support to strengthen and protect them.
- Group ownership does not necessarily secure the tenure of the group because decisions can be made to mortgage and alienate the land.

And reflection on the Land Titles Adjustment Act shows us that:

- The technical requirements of transfer are extremely complex, costly and time consuming, which can cause titles to lapse.

4.2 Proposals

To enable bridges to the formal system, *the Bill must open up options that allow all people to formalise their rights incrementally as they need or want to.* This means:

- The Bill should create more than one legally acknowledged system of records, with checks for coherence with existing systems.
- People with a land tenure right should have the option either to record this right at a local level or to register it as ownership in the Deeds Office.

- The land tenure right record should be held at an institutional level that is accessible to all users in order to improve the sustainability of accurate record management.
- The Bill should define these levels, set minimum standards for the records and their management and provide ongoing institutional support for recording and record management.
- The minimum standards should include criteria for acceptable demarcation, adjudication and recording procedures.

The overriding principles guiding the establishment of a system for recording land tenure rights should be affordability, accessibility and long-term sustainability. This will ensure that rights are clear, land administration procedures are used and a firm base created for adjudication and recourse. These principles mean that the institutional location of, and support for recording functions should be carefully determined.

5 Institutional arrangements for the management of land tenure rights

5.1 An assessment of the Bill

The Bill allows for:

- The appointment or election of structures that administer the land rights of members in terms of community rules
- The establishment of Land Boards
- The extension of DLA functions to undertake rights enquiries, approve applications and register and update community rules
- The extension of Deeds Office functions to include registration of communal ownership and/or registration of land tenure deeds

The institutional arrangements outlined in the Bill are the weakest aspect of the proposed legislation. The problems include:

- There is nowhere for people to go when things go wrong. Recourse options and mechanisms are missing at all levels of administration, from application and rights enquiry through to redress and registration.
- Linkages between community level structures and the state at various levels are not set out and therefore the location of authority for various aspects of tenure security are not clear. This undermines the possibility of institutional back-up for adjudication, record management and recourse.
- New structures are not given useful or clearly defined functions. The exact purpose of the land boards in securing tenure is very unclear while the parameters of the land management functions of the administrative structures are also not set out clearly.
- The Bill proposes the replacement of practices and institutions that are on the ground currently. This arises from the failure to recognise that existing land administration systems involve layers of linked institutions. An example of one such system could include a traditional leader, traditional council, izinduna, ward level structures, ibandla (meeting) of neighbours, extended family and household. The Bill's proposal to replace the top of the traditional structure with elected representatives indicates a perception that the traditional authority is the land administrator without recognising the depth and rootedness of the system that the Bill is trying to replace. Grafting a new tip on the top of such an embedded system of rules, practices and institutions is unlikely to work in practice.
- As a result of all of the above, the Bill's proposals result in authority that is less clear, less resourced and less known than present and creates the possibility of multiple and contested sources of authority that undermine the existing (although limited) recourse options that people currently have.

5.2 Proposals

The primary purpose of the institutional arrangements proposed in the Bill should be increased tenure security. This requires that the Bill provide a more coherent and unified system than those that exist currently. To achieve this, the Bill should seek a shift in the practice of land administration structures by:

- legalising de facto rights on enactment,
- providing adjudicators and principles to determine holders of land tenure rights and the boundaries of these rights,
- creating the institutional backup at appropriate levels to support and adapt practices and procedures to meet constitutional principles and indicators for tenure security.

Concretely, the Bill should determine the parameters of levels of decision-making and function in terms of land administration for:

- *The household. The key decision is who can alienate land.*
- *The ward or lowest public level of administration. The key decision is who can get access to land.*
- *The community. The key decisions are rights to sell and mortgage land and parameters for the adaptation of rules.*
- *The land governance/administrative structure at community level. The Bill should define land administration functions.*
- *The local municipality. The Bill should define linkages to land administrative structures.*
- *The land board has a role in providing affordable adjudication, demarcation, consent for land use change and recording.*
- *The Department of Land Affairs has a role in registration and adjudication.*

The Bill must provide for functions relating to the creation, maintenance and updating of land tenure right records, community rules and administrative structure office bearers to be located close to people living in communal systems in order to be sustainable. There are three possible options for this.

- The deeds and surveying functions could be decentralised.
- These functions could be devolved to municipal level, as a key user of information, with a corresponding transfer of funds.
- The functions could be outsourced to local conveyancers and surveyors with prescribed minimum requirements, maximum fees and linkages to centralised deeds and surveying offices.

In addition to the location of these functions, the Bill should also provide for the following support to institutional levels with responsibilities for records:

- Clear communication about the recording process and options to all members of a community
- A record format
- A record management system, with linkages outside of the community
- Recourse mechanism and place/person
- Adjudication principles and an adjudicator for disputes about who holds rights and where boundaries are.
- Clear principles for determining who in families can make decisions about the alienation of household land.

The Bill should also specify the precise recourse options for each of the institutional levels, procedures for accessing these options and adjudication principles for resolving issues at each level. Administrative structures should have some adjudication functions but there should be higher levels of adjudication and appeal accessible to people living in communal systems. In order to do this, adjudication principles and hierarchies of evidence must be developed and decision-making authority located at appropriate levels of the institutional arrangements. The Land Boards' primary functions should be located here, possibly as a high level appeal like the CCMA's in labour disputes.

