

**AN ASSESSMENT FRAMEWORK FOR
COMMUNAL PROPERTY INSTITUTIONS**

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1. BACKGROUND AND INTRODUCTION

- i) The Department of Land Affairs has five major programmes to drive the Land Reform process. These programmes are underpinned by five important Acts.
- ii) The redistribution program takes place in terms of the Provision of Certain Land for Settlement Act 126 of 1993. The restitution program takes place in terms of the Restitution of Land Rights Act 22 of 1994. The labour tenants program takes place in terms of the Land Reform (Labour Tenants) Act 3 of 1996. The program of extending security of tenure to groups or individuals with insecure tenure takes place in terms of the Extension of Security of Tenure Act 62 of 1997. The program of providing security of tenure used to take place in terms of the Upgrading of Land Tenure Rights Act 112 of 1991. Due to certain limitations, Act 112 of 1991 is under review and a new Bill will be tabled in parliament to either supplement or replace this Act.
- iii) All five of these programmes usually involve a group of people acquiring one piece of property. A legal entity needs to be formed to take transfer of the property on behalf of the group due to the restriction imposed by section 30 of the Companies Act, 1973 (Act No. 61 of 1973). Section 30 states that no company, association, syndicate or partnership consisting of more than twenty persons shall be permitted or formed in the Republic for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association, syndicate or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other law.
- iv) Several legal entities are available to groups. The most relevant are Trusts and Communal Property Institutions. Trusts have been used extensively

in the past as land holding entities. However, the structure and administration of Trusts displayed a lack of transparency, accountability and participation. The need was identified for a legal entity which would have the above-mentioned qualities.

- v) In 1996 the Communal Property Institutions Act 28 of 1996 was promulgated. This Act provides for communities to form juristic persons, to acquire, hold and manage property on a basis agreed to by members in terms of a written constitution. Communal Property Institutions are the key institutional vehicle for holding land on behalf of groups. Around 75% of land reform projects have taken place using communal property institutions. They are therefore an essential component of successful land reform.
- vi) The Act is administered by the Department of Land Affairs: Directorate Tenure Reform. The registration of a communal property association is facilitated by the Department of Land Affairs. Registration of these institutions has minimal cost implications for the groups and the bulk of the expenses is carried by the Department of Land Affairs. The registration office for communal property institutions is situated in Pretoria.
- vii) Up to date more than three hundred communal property institutions have been registered with the Department of Land Affairs Tenure Reform Directorate.
- viii) A number of acute problems experienced by communal property institutions were identified at a workshop held at the Pretoriahof Hotel from 6-8 December 2000. This paper is a response to that workshop and proposes a way forward with regard to monitoring communal property institutions.

- ix) Besides the Department of Land Affairs a number of other parties have played an important role in developing and assessing communal property institutions. These include the Legal Resources Center, Legal Entity Assessment Project and several other Non Governmental Organizations such as TRAC which undertook a detailed analysis of service delivery to communal property institutions.
- x) It has generally been agreed that the entire institutional framework in which communal property institutions operate needs to be improved and that certain key interventions would enable them to perform far better. As part of this process, it has been agreed that a broad monitoring strategy needs to be formulated and a specific research project convened to investigate certain issues.
- xi) This paper suggests an overall monitoring strategy for communal property institutions and proposes a research project to be undertaken to investigate the specific causes of communal property institutions' non-performance. The suggestions made in this paper were discussed and reviewed at a workshop held on the 17 and 18 April 2001 in Pretoria at the St George's Hotel.

2 OBJECTIVES BEHIND THE FORMATION OF COMMUNAL PROPERTY INSTITUTIONS

- i) Communal Property Institutions enable groups to acquire, manage and hold property on a communal basis. In effect they are tenure-providing instruments that offer communities a stable platform off which to undertake development initiatives.
- ii) Principles to be considered include issues of equality, transparency, non-discrimination, inclusivity, democracy and accountability.

- iii) An assessment of the performance of communal property institutions needs to consider two levels of objectives:
- At the highest, indirect level, their impact in enabling the improvement of the quality of life of their members needs to be assessed (i.e. Are communal property institutions conducive, or obstructive to development?); and
 - At the most direct and immediate level, the organizational performance of the communal property institutions in providing the group and its members security of tenure must be considered.

There are also issues that interact across both quality of life and tenure security. For example, quality of life issues such as high incidences of crime and Aids might result in people abandoning their land and land rights, while certain types of tenure might result in government departments refusing to deliver services and banks refusing to grant access to finance.

3. MONITORING COMMUNAL PROPERTY INSTITUTIONS: PERFORMANCE INDICATORS FOR EACH OBJECTIVE

- i) Performance indicators are measures that allow one to assess whether progress is being achieved in a certain area.
- ii) Performance indicators for improvement in quality of life at a group level would relate to issues such as improvements in land use, environmental changes; the quality of services provided to the group, the group's access to finance, etc.

- iii) Performance indicators for organizational performance would relate to the existence of processes and institutions that the group and its members use to increase and assert their tenure security, and their capacity to do so.
- iv) The key result from the workshop of 17 and 18 April was that the most important level or perspective to be researched relates to the organizational performance and degree to which tenure is secured for its members through the communal property association. This is an important point: until now, other longer term issues relating to changes in the quality of life of land reform beneficiaries have been the primary focus of research initiatives. Consensus was however reached amongst partners in the program that measuring tenure security and creatively identifying indicators of increased use of rights in land is to be the primary agreed focus of assessment of communal property institutions.

4. REASONS FOR MONITORING COMMUNAL PROPERTY INSTITUTIONS

- i) The Communal Property Institutions Act No. 28 of 1996 requires that the Department monitor communal property institutions and report through the Minister to Parliament on their status and progress.
- ii) This has proved to be virtually impossible since very little data is received from communal property institutions. As a result the Department has yet to submit to Parliament the necessary report on communal property institutions. It is important that a report be drafted and presented as soon as possible.

- iii) A strategy is required that will allow the Directorate responsible for administering communal property institutions to report on their status in a way that is useful and informative and meets the legislative requirements.
- iv) It has been agreed that much could be done to improve the operations of communal property institutions and that in many instances communal property institutions should not be the vehicle for land holding or development and that other tenure forms should be investigated. In view of the fact that a large number of communal property institutions have already been set up, there is a clear need to support these institutions. It is also clear from current programs of the department that these institutions will continue to form an important part of all the land reform initiatives.
- v) At this point no real basis for promoting new strategies exists since the research done so far has not been pulled together in a meaningful and strategic way. Empirically valid findings cannot be called upon to support the adoption of one approach over another.
- vi) Monitoring performance of communal property institutions should thus contribute to, and inform interventions that improve their performance at a range of levels. The results of performance monitoring could include possible amendments to the legislation and the regulations. In addition, performance monitoring should serve to advise and inform land reform practitioners of when a communal property association is a suitable institutional vehicle based on a solid understanding of what has worked historically and what has not.

5 THE ASSESSMENT

5.1 Purposes of the assessment

- i) It is acknowledged that the primary objective of a communal property association is to provide tenure security. The legal framework exists, but the institutions do not function properly therefore making it difficult to enforce the legal framework. It is proposed that an assessment be undertaken to assess and interpret the internal performance of communal property institutions as a mechanism which ensures people's tenure rights and to investigate and understand external factors that impact on these institutions and their members.
- ii) The assessment will include both internal and external issues / aspects which relate to communal property institutions. These issues / aspects will be probed in terms of both quality of life and tenure security.
- iii) The assessment will be undertaken in two phases. The first will be a diagnostic audit, which will:
 - Identify and categorise problems affecting different types of CPIs and their members.
 - Identify interventions that can be undertaken without further testing.
 - Identify the issues to be further validated at community level.
 - Give the basis for sampling.
 - Set out a detailed plan for phase two.

Phase two will be a survey of a significant sample of CPIs, which will:

- Validate the findings of the diagnostic audit.
- Give more depth and specificity to the problems defined in the diagnostic audit.
- Identify further interventions to remedy the problems.
- Recommend specific and implementable strategies and plans to undertake the interventions. (Recommendations could include specific

proposals to amend legislation, policy, systems and procedures, to address capacity needs and to restructure the institutions. These should include proposals on how to facilitate interventions that will improve the quality of life of CPI members.)

5.2 Indicators for tenure security

Tenure concepts tend to be complex and abstract. In order to concretise them it is useful to look at key events in tenure administration and indicators for measuring whether the tenure security of the group and the members is improving or declining.¹ The following indicators can be used:

- People have clear rights, they know what their rights are and they can defend them.²
 - The processes of application, recording, adjudication, transfer, land use regulation and distribution of benefits are clear, known and used.
- Authority in these processes is clear, known and used.
- These processes do not discriminate unfairly against any group or person.
- The actual practice and the legal requirements in terms of these processes are the same.
- There are places to go to for recourse in terms of these processes, and these are known and used.

¹ Application, defined as a formal request to get or give land, change land use or get help to resolve a land dispute.

Recording, defined as creating evidence about the extent of a right (demarcation), the owner of the right (registration) and the nature of the right as a basis for adjudication.

Adjudication, defined as resolving doubts about the rights held, which can involve dispute resolution.

Transfer, defined as the moment rights or the physical occupation of land move from one holder to another.

Land use regulation, defined as the rules/practices about how members/individuals can use different portions of land and the mechanisms for enforcing this.

Distribution of benefits derived from ownership and rights to the property.

² Different land uses can have different types rights attached to them and the indicator should be used accordingly.

5.3 Indicators for quality of life

The quality of life issues are those that would affect any land owner. The question is whether there are specific issues that affect CPI owners that do not affect other types of land owners. Indicators include:

- Benefits and services are as available to CPIs and their members as to any person living under a different tenure arrangement.
- *The burden on members of CPIs in terms of land holding, land management and land development should not increase as a result of their tenure. (??)*

6 CORE ISSUES

This list is not exhaustive and may be expanded during the assessment. The issues may not all apply to every CPI.

6.1 Core issues relating to tenure security

Base facts

- DLA file number
- Name and geographical location of CPI
- Land reform project type and phase
- Type of legal entity and date of registration
- Group size and demographics and main sources of livelihoods
- Significant features of the group
- Past land tenure systems and practices

The constitutions of communal property institutions.

- The language in which constitutions are drafted.
- Access to a copy of the constitution.
- Drafting process.
- Accommodation of existing traditions and practices in the constitution.

The committees of communal property institutions.

- Elections of committee members.

- Skills training.
- Committee meetings.

Meetings of the members of the communal property association.

General and annual general meetings.

Feedback from committee on decisions pertaining the association.

Relevant issues to be discussed at general meetings.

- Membership issues.
- Financial issues.
- Administration issues.
- Allocation of sites.
- Land use.
- Levies and contributions.
- Voting procedures at meetings.

Financial administration.

- Management of bank accounts.
Distribution of financial benefits to members, or use of money generated from communal resources
- Financial training.
- Bookkeeping systems.
- Annual financial statements.
- Tax.

Annual reports.

- Assistance in preparation and presentation of annual reports.
- Contents of annual reports.

Dispute resolution.

- Conflict resolution.
- Roles of traditional structures in dispute resolution.

- The role of the Department of Land Affairs' role in dispute resolution.
- Access to the courts.

Membership.

- Definition of membership.
- Membership lists.

Land Allocation

- Rules of land allocation.
- Residential Land allocation.
- Communal Land allocation.
- Grazing-land allocation.
- Arable-land allocation.

Recording of rights

- Records of membership rights.
- Systems and procedures for recording membership rights.

Land transactions.

- Rules on transfer of land (rights).
- Sale of land.
- Lease of land.
- Contracts for the use of land.

Registration Process.

- Duration of process.
- Level of involvement of community in registration process.
- Quorum at adoption of constitution.
- Support by the Department of Land Affairs.

Offences.

- Offences in terms of the Act.
- Assistance by the Department of Land Affairs in dealing with offences.
- The role and accessibility of the Courts.
- Role and capacity of the Department to deal with offences.

6.2. Core issues relating to quality of life

- Service delivery to communal property institutions.
- Access to credit.
- Economic development.
- Recognition from, and linkage to local and traditional authorities.
- Donors and donations.
- Land administration and ownership responsibilities.
- Law enforcement institutions and processes.
- Political environment

7 METHODOLOGY

7.1 Diagnostic audit

This should include a stakeholder analysis and clear analytical framework.

- Group and individual interviews with relevant government officials, consultants and NGOs.
- Review of documents including written analyses and reports, case study material (see appendix A), policy frameworks and law as a base from which to move forward
- Attendance of CPA task team meetings.
- Presentation of interim findings to members of the CPA review teams for interrogation and adaptation.

7.2. National survey

The field assessment should use action research methodology in order to achieve the following outcomes:

- In depth conversations at community level around the abstract issues of tenure security.
- The extraction of information for the national assessment and simultaneously to enable the community members to assess their own situation.
- To enable people to work with issues of felt importance so that a collective understanding of problems is achieved as a basis for taking action.

The following activities make up the assessment:

- Familiarization with and capture of baseline information, including the constitution, to create the base to understand community issues.
- Meeting with leadership to explain the context and purpose of the assessment, to understand how issues are emerging for them and to arrange meetings with the cpi members
- Focus sessions with cpi members
- Telephone interviews with external actors involved with the cpi.
- A final meeting with the community to feed back outcomes and recommendations, to check information and insights and to enable people to plan future action

Participatory tools are used to create a picture and to ask questions and discuss tenure and institutional issues. These tools included a timeline, household maps built into a land use community map, and venn diagrams of institutions.

Key in the method of doing field assessments is analysis of critical incidents. This involves asking people to describe what has happened recently in land administration as the basis for probing specific issues and dynamics.

Each assessment involves four aspects: field design, facilitation, analysis and report writing. The assessment team should include a DLA planner and an external facilitator.

The participation of the DLA official responsible for the project being assessed in design of field processes is important because they have critical insights into local dynamics and processes. Moreover undertaking remedial action following the assessment will depend on that official and her or his understanding of the current problems and strengths of the communal property institution. However, field facilitation is difficult for the DLA official because it requires the official to change roles. The action research approach demands a high level of facilitation skill and understanding of tenure.

Using the checklist of core issues

The national CPA task team created a list of core issues, which serve as a checklist for local level assessments. The checklist must be used as a reminder of what may be important and not as a set of questions that must be answered. It is neither prescriptive (not all the issues listed will be relevant in every case) nor exhaustive. The checklist is useful to build a general picture of a land reform project and to construct a context in which to understand the tenure. This general picture provides the basis for analysis and some of it is useful for the report. However, the report is more usefully structured around the analysis.

A framework for analysing tenure security

The analytical framework to analyse the information from the fieldwork has five conceptual "blocks":

- An understanding of who the rights holders are and what rights they hold.
- What issues matter in assessing tenure security, or **where to look**.
- Indicators for assessing the tenure of the rights holders, or **what to look for**.
- The institutional arrangements for securing tenure as a basis for improving the quality of life of groups and members of groups.
- Social and political issues that affect the tenure and therefore quality of life of groups and members or vica versa.

Tenure security in CPIs is not likely to be static. The assessment should draw conclusions that indicate whether the tenure of the group and its members is improving or declining and what impact this has on people's quality of life. Key factors contributing to the improvement or decline should be explained in detail as a basis for intervention and future monitoring in specific cases.

Recommendations

Recommendations should be at multiple levels, including those people in the CPI, provincial officials in the DLA and other key provincial or local government departments for the specific project and national DLA officials, which must include a national level analysis of problems and interventions needed.

8 REPORTING

Information obtained must be written up in reports that highlight issues relevant to the communities themselves, the provincial officials involved and the national office officials.

Appendix A

OTHER RESEARCH BEING DONE ON COMMUNAL PROPERTY INSTITUTIONS

- i) The Legal Resources Center has undertaken an internal review of the communal property association projects they have worked on for their donors. This was also intended to advise practitioners on the steps needed to address existing problems. The project focussed on communal property institutions assisted by the Legal Resources Center previously. It defined the causes of the problems these institutions are facing and intended to propose solutions. The intention was also to prepare supporting resource documents. Projects that were researched included several in the Eastern Cape, Western Cape and Gauteng. The project was completed by the end of July 2001. The research was intended to complement work done by the Department of Land Affairs and will include a comprehensive literature review.
- ii) The Center for Applied Legal Studies at the University of the Witwatersrand is undertaking ongoing research that includes a review of existing legislation. The Center is highly critical of communal property institutions as development vehicles. The project intends to mainstream women and their needs and is intended as a long-term project. It intends addressing developmental issues, post formation issues and will release a

number of publications specific to certain concerns. Three of these have already been published. More than five projects have already been researched. The Center promotes a hybrid approach to communal property institutions, drawing on the features of a number of different institutional types.

- iii) The Legal Entity Assessment Project in KwaZulu-Natal started a research project several years ago in response to specific requests. The intention behind the research is to investigate the problems faced by communal property institutions and thereby to create a basis for organizational interventions. The project has looked at communal property institutions broadly and has argued that they are over-burdened with expectations. This project had also struggled to agree on what the performance indicators for communal property institutions should be. This has now led to a focus on the performance of the communal property institutions in providing tenure to groups and their members. Problems identified in the project include unfriendly processes, a lack of organizational capacity building, inadequate linkages to other institutions and a lack of clarity especially regarding membership details in founding documents. The project was not active for some period of time because of funding problems. In short the project argues strongly that developmental issues need to be considered separately from the key, more important tenure concerns.

- iv) Association for Rural Advancement is undertaking a Piloting of Local Administration Records. This will aim to secure the rights of members of communal property institutions by proposing procedures and mechanisms to fill in the gaps in existing systems. This aims to address the problems these institutions experience around land invasions and the erosion of access rights amongst others. The project will identify cheaper ways of registering the rights of members of communal property institutions. The

project is piloting this approach with a community in Kwazulu-Natal and includes mapping and demarcation issues. The Surveyor General and the Deeds Registry are involved in the project.

- v) Other research includes detailed qualitative case studies prepared by Surplus People Project, projects undertaken by Border Rural Committee and other National Land Committee affiliates, as well as work done by PLAAS and the National Land Committee itself.

- vi) DLA scoping report.

- vii) DLA quality of life reports.