LEAP contributions to CPA Act review

AMENDING & SIMPLIFYING LEGAL ENTITY DOCUMENTS:

DOES THE ACT SUPPORT THIS?

(some thoughts by PL at Nov. 2000)

1. The constitutions met the formal requirements for transfer of land. It appears that to parties involved (the members, the drafter, the Dept) their making was primarily a procedural step towards this finite end rather than the other way round i.e as a facility for continuing social progress, including acquisition of a land base. The product of the constituting steps was thereby relegated to the symbolic although the Act itself is about the Associations.

2. Field work confirmed that the constitutions serve no further purpose in practice: neither as administrative guide, educational development tool nor monitoring standard.
As public documents many were faulty due to contradictions around key concepts. There is valid cause for concern.

3. LEAP reports have detailed in what respects and to what extent the existing documents are impractical and conceptually unsound. Some guidelines have been developed for drafting more usable and relevant constitutions within the provisions of the Act, and with an eye to tenure security. We do not know to what extent improved and understood texts can render CPA administration more effective and progressive, but clearly they are desirable in removing an obstruction and source of confusion.

4. As the CPA Act could not have intended to render so poor an outcome regarding written constitutions, we need to understand how the situation came about. Is the legislation at fault? Were its requirements in fact not met or were they misconstrued? And the radical amendments LEAP is suggesting: are they comfortably held within and justified by the Act as it is? Such questions are material to the proposed review.

5. Field work showed that in many instances the essence of the constitution as an agreement between the association and its members *(s8(6)(e)and Long title)* was lost because either procedures were faulty or adoption requirements not followed and often alterations were made without reference to the principals. Frequently, precedent forms were imposed which were far from appropriate to the communities *(intention as stated in Preamble)*. All these shortcomings are clearly in violation of the Act.

6. LEAP found that this essential agreement, even when meticulously facilitated, was distorted or obscured by the format and language of the texts. In this respect, members' right to have access to a copy of the constitution *s9(c)(v)* is empty unless the meaning contained therein is itself accessible to them. However, advocacy of the

use of plain language in lieu of "legalese" in these documents and a vernacular translation do not have to be justified in terms of the Act. They are constitutional rights of members.

7. Excessive length and detail in the constitutions render them unhandleable. LEAP guidelines suggest streamlining by a construction of the Act that allows for large excisions e.g. that a statement of the principles contained in *s9* is unnecessary in addition to compliance; that community rules can be developed outside the main text; that a registered CPA is held by the Act as in *s9(2)* regarding interpretation. Secondary objectives for associations, over and above to hold and manage property *(long title)* are questionable.

8. However, these steps too easily appear as isolated stratagems in danger of becoming another generation of precedents. They are insufficient as a guide to mediation between the contradictory needs of members' actual lives and the all-cases-foreseen style of a lawyer drafting a hard legal instrument. What is required is a guiding principle.

9. Perhaps we can take a wider view of the Act than its sections and schedule. Implementation of any statute must depend on its specific terms but also on its intention. In a search for such principles of mediation, it might be useful to reconsider the intention of the legislation and understand this in the light of tenure studies made throughout Africa.

10. These studies discuss underlying cultural issues that impinge on (especially land) law reform in Africa. These are specifically manifest in the CPA Act which allows a freely made choice* by participants to nest an indigenous type land tenure based on use for livlihood, with the advantages of commons, within an established framework of registered tenure rights based on land as a marketable commodity. The whole is, in turn, enclosed within the principles of the national constitution.

* in *s2(1)(d)* only. Is direction by Land Claims Court justifiable?

10. At the edges of this inner nesting, which is where the legal entity constitutions are situated, the Act allows a degree of flexibility by means of the substantial compliance concession: *proviso to s8(2).* If we see these edges as the contradictions between a traditional land administration system that is in detail negotiable (and thus unrecordable) and one that is highly prescriptive (the statutory model) it becomes clearer what deviations or omissions could well be contained within the concept "substantial".

11. We can take it that the constitutional principles of non-discrimination, transparancy and democracy are not up for negotiation and that this border with the Act points outwards, is inflexible, must hold up in the national legal system. On the other side, pointing inwards to the intimate experience of people, be it who is considered an adult, inheritance modes, family connections, the Act can support fuzziness.

12. How would this play out? If client groups have established procedures that work for them and that are, by their negotiable nature, responsive to changing circumstances it is both futile, because of the liklihood of reversion, and unnecessary for a constitution to prescribe parallel procedures. An agreement on the main rights-holders and decision- making structures within an association provides a firm enough framework to contain and influence the development of such familiar and trusted procedures. These are likely to vary from group to group and will sometimes not exist at all, in which case there is no contradiction to be mediated. The point is that an omission from the scheduled matters in such fields is legitimate where it is not, in practice, a void.

12. Constitution-making informed by this view may well produce two advantages: to ease the desired and presently non-existent compliance and to give drafters some direction in a more flexible approach which in turn could lead to a greater degree of group by group appropriateness than we have so far seen.

*****

EXAMPLE OF POSSIBLE APPLICATION OF PRINCIPLE:
The Problem Statement names gender discrimination as an issue in CPAs. A widely used precedent applies the quota system e.g the UZULU ANGAFUNI UKUSUKA CPA constitution contains this clause: *6(d)(iii) At least 40% of committee members serving at any given time shall be female...*
Field work in different groups shows a variety of outcomes to this approach where the idea is not readily accepted: women did not want to be elected, were appointed by default and did not attend meetings; female committee members occasionally attended meetings at first but were constrained by custom from speaking in that forum; men did not approve and called meetings at times when women's household duties prevented their attendance.

A second approach is illustrated in the EMSI document at clause *14.12.3 No person may be disqualified from standing for election... on account of being a woman.* In actual practice there are as yet no women on the committee. On the other hand, at NKASENI women were elected and at GANNAHOEK were actively engaged on committees where no such stipulation had been made.

The quota stipulation is inserted, using the imagery of these notes, in terms of the inflexible border between the Act and the Constitution. Where participants are clearly not in agreement with the idea, it properly belongs on the fuzzy, cultural side. In these cases such a provision can alienate people from their constitution and so discredit it. The second, negative, approach acknowledges a real present discrimination but insofar as it arises from the inner nesting of cultural habit and is quite capable of change, it has no business being recorded.

Non-discrimination is of course not negotiable. It belongs where the quota clause, which is negotiable, has been placed. In terms of the principle outlined, non-discrimination could effectively be included in defining members and a member's rights, one of which is to election. This respects the people's present situation but enables and justifies any future claim women may wish to make.