

Choosing legal forms to fit people's tenure requirements

Consolidating LEAP's position for further development and discussion

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Thelma Trench, Legal Entity Establishment Project

1. Introduction

LEAP has worked in the context of communal property and land reform, mainly in KwaZulu-Natal, South Africa. Our goal has been to increase tenure security for groups and people inside groups. LEAP has struggled for years with questions around choosing legal forms, which come up repeatedly in its own fieldwork and that of officials and facilitators with whom it works: "Which is the better choice, communal property associations (CPAs) or Trusts?" "If LEAP says 'Avoid trusts', on what basis are we saying that?" "Where people need information to make an informed decision on legal forms, what do I tell them?" We decided to consolidate our understanding in order to develop a LEAP position on these questions, and the results are this paper and a pamphlet developed from it¹. The national communal property institutions review that is currently underway may comment on different legal forms more widely and systematically.

The process of writing the paper led to better definition of the problem and better questions. What do we mean by the term legal form? On the ground, people organize themselves (or are organized by others) to achieve certain purposes around land use and its administration. For different land use purposes the same people may act as individuals, as households, as interest groups or as large collectives. In the context of land reform, we therefore understand **legal forms to be the ways in which the organizational structures and practical arrangements of people on the ground are configured in order to draw on legal recognition and support**. The legal form is not the same thing as the founding document of a legal entity, although the law in terms of which a legal entity is established may require that the founding document reflects certain principles or makes provision for certain situations.

LEAP recognizes the crucial importance to tenure security of the local land rights administration practice of groups as the foundation on which people hold and manage land to achieve tenure security. Furthermore, Pienaar (2000)² reviewed work on group land holding and management arrangements and commented that *There appears to be little or no link between the extent of problems experienced and the type of legal entity – be it a trust, a voluntary association or a similar entity*. An early question was therefore "Why bother with the question of which legal form is better? Why do legal forms matter?" Firstly because LEAP's position is that tenure security must enable maintenance and development of activities important to livelihoods, which requires working linkages to a larger framework of government support. Legal forms are an important piece of this. Secondly as LEAP and others try to create functioning linkages to achieve tenure security and enable development, we have hit situations where issues inherent in the legal form itself have important implications for people's ability to further their objectives and get access to government support when they need it. This paper looks at some examples.

What matters in choosing legal forms? In working with legal forms the question of whether the arrangements they create function as "enabler", as "broken reed" or as "killer factor" may sit at many levels: in the wording of law, in the way it is interpreted, in the great variety of ways that practitioners choose to work with law and in the detail of founding documents by which groups hold and manage land. In finding a way through this we first posed another question, that seems to lie at the heart of the debates on implementation of land reform: "Whose purposes are being met and whose organizational structures and arrangements are getting legal recognition and support?" While the ideal answer would be "Those of people

¹ To obtain the pamphlet "Choosing legal forms" send an email to midnet@sn.org.za.

² Pienaar, K. 2000. "Communal" property institutional arrangements: a second bite. Published in Cousins, B. (2000). *At the crossroads. Land and agrarian reform in South Africa into the 21st century*. Capetown: PLAAS/NLC.

living in communal property institutions”, the reality varies from case to case. Some officials and service providers give high priority to their own pressures and constraints, resulting in legal forms which are inadequate for the purposes of people on the ground or undermine them altogether. Officials and practitioners who genuinely try to achieve the ideal continue to wrestle with questions around costs and implement-ability that have to become part of the debate. In structuring this paper we decided that to find out what matters choosing legal forms we would need to start by looking at the degree to which the legal form/s **meet people’s purposes and situation** around land use and its administration, now and in the foreseeable future and in crisis situations, and the **processes** by which the choice is made.

This paper reviews LEAP’s understanding of issues to consider in choosing legal forms to hold and manage land. It draws mainly on our own and others’ experience of the processes of considering and making choices and assessing the impact of choices of legal forms in work with people on the ground. It avoids theorizing from the word of the law, except where this constrains or enables meeting people’s purposes or situation, or seems to have the potential to be activated to address a problem on the ground. We touch only lightly on the way particular laws defining legal forms are interpreted and the systems by which they are implemented, which have been reviewed exhaustively. LEAP has commented on systems for legal entity establishment and on legal entity foundation documents elsewhere³, and most of these arguments are not repeated here.

2. Understanding the limits of legal forms

A common misconception in relation to common property situations is that the choice of the legal form will determine whether communal property institutions function well or not: for example, “CPAs are failing so we should repeal the legislation or start using trusts”. The reality is that whether good, fair management and land administration takes place or not is often largely determined by issues like the following, which can undermine effective governance and land administration irrespective of which legal entity is used:

- Do the majority of residents understand and agree with how land administration processes work?
- Are there major conflicts within the group that hamstring decision-making?
- Does the committee understand its role, and have the capacities, resources and legitimacy to exercise authority?
- Can the members / residents hold the committee to account in practice?

The legal form becomes important when interest groups or individuals have to go beyond the committee and the group for help or when something must be done but the group can no longer help itself, for example, there is a high level of conflict so that decisions and action become dangerous or impossible, the legal entity goes bankrupt, or people’s land is sold from under them. In such situations the legal form determines what help people are entitled to under the law, which authority they can apply to and who may take what action.

3. What were and are the choices of legal forms?

Understanding the implications of unfamiliar legal forms and drawing up documents to meet legal requirements is a lot of work. Probably because of this, many of those structuring the legal arrangements for communal ownership of land in the mid and late 1990’s used trusts (Trust Property Control Act 57 of 1988) and then communal property associations (Communal Property Associations Act 28 of 1996), often slavishly. Some tried voluntary associations and closed corporations. New options may be offered by the Communal Land Rights Bill but there is not yet experience to draw on so they are not considered here.

³ See www.leap.org.za and its library

Understanding of tenure needs on the ground is greatly better than it was in the mid-1990's. Legal Resources Centre⁴ and the Ekuthuleni-AFRA partnership in the PILAR project (see Box 1) have spent years critiquing legal forms in order to find those which best meet the requirements of groups with whom they are working. They follow some important principles:

- The legal form/s chosen become an important part of the net of institutional arrangements to achieve sets of locally negotiated purposes, rather than ends in themselves.
- It becomes possible to think of combinations of legal forms, of legislative frameworks rather than "a law".
- Where they have tried and failed to meet locally negotiated purposes they have started to name gaps in what is currently on offer in terms of legal forms and where the law fails to align properly with need and practice.

Box 1: The Ekuthuleni-AFRA PILAR project partnership

DLA owns properties at Ekuthuleni near Melmoth in KwaZulu-Natal. An AFRA report⁵ describes how the Ekuthuleni Communal Property Association came into being. *"Representatives of the community approached the DLA in early 1997 requesting PTOs (Permissions to Occupy). The catalyst for this request was a desire to access credit for agricultural expansion. However members of the community found credit access difficult without records of their tenure rights."*

On the one hand there was a high demand for individualized rights. AFRA established in workshops that this demand for a record of property rights had two main roots:

- For the majority, concerns about threats to tenure security of disputes around boundaries and uncertainty about who holds what rights (especially important to women) including a fear of eviction;
- For some, a desire to access agricultural credit.

On the other hand there were arguments for communal ownership. The costs of surveying and transferring individual portions were prohibitive, and raised questions about future sustainability of title. People at Ekuthuleni also wanted to *"remain part of a tribal structure which defined their culture, membership and mechanisms for land allocation, administration and dispute resolution"*. The decision was to proceed with a transfer to a communal property association with the development of local systems for creating and maintaining records of exclusive and use rights based on local land administration practice.

In partnership with AFRA, Ekuthuleni is currently defining its own systems of land administration rules and records, including records of exclusive rights of households to particular parcels of residential and arable land. The systems they are developing fit their need and situation, and accommodate both individualized rights and the pressures towards communal ownership of the Ekuthuleni property. However although the partnership has exhaustively explored the possibility of links to the formal system, the Ekuthuleni systems continue to lack legal recognition or state support.

The shift in approach opens the door to questions like "Would township establishment and individual title work as arrangements by which people could hold household sites in this group, with group ownership of the veld?" or "It's clear that setting up a CPA would mean that the group as a whole could have some control over who comes to live here, but what would that mean for delivery of services and for that group of farmers who want to grow sugarcane?" The experience of Ekuthuleni, however, shows that getting answers to these questions is much harder than it looks.

4. The processes by which legal forms are chosen

This section examines some of the **processes** by which the choice of legal forms has been made. The choice of legal forms depends on who makes the choices, with what information, to achieve what purposes and acting under what constraints. Good process in establishing the legal entity can help to prevent creating problems, but cannot always solve them if there are deep rifts and complex histories.

The way in which the land reform project cycle is usually conceived and implemented means that beneficiary groups often reach the "legal entity milestone" after years of negotiations, desperate for land transfer, uncritical of what this means beyond "having our title deeds" and

⁴ For example, as described in Pienaar, K. 2000. "Communal" property institutional arrangements: a second bite. Published in Cousins, B. (2000). At the crossroads. Land and agrarian reform in South Africa into the 21st century. Capetown: PLAAS/NLC.

⁵ Association for Rural Advancement, 2001. Handout on "Presentation of options", Piloting Locally Administered Records Project Advisory Committee Meeting, June 2001, and discussions with AFRA staff.

resistant to prolonged discussions which might lead to further issues to resolve before this can happen. Officials on the other hand are assessed by the amount of land they deliver (often interpreted as transfer of title) and whether they can spend budgets in time. For both groups the speed with a legal entity can be set up may be the key criterion in making a choice of legal form.

LEAP has recognized some of the dangers of approaches in which facilitators see their main task as to “get past the legal entity establishment milestone”. It led to sequences of poor field processes which first stated what legal forms were on offer, examined their costs and benefits, required people to choose, posed a series of questions related to this choice, and then adjusted the answers to get compliance with legislation. In such approaches the legal form determined how people would hold and manage land together. Such approaches are easy, cheap and quick, but in practice the arrangements are useless to land reform beneficiaries and not implemented in practice, and widen the gap between law and practice.

The “need for speed” leads to a more serious problem in which officials or consultants employed by them draw up a legal document with little or no reference to the beneficiaries, and get people to sign documents they do not understand. In workshops at Grange⁶ LEAP learned that the processes reported on in official files relating to establishment of their CPA had not taken place. People did not have copies of their constitution, nor had it been discussed with them.

There are examples of different approaches in which the first step was to hold discussions to clarify people’s tenure requirements to equip them to make an informed choice of legal forms in a later step. At St Bernards, the process was not easy, cheap or quick, but rules and arrangements are already being implemented.

Box 2: Choosing legal entities at St Bernards and Amandushill⁷

When the Diocese of Marianhill asked LEAP to co-operate with them in setting up legal entities for St Bernards and Amandushill the LEAP team understood the task to be to set up institutional arrangements to meet residents’ real land use purposes and needs. This involved finding out what these intentions and needs were, understanding people’s understanding of land rights and their administration, discussing and developing adaptations to this, and only then going out to find a legal form to fit.

Residents at both St Bernards and Amandushill wanted a high level of household decision-making over residential sites, with a high level of group decision-making into “who comes to live here”. Early in negotiations with the Diocese they rejected the idea of a township. However, their purposes in taking transfer of land would not be met if the agreed tenure arrangements blocked delivery of services and infrastructure or forced them to set up service maintenance agreements that they could not sustain.

The choice of legal forms lay between a CPA, a community land trust, and less formal township establishment with private title, none of which completely matched residents’ requirements.

- Township establishment carries high financial costs and the probability of title lapsing.
- In community land trusts, the nature of power relations, members’ land rights and availability of recourse is currently under question.
- There were also questions about a communal property association as the legal form to hold the St Bernards or Amandushill properties. These would technically remain private land, raising a clash between national financial regulations and the obligations of local authorities to deliver and maintain services. In the municipality into which St Bernards and Amandushill fall, there was an in principle willingness to deliver and maintain services. The main concern was payment for services. Sorting out these questions needs much further research.

⁶ See the Grange case study in the case studies section of the LEAP website at www.leap.co.za

⁷ Thelma Trench, 2004. Applying new approaches in setting up legal entities. Experience at St Bernards and Amandushill. LEAP occasional paper

The final decision was to form a CPA, in which the details of the constitution became the instrument to meet residents' tenure requirements and at the same time provide for some of the different ways in which the muddiness around future delivery and maintenance of services might play out. Achieving compliance with the Act was not a problem.

Many of the approach questions are not shaped by legislation –service providers and officials can themselves decide how they will run processes. However, an important question is: “what do different legal forms require in terms of set-up? Officials of the Regional Land Claims Commission were able to draft Trusts, and get them signed and accepted by the office of the Master of the High Court without comment from the Gongolo claimant community on provisions (Box 3). This was possible in the case of establishment of a trust, which does not require comment from beneficiaries on the provisions of a trust deed but would have required breaking the law in the case of a CPA. Section 7 of the Communal Property Associations Act deals with adoption of a constitution and requires an authorized officer to report on attendance, disagreement with the constitution or specific provisions, and whether “the interests of any person or group of persons are likely to be adversely affected as a result of the adoption of the constitution” (section 7(d)). The protections offered by this section of the CPA Act can, of course, be undermined when officials act illegally, as happened at Grange.

Box 3: Gongolo – Who decides on the legal entity to take transfer of land?⁸

The Gongolo area spreads into the Amathembu and Amachunu tribal areas, and includes seven tribal wards. About half the resident households lodged claims as labour tenants under the Land Reform (Labour Tenants) Act No. 3 (1996) and those forcibly removed or evicted lodged claims under the Restitution Act as Abathembu and AmaChunu communities, so the geographical areas and many of the claimants in the labour tenant and restitution claims overlapped. The Abathembu and Amachunu communities amalgamated to form the Gongolo community and Department of Land Affairs dealt with the labour tenant and restitution claims together.

The Gongolo area consists of farms owned by about 15 landowners, who formed a company to convert their land to a wildlife reserve. The proposal required all residents to leave the reserve and move elsewhere, a step that residents steadfastly resisted as an option. In 2000 the farm residents committee appealed to AFRA for help in negotiations with the landowners. AFRA assisted them in setting up the Gongolo Committee to represent the interest of all those affected by the reserve, which involved pulling together separate committees for labour tenant and restitution claimants.

Officials of the Department of Land Affairs (DLA) and the Regional Land Claims Commission KwaZulu-Natal (RLCC) held discussions with the Gongolo committee on issues relating to land claims and the future of the reserve and negotiations reached the point at which transfer to the claimant community was undisputed and legal entities were needed to take transfer of land. There was agreement that neither conflict between one of the ward committees and the Gongolo Committee nor the need for wider consultation on land use and legal form should hold up land transfer. The Gongolo Committee wanted legal entities to be set up in terms of each of the tribal wards. This proposal was rejected as impracticable by officials. They proposed instead two trusts in terms of the relevant tribal authorities with the amakhosi (chiefs) of the Amachunu and Abathembu as founders and sole trustees. The Gongolo Committee preferred a traditional leader along with a second trustee who would be someone neutral, such as a judge, magistrate or eminent lawyer, and pointed out the need to consult the traditional leaders on the issue. The Gongolo Committee understood these legal entities to be an interim measure to enable land transfer, while wider consultation took place to determine land uses and arrangements for holding it. They agreed therefore that the documents setting up the interim land holding structures would be discussed with the Gongolo Committee and other relevant role-players before registration with the Master of the High Court and that claimant communities would be consulted in a process leading to drafting of documents to establish long term arrangements.

When the Gongolo Committee learned that the AmaChunu Community Trust deed had been signed without their seeing it, they were concerned to establish whether the trusts had been registered and the properties transferred. A number of letters and interviews with the Regional Land Claims Commissioner failed to bring clarity. Eventually they appointed attorneys to act on their behalf. An official of the RLCC and the Commissioner refused to stop the process. The office of the Master of the High Court reported that a reference number had been allocated by that office, but the file in question was missing and it could not be determined whether the trust had been registered. Finally the Gongolo Community (as restitution claimants) challenged the Commissioner in the Land Claims Court in March 2004. The following are extracts from the affidavit of the chairperson of the Gongolo Committee:

In October 2003 I discovered that, without reference to the applicant and contrary to previous undertakings the first respondent [the Regional Land Claims Commissioner, KwaZulu-Natal] had caused a deed of trust establishing the Amachunu Community Trust to be prepared and had this document signed with the purpose of registering the Trust in order to enable it take transfer of a portion of the land.

⁸ Information synthesized from AFRA documents

....The committee has now also learnt that a second Trust, the Amathembu Community Trust, is in the process of being formed by the first respondent.

The position is thus that the first respondent appears intent on transferring the property into Trusts which he has created contrary to the wished of of the community and in conflict with her undertaking to the community.

If the first respondent is allowed to do this the applicant and its constituent member households will be severely prejudiced and even possibly dispossessed of our land for a second time. The deeds of trust prepared by the first respondent have not been discussed with the applicant and its constituent members, and appear to offer very little protection to the community's interests. In addition, and after having received legal advice, the applicant now doubts whether the proposed process of transferring our land to an interim trust is the most prudent, practical, or cost-effective means of transferring the restored land to the community.

An out-of-court settlement was reached which required the Commissioner to properly investigate who legitimately represents the claimant communities. The settlement outlined detailed mechanisms to ensure as far as possible that those participating in meetings to decide this are *bona fide* claimants. Until this had been done, no terms of the deeds of trust would be implemented, except for the signing of the Deed of Trust and transfer documents.

5. Choosing legal forms to meet people's purposes and situation

This section highlights issues that have come up practically in work on the ground, with the idea that they become the basis for developing criteria for choosing legal forms beyond those required by law.

What do the legal forms chosen provide in terms of recourse?

In the case of communal property, the ideal is that registration as a legal entity will make the legal entity publicly accountable and that State intervention can take place if the communal land and property is not being properly administered. In theory both trusts and CPAs offer useful possibilities for recourse, with CPAs having the advantages that costs are covered by the state and recourse is easier to activate in practice. When there is a severe problem and external assistance is needed, in the case of a trust the costs for sequestration, liquidation or judicial management would come from the assets of the trust. In terms of Section 13 of the Communal Property Associations Act, the Director General could bring the communal property association under his/her administration at the cost of Department of Land Affairs. In theory, the Master of the High Court has stronger powers to dismiss trustees and appoint new trustees than the Director-General of Land Affairs has to dismiss committee members.

Pienaar (2000)⁹ looked at existing legal mechanisms for problem-solving in communal property institutional arrangements and commented that

On paper, an arsenal of legal remedies are available to be used by members and interested parties. These remedies are provided for in the constitutions of entities, the CPA Act and the provisions of the common law and statutory law that regulates the conduct of trustees and voluntary association, in addition to ordinary contractual and delictual civil remedies and criminal law sanctions.

Although it may seem unlikely that the Master of the High Court, or the intervention of the Director-General of Land Affairs would assist in remedying current problems – or for that matter, the police... the only way we may find out whether it is the case or not would be for support agencies to begin with concerted efforts to ... test drive the remedies, monitor the steps taken and work in creative ways to adapt and adjust remedies and options for exercising them.

In other words the acid test is whether law works for people on the ground, and experience should guide improvements.

One of the LEAP indicators of tenure security is "There are more and increasingly accessible places to go to for recourse in terms of these processes and these are becoming better known and more used." In considering different experience with different legal forms, the important questions about recourse are

- What help are people are entitled to under the law?

⁹ Pienaar, K. 2000. "Communal" property institutional arrangements: a second bite. Published in Cousins, B. (2000). At the crossroads. Land and agrarian reform in South Africa into the 21st century. Capetown: PLAAS/NLC.

- Who can activate this support and what does it take in terms of time and effort?
- Which authority they can apply to?
- Which authority may take what action?
- Who pays the costs of intervention?

LEAP experience is that people use a range of different kinds of recourse, depending on their problem, what they know and what is accessible and affordable. Common in groups with a history of traditional land administration is that members call on the induna and neighbours to resolve boundary disputes. Members of the Thobelani CPA at Gwebu made enthusiastic use of more formal legal mechanisms: they challenged the provisions of the business plan during implementation because they couldn't see how a proposed purchase of cattle would improve their living standards. DLA appointed a mediator and local tribal structures were helpful in mediation. During mediation it emerged that there had not been wide consultation around the business plan and after a long mediation process, there was agreement that the business plan would be revised.

Box 4: Legal forms and outside intervention – Ntabeni Community Land Trust

A labour tenant group of eight households set up the Ntabeni Community Land Trust to purchase a portion of the farm Misgunst on which they lived, with the support of the land rights ngo Association for Rural Advancement (AFRA). Department of Land Affairs moved to project closure in 2000.

In 2001 a gender rights researcher noted major destabilizing tensions over the internal allocation of cropping fields among participating households, and recommended that AFRA intervene. One of the Ntabeni leaders also asked AFRA for assistance. LEAP and AFRA held some joint workshops in 2002, the third of which closed after a violent confrontation between two men inside the group. Dysfunctional structures limited action: the committee was not functioning and the members had become afraid to meet. The strategy was to find out whether the group would agree to bring in someone from outside who would have an agreed authority and could play a mediation role over time. The suggestions were traditional authorities or local government councillors. Both of these were rejected by members, who stated they would accept only *ad hoc* assistance, as they do not wish to give up their independence.

The example of Ntabeni (Box 4) shows the problem created by the use of a trust as a legal mechanism in a situation where other external linkages were weak. The trust deed offered little help. It was only available in English and was not clear or specific enough to serve as a tool for the real problems people were facing. The work of making the intervention fell on ngos, who could find no legal mechanism to activate an outside intervention that could be sustained until the problem was resolved. DLA had finished work on the project and does not administer the Trusts Property Control Act. The Master of the High Court is unlikely to act unless there is a complaint, which neither trustees nor members were making to him/her. Having rejected mediation by outsiders, Ntabeni people are on their own, in a situation where the group seems unable to resolve its issues unless the group breaks up.

Upgrading tenure: What does it cost to change the legal form later?

Land reform and housing beneficiaries get government grants to cover the costs not only of land, but also of setting up arrangements to hold and manage it – in different situations this has included the costs of adjudication of disputed land rights, land use planning, survey and registration of transfer. In administering batches of grants, the state is able to achieve considerable economies of scale, for example, putting out to tender the task of survey for less formal township establishment. One of the implications of choosing a cpa at Ekuthuleni as opposed to going the route of less formal township establishment (Box 1) is that an individual or household wanting to upgrade later to individual title will be faced with formidable tasks and costs. These might include negotiating privately with the association, negotiating re-zoning of the residential site from small-scale agriculture to residential, requiring planning permissions and environmental impact assessment, and payment of survey and registration of transfer costs. For none of these would state grants and economies of scale would be available after DLA exited from a project.

What this means in reality is that once poor people have chosen to go the communal ownership route, they are locked into it, and the option of individual title is closed off to them. This indicates a gap in legal forms for intermediate simpler, cheaper and less rigorous options. In such options survey, planning and registration requirements would be relaxed, providing a “stepping stone” between communal ownership and individual tenure without

having to go back to square one. Such an option would help those with arrangements like those at Ekuthuleni and wanting to use their properties as security to raise credit.

Although a facilitator can't fill this gap, she can explain that one of the implications of the choice between communal ownership and individual title is that for the foreseeable future the choice is irreversible without going back to the beginning, and great expense in time and money.

Do the legal forms chosen enable delivery of services and infrastructure?

Both Trusts and CPAs would technically lead to private ownership of land, which has led to unclarity about the obligations of the state municipalities to deliver and maintain services. Delivering and maintaining services on private land sets up a clash between national financial regulations and how municipalities understand their legal responsibilities to deliver services, so that policy and criteria for delivering and maintaining services in CPAs varies from municipality to municipality. Some municipalities refuse to spend public money on private land as in the Clarkson example; others disregard the national regulations because they are coming under pressure to fulfill their legal responsibilities, as in the St Bernards and Amandushill examples (Box 2). Where people have gone the route of vesting ownership of public land in a municipality, e.g. by means of servitudes, this problem doesn't arise.

At Clarkson¹⁰, the Moravian church refused to agree to transfer land to residents. The Clarkson Communal Property Trust therefore leased the residential sites from the Moravian Church, and residents had individual participation agreements with the Clarkson Communal Property Trust, which governed their use and occupation of residential sites. Residents had a problem with maintenance and management of the sewerage works and a reservoir - the local authority refused to take responsibility for these, because they were situated on privately-owned land.

Do the legal forms chosen enable development of business interests?

One of the reasons that closed corporations were considered as a legal form to hold and manage land was the early understanding that other legal forms, such as communal property associations were not as suitable for setting up and running a business. LEAP tackles the question differently. The arrangements by which people control land is something separate from, although related to, the development of business enterprises. The first step is to set up an entity or mix of entities with the main objective of holding and managing land. After proper processes to understand and define communal ownership, it should be clear who owns the land and by means of what structures and rules, including rules for allocating land for interest group and business uses, and distribution of benefits. A later step is to set up a separate entity or entities to meet the objectives of the business, noting that it is bad business practice to put land at risk. The owner of the land can lease land to a business entity, and have little or nothing to do with the business, or can require that those who carry out land-related functions on behalf of the owner also make business decisions.

In describing and evaluating 6 case studies of joint ventures, David Mayson (2003)¹¹ noted that

The power balance is really the fundamental issue in any JV [joint venture].... The critical factor in all JVs is how the power of black, generally subordinate partners is bolstered in and through the venture... Access to land and control over its use is a key factor in land-based enterprises. The Witkleibos venture provided the black participants with far more power than any of the other types of JV – the community had a resource which commercial farmers wanted, and was able to use it to largely

¹⁰ Example cited by Pienaar, K. 2000. "Communal" property institutional arrangements: a second bite. Published in Cousins, B. (2000). At the crossroads. Land and agrarian reform in South Africa into the 21st century. Capetown: PLAAS/NLC.

¹¹ David Mayson, 2003. Joint ventures. Evaluating land and agrarian reform in South Africa series, no. 7. Programme for Land and Agrarian Studies and Surplus People's Project, Cape Town.

determine the terms of the venture. JVs should strive to bolster black participants' control over land (as leased or private land) as a resource that can be used to leverage preferable terms with commercial and other partners.

The Witkleibos Dairy Trust is an example of a joint venture between two white dairy farmers and the Witkleibos Development Trust with each receiving 50% of the profit from the enterprise. The arrangements for land used by the Witkleibos Dairy Trust are regulated by lease. The Tsitsikamma Development Trust holds land on behalf of five sub-groups of the Mfengu, whose land was restored in 1994. Each set up an area management committee. The Witkleibos Area Management Committee leases land from the Tsitsikamma Development Trust, and leases it to the Witkleibos Dairy Trust. 20% of the profit share of the Witkleibos Development Trust is paid to the Tsitsikamma Development Trust to cover rent and for the use of the resource.

What does first registration cost?

Costs of first registration come up as an issue for outsiders managing limited budgets, rather than for people on the ground. In the case of CPAs the issue does play out as poor or ineffective practice on the ground.

The costs of registration of trusts include the payment of stamp duty for registration, the costs of opening a bank account, and small costs in time setting up arrangements for auditors, getting letters of acceptance signed and taking documents for registration. The registration process is well understood and highly systematized, has no requirements for official supervision of the processes by which documents are produced, and in cases where participation is not an issue, can be carried out in a few days entirely by outsiders.

Meeting the requirements of the Communal Property Associations Act is much more intensive in terms of workshop time, because it requires drafting a constitution that meets the requirements of the Act, the appointment of an authorized officer and complete a report on the adoption process. No payment is required for registration but the financial costs of setting up CPAs is probably higher than for trusts. Meeting the requirements of the Act was once envisaged as something that applicants could do themselves¹², but the practice is almost always that outsiders guide applicants through the process. Some officials do the work themselves; some contract outsiders; the costs in both cases have to be borne by the state and there is pressure to keep them low.

What does it cost to maintain legal forms? Remaining legal and the issue of records

In the case of trusts, some of the arrangements necessary to maintain a "living" legal form in terms of trust deeds include annual auditing of accounts, the appointment and payment of auditors, and lodging amendments of the trust deed and changes in trustees with the Master of the High Court. In practice trustees of community land trusts rarely carry out these functions and auditors withdraw from such arrangements.

The legal status of many CPAs as "living" legal entities is probably also highly questionable, sometimes because the requirements of the Act or the provisions in the constitution are out of line with an existing situation and practice, sometimes because they are too onerous for members trying to carry them out without state support, and sometimes because they are not enforced by the state. For example, the schedule of the Communal Property Associations Act assumes that one of the structures of a CPA will be general and annual general meetings and requires that the constitution and procedures of such meetings be addressed in the constitution. LEAP experience is that provisions for such meetings are often out of line with

¹² Department of Land Affairs, August 1999. Using a Communal Property Association (CPA) to manage land as a community. An easy to read how-to-make-it-happen manual available in all official languages.

actual practice, especially in very large and very small CPAs. At Gwebu¹³ where the decision-making structures were dysfunctional, it was difficult even to hold a meeting.

Another example is the requirement for annual reports. Section 11 (1) of The Communal Property Associations Act requires that “An association or provisional association registered under this Act shall, at the prescribed times, furnish prescribed documents and information to the Director-General in order to enable him or her to monitor compliance with the provisions the relevant constitution and this Act”. Section 8 of the regulations requires submission of annual reports by a CPA to the Director-General on matters including names of members of the governing body, new members, financial statements, minutes of general and annual general meetings, a list of all dealings in land or rights to land involving the body itself or any of its members and any other information required by the Director General. We know of no cases where such information has been either demanded by the state or submitted by a CPA committee. One practical outcome is that there is currently no pressure to hold up-to-date records of land rights inside CPAs, and no mechanism for holding such records outside.

Where people have gone the route of individual title, the high costs of transfer of title, for example on the death of the person holding it, or in cases of sales where people’s financial resources are limited, have meant that transfers happen informally and are not recorded officially – title lapsing is a widespread problem. After time it becomes difficult to establish who owns the property without expensive adjudication processes. This in turn creates problems for those who think they have rights to land, and for municipalities struggling with issues like delivery of services and collection of rates and levies.

Clearly there are problems maintaining all the currently available legal forms. Members of CPAs seem to struggle to meet real costs in terms of finances or time, or find the arrangements incomprehensible. In the case of CPAs, the state has not widely enforced its requirements for information and annual reports.

What are the requirements of the law in terms of founding documents

LEAP’s experience is that legal requirements do not necessarily change practice, and practical outcomes on the ground seem to depend more on existing practice and on a facilitator’s interpretation of the law and the task than on these legal requirements. LEAP has described in detail how it works with this. Having said this, we found that the strict requirements of the Communal Property Associations Act in terms of principles and content of founding documents are rather a benefit than otherwise and that it is easy to work them into good process in groups that were not too big.

For example, Section 9 of the Communal Property Associations Act requires the constitutions of CPAs to be consistent with certain principles which include fair and inclusive decision-making, equality of membership, democratic processes, fair access to the property of the association, and accountability and transparency. Experience at St Bernards and Amandushill is that this requirement gave the facilitation team the opportunity to raise questions important for the right to information and the definition of land rights of women, which led to small adaptations to practice towards the ideal principles¹⁴. The Trust Property Control Act does not require trust deeds to be consistent with these principles. However, Restitution of Land Rights Act, No. 22 of 1994, does require this. This should shape the content of trusts set up for communal ownership in restitution cases, but in practice doesn’t necessarily do this, as in the Gongolo example in box 3 .

The Schedule of the CPA Act also requires that certain matters be dealt with in a constitution. LEAP experience is that the Schedule provides a valuable checklist of matters with important implications for land rights, and that filling in the form showing compliance with the Schedule is useful in forcing a facilitator to analyse a constitution and think into what is covered and

¹³ KZN Provincial Team of the Common Property Institutions Review, August 2002. Assessment of the Thobelani CPA at Gwebu. Available on the LEAP website at www.leap.co.za

¹⁴ Thelma Trench, 2004. Applying new approaches in setting up legal entities. Experience at St Bernards and Amandushill. LEAP occasional paper

what not. The Trust Property Control Act neither requires nor forbids that such matters be dealt with.

Whether or not members use the founding documents of legal entities, they form a critical piece of the bridge between local practice and outside institutional support, and are technically public documents. The experience of LEAP in KZN is that getting copies of trust deeds from the registry at the office of the Master of the High Court has not been a problem, provided we were prepared to spend time working through the handwritten registers. Getting copies of the constitutions of established CPAs from the Department of Land Affairs has been very difficult, however, and defining what needs to be in the register has been one area of proposed amendments to CPA Act regulations¹⁵.

6. Consolidating the LEAP position on legal forms at May 2004

LEAP tackles the problem of choosing legal forms not by relying only on what the law says, but also by examining how different choices of legal forms play out for people on the ground. We work outwards from their experience to examine how such outcomes relate to what the law says and how the state implements the law. We think about institutional arrangements rather than “a law”. We consider the possibilities of group title, individual title and mixes as options which people might look at.

For LEAP the question “Which is better, CPAs or trusts?” can only be answered by looking at other deeper questions:

- In choosing legal forms, whose purposes are being met and whose organizational structures and arrangements are getting legal recognition?
- What can legal forms not do?
- Where do legal forms matter?
- What choices are there?
- When and how does a facilitator raise the subject of legal forms?
- Where people do not have all the information they need to make an informed decision on legal forms, what important things do I tell them?
- What matters in choosing legal forms?

In choosing legal forms, whose purposes are being met and whose organizational structures and arrangements are getting legal recognition? The approach used in setting up legal forms is critical in shaping outcomes, and the case studies we look at make it clear that legal forms have been applied inventively to work both for the interests of people in communal property situations and against them. The reality of whose purposes and whose arrangements get legal recognition varies from case to case. Sometimes facilitators give priority to their own pressures and constraints: this can undermine people on the ground. Sometimes facilitators give priority to the purposes and arrangements of people on the ground: this helps people on the ground. Facilitators have to make compromises – the existing legal framework leaves many questions unanswered.

What can legal forms not do? and when do they matter? What legal forms can do is limited. They do not on their own ensure fair and accountable land rights administration. They do become critically important when people start to seek recourse.

When does a facilitator raise the question of legal forms? LEAP believes that the legal form should accommodate people’s intentions, practice and agreements about holding and managing land together. The legal form is discussed after people have discussed their broad intentions around land use, and after they have made work-able agreements about membership, land rights, and authorities and procedures to administer land rights.

What choices are there? The choice of legal forms is wide, especially when one starts to look at mixtures of options. In spite of this, our experience is that in both cases of individual and communal ownership it can be difficult to get a good fit with people’s situation and

¹⁵ Kobus Pienaar, personal communication

intentions. There are big gaps between the current legislative framework and people's practice.

What important things do I tell people to help them make their choice? LEAP has no easy answer to this question.

- LEAP avoids the use of Trusts because our experience is that their registration and decision-making requirements have led to them being used against the best interests of members of groups.
- We ask groups to weigh the costs and benefits of fast transfer of title to groups against the costs and benefits of taking time to get clear on internal arrangements and legal linkages which are widely understood and likely to work. We have sometimes had to compromise on this
- We are collecting examples of what has happened in making choices about legal forms to share with people as well ideas on interpretations of what the law requires and offers. We would tell people what the law offers in terms in terms of recourse so that energetic groups can push the boundaries of official practice. We would also tell them that the law around legal forms can be interpreted differently by different officials and is not always enforced or implemented.

What matters in choosing legal forms?

We summarize our understanding as follows:

Issue	Experience	Questions when choosing legal forms
<p>Recourse Availability, accessibility and costs of recourse.</p>	<p>People seek recourse when their need is desperate, not lightly.</p> <p>Many cases where individuals, interest groups and committees can't solve problems internally. Some seek and get outside help, but many do not.</p> <p>Recourse in trusts and CPAs is activated by complaints, not by monitoring. For some situations people have only managed to get recourse because of support from legal or land rights ngos.</p>	<ul style="list-style-type: none"> • What help are people entitled to under the law? • Who can activate this help and what does it take in terms of time and effort? • Which authority can they apply to? • Which authority may take what action? • Who pays the costs of intervention?
<p>Upgrading tenure</p>	<p>During the land reform or housing project cycles the state can cover costs and achieve economies of scale by processing batches e.g. by putting out to tender the costs of survey and covering the costs of registration of servitudes and household title.</p> <p>Once people have chosen to go the communal ownership route, they are locked into it, because the costs and bother of individual households upgrading to individual title are prohibitive.</p>	<p>What must we deal with during the land reform project cycle (e.g. establish servitudes)?</p> <p>What does it cost to change the legal form later?</p>
<p>Who decides on legal arrangements? Requirement for participation by members before registration of a legal form for group ownership</p>	<p>Some cases where founding documents for group ownership have been registered without consulting members on details so that there is no fit with their understanding and purposes.</p> <p>Legal requirements for member participation are more rigorous for CPAs than for trusts.</p>	<p>What do different legal forms require before registration in terms of participation by members?</p>
<p>Speed of registration</p>	<p>Members and officials often desperate for transfer of title to the group as fast as possible.</p> <p>Trusts – fast CPAs – slower Less formal township establishment and registration of individual title - slow</p>	<p>How long does it take to meet registration requirements?</p>
<p>Costs of maintenance of legal forms as "living" entities</p>	<p>Probably in most cases the legal requirements for maintenance of legal forms are not met. Sometimes the requirements are incomprehensible to people, or unknown, or too much work or too expensive. Sometimes requirements are not enforced by the state.</p> <p>Group ownership:</p>	<p>What does it take to meet the requirements of maintaining the legal forms as "living" entities which can continue to meet their objectives into the future?</p>

	<p>Few community land trusts report changes in trustees. Few if any CPAs submit annual reports as required by law and the state does not enforce this. Few trusts and CPAs register amendments to their founding documents.</p> <p>Individual title: When owners die or land is sold, those who take over fail to transfer title. Registering transfer of a title deed is expensive, title lapsing is a widespread problem.</p>	
Records of land rights inside groups.	<p>Title deeds act as a record of the rights of groups as a whole or of households or individuals holding title. Founding documents record the in-principle rights of people inside groups.</p> <p>Group ownership: It is very difficult to get official copies of the constitutions of CPAs. Trust deeds are easier to locate.</p> <p>There is no functioning system for registering records of specific rights inside groups and keeping track of transactions. In CPAs the requirements for annual reports detailing internal transactions in land rights is not enforced by the state.</p>	<p>What provision does the legal form make for registration of founding documents of groups holding property communally and how easy is it in practice to get hold of such documents?</p> <p>In the case of group ownership, what provision does the legal form make for setting up and updating records of internal transactions in land rights.</p>
Enables development of services	<p>For CPAs and Trusts the situation is fuzzy, unless the decision is to put in servitudes. These involve alienation of land and cost money to set up.</p>	<p>What do the local authority and other government departments require to enable delivery of services?</p>
Enables development of business interests	<p>Registration of land holding entity as a business entity may put land at risk.</p> <p>Current good practice is to set up the land holding entity first. Business interests then establish agreements with the land-holding entity.</p>	<p>What separate legal forms are appropriate for land holding and development of business interests?</p> <p>Do the arrangements for business interests put land at risk?</p>