Perspectives on Land Tenure Security in Rural and Urban SA

An analysis of the tenure context and a problem statement for Leap

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Leap is a project that has evolved from a focus on communal property institutions set up in land reform projects to a focus on tenure security and the land administration required to manage tenure in both rural and urban contexts. This report aims to build a conceptual base for working across urban and rural contexts. The report is seen as a 'living document' capturing paradigms and perspectives, rather than a finite product. It expresses the conceptual leaning based on Leap's work to date.

Executive summary

Approaches to securing tenure have been dominated by debates about whether titling advances secure land tenure and development in developing countries or whether it is either ineffectual or detrimental to socially more relevant systems. While the policies of many developing countries, including South Africa, continue to support titling approaches to securing tenure, there is widespread confirmation in the literature that title can be problematic for poor people living in both urban and rural areas. Furthermore, with the rapid development of urban slums and the advance of cheaper information technologies other approaches to tenure are also emerging, which tend to sidestep the titling debate and examine what may be possible within a different land management structure.

These new approaches call for a review of tenure terminology and concepts. Leap argues that current terminology tends unhelpfully and often inaccurately to polarize and thus mask descriptions of reality. This is a symptom of a deeper, underlying problem of duality, which manifests at different levels. There are several reasons why terms such as "informal" and "formal" are misleading. Firstly the terminology tends to privilege "formal" over "informal" as though formalisation is the ultimate solution. Secondly, "informal" is suggestive of a disorganized, even chaotic or anarchic "other", which is at odds with what is often a complex, well organized and regulated set of rules and procedures characterized more appropriately in the plural – heterogeneous systems which vary from place to place, context to context. Formality could thus be better defined as organized regularity, which would include those customary systems that have known and used procedures for land allocation, boundary demarcation, adjudication and dispute resolution, although the system does not deliver registered tenure. Thirdly, the dichotomy is itself problematic as it indicates a false polarisation, more appropriately represented as a continuum in which the situation is moving towards more informality or more formality.

The terms "legal" and "extra-legal" are sometimes offered as a more constructive alternative to "formal" and "informal". While useful, there is the continued problem in the language that the implied solution lies in "legalisation" of the extra-legal in the sense that Hernando de Soto employs the term. From the point of view of the social reformer, however, social legitimacy at a local level may be regarded as being as important as the formalities of the law with regard to property ownership. Leap notes, however, that the state displays institutional bifurcation to the extent to which it channels resources towards the legally recognised as

opposed to the legally unrecognised. These terms are therefore all contingent and do not provide ultimate solutions to the problem of terminology.

The concept of a continuum may therefore be a more useful way of thinking about tenure. There is a great deal of fluidity in tenure systems. Some "formal" systems have in reality become informal over time; for example, when the property information in situations where the state has intervened to bring people into the registered system (e.g. township-type layouts) has declined to such an extent that people with registered tenure, such as ownership evidenced in a title deed, once more find themselves regulating their property informally. On the other hand, some systems defined as "informal" in reality display more robust characteristics than the legal system, and in some of these there is movement towards greater individualisation and recordal. Informality is also evident in the bureaucratic structures themselves where rules, procedures, criteria are interpreted in many different ways by officials sitting in different places and depending on context.

Leap contends that the reality is that there are multiple tenure systems rather than two self-contained, polarised tenure opposites. These multiple tenure systems, that may all display varying degrees of formality and informality, are more accurately placed in a multi-dimensional relationship to one another. Movement towards formality or towards informality may equally apply to customary rights, registered individual titles or other forms of tenure.

Even where these realities have to some extent been recognised in policy or law, they have in practice been difficult to implement. In South Africa, the new rights framework for land reform laws secures or strengthens possessory rights in certain contexts but these tend to be interim measures pending formalization into permanent real rights. In the housing sector, tenure, usually individual ownership, is "delivered", along with land, services and housing. This is because a juridical (legal) cadastre underpins secure land rights in South Africa, meaning that land has to be "cadastred" if it is to be recognized by the land management system. The cadastre is a form of land tenure literacy - where there are no land parcels, officialdom system cannot "read" the system. The problem is that cadastres don't easily adapt to systems that allow a layering of rights, such as multiple, differentially entitled owners with different rights to different uses that are socially determined. This system also has difficulties with user rights that are linked to people and not to parcels.

This has led to concerns from many quarters that despite the state's attempt to extend a regulatory framework over all land and tenure systems in the country, a large percentage of South Africans continue to occupy and hold land outside the official systems and are likely to continue to do so for the foreseeable future. These concerns have been expressed in fragmented ways, which is compounded by the recent struggle of key progressive civil society organisations and networks to survive.

Concerns about policy interventions are also influenced by the recognition that the impacts of policy and intervention affect different sub-groups in different ways, due to social and economic differentiation. And yet not enough is known about how these impacts are felt and by whom. Women's land rights operate in heterogeneous, contested and dynamic contexts that make it difficult or dangerous to generalize. It is also important to differentiate between women. Their land rights are mediated by class, marital status, and the age and gender of their children and issues around land rights change at different times in their lives. The ways in which women can and do mobilize in defence of their rights also varies greatly. These social cleavages are exacerbated by the context of HIV and Aids given the bi-directional

relationship between HIV, Aids and poverty. The mental 'models' of households targeted for various interventions may in fact not fit the reality of households distorted by HIV and Aids, such as, for example, child-headed households that are not accommodated in tenure upgrades through state subsidies.

Given the above analysis, Leap argues that a central problem may be stated as follows:

> There are multiple tenure arrangements operating in South Africa, with varying degrees of security, but most of them are not recognised, supported and valued, resulting in gaps between law and policy on one hand and practice on the other. This carries the risk sidelining many vulnerable people, households and communities from development opportunities. Coupled with the recognition granted to title, especially individual title, this phenomenon reproduces the dual economy and perpetuates inequity.

Linked to this central problem is the fact that:

> South Africans do not all experience the impacts of the failure to recognise, support and value the multiple tenure systems operating in South Africa in the same way – tenure insecurity in urban and rural contexts intersects with poverty, gender and HIV and Aids in complex ways that appear to exacerbate vulnerability. This is inadequately understood and therefore policy interventions often fail to mitigate vulnerability and instead contribute to it.

Tenure "arrangements" refers to processes, rules and procedures associated with tenure. Leap has developed a categorisation of these arrangements, which is an attempt to facilitate an enhanced understanding of the diversity that exists on the ground. Categorisation should be seen as a heuristic device rather than as a description of reality – the categories are helpful for depicting how tenure works in practice. In reality any one situation (or community) could have two or more arrangements operating at any one time, and these can be used against each other, or in support of each other.

The arrangements can be clustered into four categories:

- Customary tenure arrangements;
- The tenure arrangements association with the registration of deeds – the ROD system.
- Local and off register tenure arrangements in rural and urban areas
- Transitional tenure arrangements.

Leap's work in its next phase will have an overarching focus: ***an enhanced understanding of the multiple tenure arrangements that characterise South Africa's tenure landscape.***

In order to work in this diversity and complexity, Leap proposes to structure its work into a number of different project partnerships in the urban and rural contexts. The project partnerships aim to represent a range of situations in order to work with the various arrangements and how they operate. They will not provide complete coverage of tenure situations, but will enable meaningful work in a rather wide terrain.

Leap will explore the characteristics of the transitional, customary, local and off-register and ROD arrangements. In addition, Leap considers it important to apply *an inter-systems* approach, i.e. how the various arrangements relate to each other. Identifying precisely issues of articulation will assist in showing how the official systems fail and what possible areas

interventions should focus on. Furthermore, in reality the land tenure arrangements interact as evidenced in an interactive economy, a mobile population with rural-urban linkages and engagement in labour and consumer markets and a services sector. No tenure arrangements operate completely outside of the broader economy, market and service sector. However, the degree to which the various tenure arrangements are regulated by the state, local government, local structures or Traditional governance institutions varies greatly.

Leap uses the concept of "recognition" in an attempt to provide an intermediate tool for describing the legitimacy of tenure arrangements that fall between legally acceptable on the one hand and socially unacceptable on the other. From the perspective of the state, an act of recognition could include service delivery to a group of people living within the city without title, once the city has determined, for example, that the area is suitable for fluid urban-rural migration patterns. Such recognition would begin to provide an incremental base outside of the cadastral model for securing the tenure of the urban poor.

In addition to an enhanced understanding of current reality, Leap will develop and advocate for a more appropriate approach which it defines as one which:

- Recognises the reality of multiple tenure arrangements;
- Identifies the relationships between them, including the tensions and incongruities;
- Finds solutions to integration; and
- Increases tenure security for poor and vulnerable, individuals and groups in order to:
    - Enhance livelihood strategies
    - Enable improved delivery and maintenance of services
    - Enable improved equitable access to economic opportunities

Central to this approach is a shift from thinking about what forms of tenure bring security towards the ability to enforce a socially meaningfully and socially legitimate tenure system.

In adopting a focus about enhancing understanding of and recognition for the multiple tenure arrangements that characterise reality, Leap's work will prioritise the impacts on the poor and vulnerable. Leap will seek to develop a better understanding of the impacts of the ways in which the failure to recognise, support and value the multiple tenure arrangements are experienced by South Africans, exploring the intersection of tenure insecurity in urban and rural contexts with poverty, gender and HIV and AIDS in order to identify how policy can mitigate vulnerability instead of contributing to it.

1. Background

Initially named the Legal Entities Assessment Project, Leap has evolved from a specific focus on communal property institutions (CPIs) set up in land reform programmes, to a clearer focus on tenure security and the land administration required to manage tenure in both rural and urban contexts. Having a strong identity and so unwilling to change its name, but this acronym being no longer descriptive, the project resolved to still called itself Leap, signifying its approach to the problems it seeks to solve. Thus: **Leap:** a ***le****arning* ***ap****proach to increasing the security of tenure of poor and vulnerable people, in order to enhance their livelihoods and access to services and local economic development.*

Leap has now completed a preparation phase for the rural/urban collaboration. One of the objectives for the preparatory phase was to build a base for developing a conceptual

framework across the rural and urban sectors around tenure. This report aims to build that base.

2. Context

Questions about land tenure and administration are the subject of considerable international debate, particularly in how they are reformed and implemented in developing countries. The debates range from conceptual questions of interpretation and definition to technical issues of law, technology and implementation. These are not neutral debates. They are often loaded with political values that themselves contain ideas and assumptions about society and economic imperatives that are often derived from very particular historical and national contexts.

In this section, we begin by identifying the broad trends and tensions in the international debate. Although this debate is far from complete, we see that on one side there are various arguments for titling or registration as key tools for securing tenure and on the other are titling/registration sceptics who argue that tenure security lies in better understanding of the social embeddedness of local tenure systems. A third approach is also emerging that side-steps titling in favour of examination of land management systems. The relationship and possible relationship between different tenure systems is itself a debate, with some arguing for adaptations of both that enable bridging while others that there are fundamental incompatibilities that render impossible attempts to bridge. A further muddying of the debate are terminological difficulties and biases that result in the privileging of certain tenure systems over others.

2.1 Current analyses of tenure

Up to now approaches to securing tenure have been dominated by debates about whether titling advances land tenure in developing countries or whether it is either ineffectual or detrimental to socially more relevant systems. With the rapid advance of cheaper information technologies and the rapid development of urban slums, however, other approaches to tenure are also emerging, which tend to circumvent direct engagement with the titling debate and examine what may be possible within a different land management structure.

While the policies of many developing countries continue to support titling approaches to securing tenure, there is widespread confirmation in the literature (Quan, 2003; Durand-Lasserve, forthcoming; Robins; 2003; Cousins, 1999) that titling programmes can be problematic for poor people living in both urban and rural areas. In addition to the pro-and anti-titling lobbies, a third position on titling has emerged, which represents a compromise between group and individual titling. The arguments underpinning these positions are not static, and discernible shifts are evident over time. Particularly complex are the anti-titling arguments, which are diverse in both focus and conceptualisation of tenure. For the purposes of simplicity, we've divided this section into: approaches to tenure, the titling debate and terminology issues.

2.1.1 Approaches to tenure

Defining how tenure is secured is in itself a politically contentious activity, manifesting in political values around class and social status.

Various mainstream economists would argue that tenure is secured legally as the product of various procedures undertaken publicly in a transparent and rigorous manner. The purpose of such precision is certainty, an important value for economic transactability. (Simpson, D: 2002.) But such a definition remains neutral about how accessible the law and public institutions are to all citizens and about whose economic interests are served by these institutions. Hornby (2004) argues that, "The legal [property] system …does what it needs to do for land markets, credit facilities, land use planning and urban zoning. The rich can afford it, and they are visible to the economy and the state…The extra-legal property system meets the needs of the poor for cheap access to land, relatively functional tenure security, oral based evidence and adjudication practices. Its major problem is that it is invisible to those who determine and allocate government and private sector resources. It is a black box to the official systems." (pg.11)

By contrast to conceptualisations of property as economic asset, Mohit (2002), writing on Thailand, finds that security of tenure is related to various dynamics and power balances among different stakeholders. He argues that perceptions of secure tenure are influenced by qualitative factors, such as a hierarchical society, which plays a crucial role with regard to perceptions of security. The patronage system connects the poor to the powers that be and allows them to live and work in informal settings, with minimum levels of formal security, in exchange for money and political support for those in power in the city. Mohit also argues that socio-economic issues also influence tenure arrangements. Because low-income communities are mobile, they depend on a range of networks, which influence how secure individuals feel living in a particular community. Similarly, Butler (2002) argues that homesteads in KwaZulu-Natal, with their allocated land and rights to natural resources, were at the "core of social organisation and reproduction of African society in the region".

An important strand of discussion in the literature is how security of tenure is *perceived*, rather than how it is legally conferred and whether it is legally recognised. Some key urban commentators (Fernandes (2002),, Durand-Lasserve (forthcoming)) note the importance of perceptions of tenure security in prompting many of the actions that formal title is meant to ensure, such as access to credit and investment. Tenure arrangements in informal delivery systems can guarantee a reasonably good level of security, even when this is not formally recognized by the state. Recognition by the community itself and by the neighbourhood is often considered more important than recognition by public authorities for ensuring secure tenure (Durand-Lasserve, forthcoming; Cousins, Hornby, Ziqubu 2003). Evidence of this perceived security is that people around the world spend money on improving houses that they officially or legally do not own. (Payne, 2002). Under certain circumstances however, perception on its own is insufficient, for example in some conflict situations (Durand-Lasserve (forthcoming).

However, tenure security is constrained by dominant ideologies and institutions which privilege certain assets, legitimise and reproduce social inequity and make tenure security a site of ongoing power struggle (McDonald 2000). Constitution-making, for instance, could not create tenure security and prevent contests over rights in communal property institutions in South Africa, nor could adherence to legal rights and obligations on their own provide the basis for assessing tenure security in these environments. (Cousins and Hornby 2000)

McDonald (2000), searching for indicators of secure tenure in communal property, emphasizes that tenure is socially embedded and dynamic. Tenure is secured not because the processes deliver a product (title, realized rights or a constitution document) but because the structures and processes construct a meaningful recognition of a tenure right.

However, institutions, defined as regularized social practices in pursuit of a social goal, can only shape and not determine human action, and are constructed by everyday human activities and struggles. Lund (1999), for example, argues that property is an issue "over which political and legal struggles intertwine, where local powers and authority are brought into play". Adding to the notion that tenure is an embedded social practice subject to changes and political influence, Moore (1978) and Berry (1993) argue that African property and governance institutions should be conceptualized as fluid, ambiguous, contradictory and subject to multiple interpretations and redefinitions through local behaviour and practice. Moore, working within a legal anthropological paradigm, argues that the attempt to regulate a society is always partial and that the social processes that prevent total regulation are the same processes that transform and alter attempts at partial regulation. Securing tenure, in this paradigm, can never be viewed as a having achieved finality. Rather, it is better analysed as a movement towards or against security, depending on current practices and the influences on them. (Leap 2000)

In South Africa, legal pluralism exists as a corollary of cultural pluralism (Cousins and Hornby, 2002). Like the rest of sub-Saharan Africa, "property matters are determined by a combination of residual colonial law, current constitutional law and ongoing customary law" with "complex interaction between local traditions, customary law, statutory law, and enforcement systems" (Strickland 2004). Official indigenous law, values and practices have a much lower status than imposed Western law and values, which are regarded as a tool to modernize and re-shape indigenous social and legal orders. In spite of this, indigenous culture, law and institutions have proved remarkably resilient to Western influences (Cousins and Hornby, 2002). Williams argues that this resilience lies in the ability of chieftaincy to "make and enforce rules and to reproduce a normative framework which continues to resonate with local populations" (Williams JM: 2001:338) Alcock and Hornby(2004) separate the concept of the structures and authorities of traditional leadership, from that of traditional communal property institutions. Particular authorities may change but practices remain deep-rooted. Even where traditional leadership has been absent for decades, the systems and practices of customary-based land administration remain evident in the daily realities of millions of rural and peri-urban, and some urban South Africans.

A new strain of thinking about tenure is emerging from a perspective of land management and land administration, of which land tenure is seen as a critical subset, but not an end in itself. This approach involves redefining the western concept of the cadastre to embrace development contexts and non-western notions of land ownership. This approach at the same time embraces modern land information technologies as a means to leap-frog from the static and centralised "Deeds Registry" system to decentralised systems that rely on both cadastral and non cadastral evidence of land rights. This approach does not speak directly into the titling or anti titling debate but is a more pragmatic and/or human-rights perspective to cater for the deepening crisis of rapid urban slum development in large parts of Africa using "non conventional" methods to secure tenure. Although this approach argues for technical intervention where useful, and specifically for the design of new technical tools, at the same time it takes into account questions of human behaviour and governance institutions,

something which the highly technical, inflexible and centralised systems of land registration do not.

A key proponent of this new thinking is Fourie (2001) who calls for a new approach to land and property registration. She states "Land registration and cadastral surveying in much of the developing world has reached a crossroads. It is not possible to continue with business as usual in the face of massive informality within the world's cities, and new and more relevant approaches have to be developed." Her point of departure is that conventional land registration does not supply urban tenure security and access to land for the majority of city dwellers. It is only capable of recording legal land parcels and not the 30-80% of illegal urban land parcels in most of the developing world. Hence the majority does not benefit from the system and instead lose their land because of the system.

Fourie, van der Molen and Groot (2002) explore the idea of developing appropriate geo-spatial data infrastructures (GDIs) that can accommodate multiple institutions and a range of spatial units. These should not be based exclusively on the cadastral parcel, and definitions of land management and administration should allow for the inclusion of cadastral and non-cadastral based organisations as the cadastral office is only one of a number of organisations undertaking land administration. "Foundation data sets" should also include a range of spatial units, cadastral and non-cadastral, and strive towards inter-operability of such framework geo-spatial data to improve land management/administration.

Fourie (n.d.) focuses on using spatial information associated with a GDI linked to urban service delivery as a source of legal evidence to validate people's rights or adverse possession claims and to prevent eviction. In other words, include information from a range of sources such as electricity billing systems, planning information, mapping of the "as built" environment rather than only the legal situation to provide "first evidence" of land rights (not the cadastral system) to protect people's land rights. Such a GDI could also in time be used to give a form of tenure security and become used as first evidence if and when titling is introduced. This will minimise the expense of adjudication. This approach would argue against attempts at settlement-by-settlement titling using cadastral surveying as a starting point, but rather the starting point should be city-wide planning and infrastructure development.

This approach has converged with the crisis faced by officials in charge of planning and housing programmes, especially irregular settlement upgrading programmes. The issue of access to land and security of tenure as a condition to sustainable shelter and urban development topped the Habitat II agenda in 1996 and tried to elicit commitments from governments at central and local levels, the private sector, the community sector and organisations representing civil society to prioritising issues of security of tenure 'for inhabitants of irregular settlements, slums, shack dwellers, and all precarious living environments'. Tenure issues were singled out for the implementation of the United Nations Centre for Human Settlements (UNCHS) Habitat Agenda (UNCHS, 1996b). Governments were asked to commit themselves to 'Providing legal security of tenure and equal access to land to all people, including women and those living in poverty' (UNCHS, 1996b, paragraph 40). In 1999 the UNCHS launched two global campaigns, one of which is security of tenure (the other is governance) (UNCHS, 1999a).

The significance of these arguments for titling is that the UHCHS has put its weight against a systematic titling approach to land for the poor.

Converging with international concern around human shelter in relation to tenure is the human rights based approach to development, of which secure tenure is seen as a critical element. This more recent paradigm shift attempts to lift the tenure debate from national policies that determine the primacy of some tenures over others, towards a universal human rights based approach to tenure. "Rooting policy in universal basic rights may be the only way to reorient government priorities towards the poor. Basing entitlements in rights rather than discretionary policy makes it easier to defend continuity of service provision, increasing the political sustainability of pro-poor actions" (Conway, Moser, Norton, Farrington, 2002).

The rights based lobby, however, recognises that rights on paper are a necessary but insufficient condition for pro-poor policy, and hence rights based approaches are increasingly seeking complementarity with livelihoods based approaches to development, which are informed by a growing body of practical experience. "Secure rights to land underpin secure livelihoods and shelter by reducing households' vulnerability to shocks, guaranteeing a level of self-provisioning and supplementary incomes from basic foodstuffs and enabling easier access to basic infrastructure, employment markets and financial services". (Julian Quan: 2002). "Highly marginalized groups lacking organization and resources may be unable to realize their formal rights: improving livelihoods may be necessary to give them the incentive and leverage to lobby for realization of rights. Social capital, effective allies, and voice are thus essential. Struggles for the realization of rights require sustained action in a variety of national and international fora. By guaranteeing a minimum livelihood and discouraging extreme inequalities, enforceable economic and social rights also help to promote the social and political stability necessary for sustainable national development." (Conway, Moser, Norton, Farrington, 2002).

International law has until now provided the most succinct elaboration of socio-economic rights. "Generally speaking, international human rights law creates obligations on every country to comply and implement specific rights."(Pejan, Norberg, duToit and Pollard, 2005). However, human rights may be interpreted in national constitutions in different ways. Under human rights law the state is the principal duty-bearer. Elaboration of the obligations of states with respect to human rights has emphasized that this does *not* mean that states have to provide free services. Rather, they are required to *respect, protect and fulfil* these rights. Interpretation of the state's duties in relation to these injunctions with regard to tenure rights remains an ongoing site of contestation.

2.1.2 The titling debate

Central to pro-titling arguments is the hypothesis that registered ownership encourages investment in property, which contributes to economic development. Quan (2003) points out how the World Bank strongly pushed for "modernising" and land titling throughout the second half of the 20th century, on the assumption that individual titles are necessary to overcome poverty and constraints to development. Their lending was to technical projects to support registration and titling. This view became "received wisdom" and was internalised by developing country officials and policy makers. It has also dominated conventional responses to land management in developing countries. Durand-Lasserve and Royston (2002) argue that these conventional responses are based on the regularisation of irregular settlements with emphasis on the provision of individual freehold titles. Urban land policies are based on the view that home ownership and the provision of property title is the only sustainable solution,

providing secure tenure to the urban poor and facilitating integration into the formal market. Hernando de Soto's current influence on donor agencies and developing country national governments, including South Africa, reinforces the dominance of title in what Huzchermeyer (2004) refers to as the "intervention record". De Soto's ideas are not new. The notion that title, individual title in particular, is the securest form of tenure fits snugly with neo-liberal development paradigms. De Soto captures this rationale seductively in The Mystery of Capital, by claiming that title can make capitalism work for the poor. This speaks to the rather less sensationalised concerns of many governments and aid agencies of how to make markets work for the poor. Title tends to dominate in this discourse.

The arguments that question titling are more diverse than those lobbied in favour of titling. At a broad level, Durand-Lasserve & Royston (2002) identify a shift away from the conventional responses of regularisation (the provision of legal title) to an emphasis on secure tenure, based on the failures of tilting programmes. Urban slums are growing at a faster rate than any developing country government can deal with through conventional means – e.g. Cadastres and legal titles. Similarly, from the late 90s the World Bank stopped loans for land titling and administration in Africa and began to emphasize "well-defined, secure, and transferable rights to land" (World Bank, undated p 2)

Titling is not the primary "cause" of investment. People invest in land if they experience their rights to that land as secure. Cousins (2004) argues that titling can damage the nested rights various family, clan and tribal members have to resources on the land because it compels exclusivity and individualises decision-making. Confirming this argument, research on the Kenya titling programme shows that vulnerable people were displaced from land through sales (Bruce *et al* 1994). Durand-Lasserve (forthcoming) takes this argument further. Titling enables sales because it creates commodities of properties that were previously a source of multiple livelihood assets, which can result in "market evictions" (defined partly as forced distress sales.) The World Bank has recognised that part of the difficulty of titling for poor people lies in the cost of maintaining a registered ownership. "The costs of delimiting and enforcing boundaries to individual plots are high, and even if feasible, the benefits from a transition to formal and individualized titles may not be high enough to cover expenses associated with their establishment and maintenance. Indeed, titles that were generated at high cost have, in a number of African countries, lost their value as landowners failed to update them." (World Bank: p22). Quan (2003) appears to support this argument, pointing out that debt burdens of mortgage are not appropriate for the poor. He argues further that formal property ownership may not be appropriate for everyone until property institutions become transparent, accessible and equitable in their operations. Similarly, Rutsch and von Riesen (2004), drawing on evidence from informal markets in KwaZulu Natal, emphasize the inaccessibility and lack of familiarity of the titling system. Finally, Leap (Alcock & Hornby, 2004) notes that the titling is not offered in a tenure vacuum but in the context of off-register, "informal" systems that are often vibrant and functional.

The third possibility on the titling debate is a compromise in which ownership is transferred to groups of people rather than individuals. The World Bank (undated) and others (eg. Alden, Okoth refs and Ostrum cited in MacDonald) argue that collective or community ownership as a legal model creates incentives for sustainable resource use through local definition and enforcement of allocation and use. In the South African version, group ownership remains within the cadastral model but the costs of legal tenure are reduced by the creation of a single perpetual juristic person that takes transfer of the property. In this example, the parent

property can also be used as a commodity in a commercial venture, if that is the collective decision.

Leap's research in South Africa raises questions about the benefits of the compromise. Firstly, the transfer of land to a legal person masks the reality of many people struggling to access, secure, use and develop land and the complex land and land rights administration functions associated with mediating these struggles. The World Bank (undated) appears to recognise some of these problems arguing that it is important to secure individual rights within group or customary systems, requiring procedures for partitioning and enforcing these rights. Secondly, the relationship in South Africa between cadastred property and other land management functions (servicing and cost recovery, land use management and rating) means that the legal transfer of ownership may isolate a property densely settled by extremely poor people from public service functions. (Kingwill: 2004)

2.1.3 Terminology

Thinking about tenure perspectives across rural and urban situations highlights that a problem exists with terminology, which tends unhelpfully, and often inaccurately, to polarize descriptions of reality. This terminological problem is merely a symptom of deeper, underlying problem of bifurcation or duality, which occurs at different levels including:
Conceptual: urban / rural, formal / informal, legal / extra-legal

- Structural: communal and individual tenure
- Systems: western ownership and customary tenure
- Programmatic: land reform / housing
- Institutional: land tenure rights i.e. deeds registry systems, and land use rights i.e. spatial planning and land management systems

The terms "informal" and "formal" represent the most obvious terminological form of duality. There are several reasons why these terms are either problematic or misleading, or raise problems in themselves. Firstly the terminology tends to privilege "formal" over "informal" as though formalisation is the ultimate solution. Secondly, and related to the first, is that the term "informal" is suggestive of a disorganized, even chaotic or anarchic "other", which is at odds with what is often a complex, well organized and regulated set of rules and procedures characterized more appropriately in the plural – heterogeneous systems which vary from place to place, context to context. Thirdly, the dichotomy is itself problematic as it indicates a false polarisation, more appropriately represented as a continuum in which the situation is moving towards more informality or more formality. This movement may be activated at either end of the continuum, in other words, the formal system may activate a movement towards informality, just as the informal system may activate a movement towards formality.

The terms "legal" and "extra-legal" are sometimes offered as a more constructive alternative to "formal" and "informal". Extra-legal is different from "illegal" as the latter implies subversion of the law, whereas "extra-legal" implies operating "outside of the law" and it can simply mean "beyond the scope of the law or the state's regulatory framework". While this is useful, there is the continued problem in the language that the implied solution lies in "legalisation" of the extra-legal in the sense that Hernando de Soto employs the term, meaning that the "solution" lies in legalisation. The state would not look favourably on extra-legal systems as this implies possible anarchy or chaos, systems that are unmanageable. From

the point of view of the social reformer, on the other hand, legalisation is not seen as a solution in itself because legalisation may be a mere formality. Social legitimacy at a local level, as mentioned above, is regarded by many as being as important, if not more important, than the formalities of the law. These terms are therefore all contingent and do not provide ultimate solutions to the problem of terminology.

For example, while it is argued that "extra-legal" systems in reality provide socially meaningful and relatively "secure" tenure on the ground, at the same time it is a reality that the state displays institutional bifurcation, to the extent to which state resources are channelled towards the legally recognised as opposed to the legally unrecognised. In this sense institutional bifurcation cannot be ignored.

On the other hand, there is a great deal of fluidity in the way in which tenure reform is playing itself out in South Africa. Polarisation is less clear in the actual "lived experience" than it is in the terminology. Some tenure systems defined as "formal" have in reality become informal over time. This happens when the property information in situations where the state has intervened to bring people into registered system (e.g. township-type layouts) has declined to such an extent that people with registered tenure, such as ownership evidenced in a title deed, once more find themselves regulating their property informally. This process is sometimes call "deformalisation" or reversion to locally optimal systems. This happens when rights holders are unable to use, access and afford the system, i.e. the system becomes unsustainable. While some systems defined as "informal" in reality display more robust characteristics than the legal system.

Informality is also evident in the bureaucratic structures themselves where rules, procedures, criteria are interpreted in many different ways by officials sitting in different places and depending on context. So some municipalities may service privately owned communal land but others don't. There are countless other minor examples

In an effort to address some of these terminological issues, Leap has developed a glossary of definitions for using various terms in our work.

Cadastre; Cadastral system: is used in the conventional sense to mean a land information system that has two key components or subsystems: a spatial component, the geometric description of the land parcels linked to the textual component, the records or registers, describing the nature of interests and ownership of the land parcels . The concept of a "cadastre" is, however, fluid. The International Federation of Surveyors (FIG), for example, has been involved in ongoing redefinition of the concept and its objectives is to take into account contexts other than those of the Western European countries or their colonial legacies, leading to broader conceptualisation of land administration definitions, e.g. the Bogor Declaration (1996) and the Bathurst Declaration (1999). It remains, however, a heavily contested professional, intellectual and practical concept.

Communal (as in communal system; tenure; land): is used to reflect the broadest possible interpretation of community land settlement arrangements, including areas under customary, PTO, Communal Property Associations, Land Reform Trusts, quitrent and other hybrid systems of community tenure where land access and allocation is based on membership of a particular group or community in contrast to market-based private land transactions. The communal system refers to multiple levels of community decision making around local land issues, viz., land rights and access, spatial arrangements, land use management and

governance practices. Communal systems vary from place to place, context to context. The term is thus *not* used to reflect one specific land tenure form. Indeed, communal tenure types can include aspects of sectional title and share block schemes.

Customary (as in customary system; tenure; principles)**:** is used to reflect communal land tenure systems that are regulated by customary principles. These include layered and shared rights of land access and use, institutional nestedness of family, clan, tribe and normative values that inform the basis of resource entitlement. The principles governing land access, rights and use are well understood by a local community, but may not conform to the country's legal procedures. There is an implied quality of historical continuity, mitigated by adaptability as systems respond to new external challenges over time. The concept is similar to "traditional" only the latter can be misinterpreted to imply a naïve or obdurate adherence to unchanging values, which these systems do not necessarily display. The term "traditional" has also somewhat controversially become co-opted into formally recognised state structures.

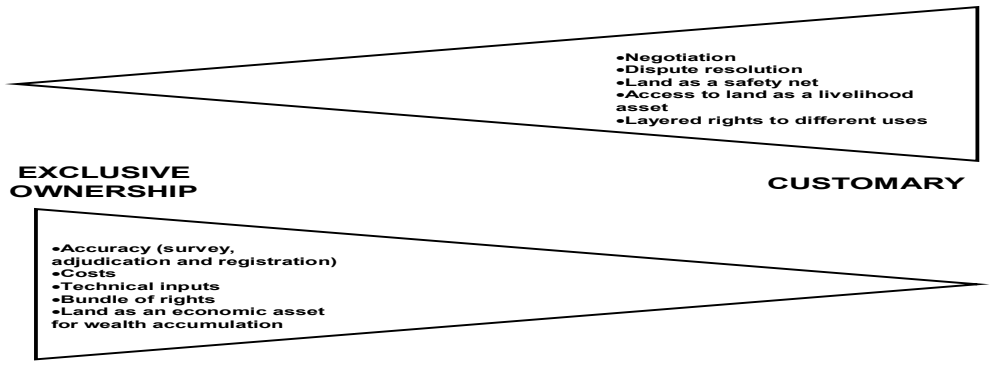
Freehold Tenure: The term "freehold" title will generally be avoided in this proposal due to some ambiguity around its precise legal meaning in the South African context. The term however continues to have currency and is understood by most land practitioners to mean a title that confers ownership in land, which is recorded and registered in the central Deeds Registry of South Africa, having been formally surveyed by registered land surveyors and transferred by registered property conveyancers. The term Registration of Deeds (ROD) System is preferred, particularly since the advent of group titles, sectional titles and registration of trusts. See ROD below

Formal and Informal Systems: The formal system usually refers to the legally recognised system of registered rights; whilst informal usually refers to the range of off-register rights, be these former state administered "homeland" tenures, adapted customary systems or local arrangements in informal settlements. However, Leap's contention is that there are high levels of formality in some customary and transitional systems. On the other hand, there may be low levels of formality in the ROD system where these have reverted to more familiar and locally optimal systems. Where the formal system is less relevant to people's socio-economic contexts, the formal requirements thereof are regularly disregarded. A more useful depiction of formal and informal systems is through the use of the concept of a "continuum" which is multi-dimensional. It does not polarize legal versus off-register rights as much as introduce criteria by which each are assessed in terms of degrees of formal or informal.

Registration of Deeds System (ROD): The ROD is used in this proposal to mean the system of national land registration in South Africa. The ROD system, theoretically, is regarded as a "negative" system of state supported compulsory land registration. The state acts as the custodian of Deeds but does not actually effect transfer or guarantee title: the law itself does not guarantee title. It is primarily concerned with recording of real rights in land. The responsibility for accuracy lies with the professional surveyors and conveyancers whose actions must conform with legal requirements, e.g. the Deeds Registries Act, No 47 of 1937. Legal liability therefore rests with the professionals involved with the subdivision and transfer of property. It is their responsibility to do all the necessary cross-checks to ensure accuracy. The ROD is contrasted with ROT (Registration of Title or the "Torrens" system pioneered in Australia), which is a "positive system" in that the state guarantees title – i.e. registration carries with it a guarantee of unimpeachability (not liable to indictment). However, in South Africa the state plays a more assertive role than is suggested by the ROD model. For example, the state sets standards for, and regulates, the survey and conveyancing industries. The Deeds Registration Act requires strict compliance with standards before the Registrar will register property. In so far as the South African state's role goes further than mere recordal in South Africa the system resembles the ROT system in some respects.

Comparison of characteristics of customary and ROD tenure arrangements: The diagram below shows tenure arrangements on a continuum in which the extreme ends are most appropriate for particular types of purposes. Registered ownership, for instance, is highly technical and expensive but is most appropriate for property that is to be used as a base of capital accumulation. Informal and customary tenure on the other hand requires greater negotiation and dispute resolution but is most appropriate for land that is to be used as a livelihood base in a set of relationships that constitute social capital.

Figure 1:Characteristics of customary and ROD arrangements



2.2 The South African context

2.2.1 Introduction

Concerns about problems related to tenure security stem from a number of different perspectives, including progressive civil society organisations. These problems are widely experienced but poorly understood, or they are understood in ways which are not leading to

the development of affordable, sustainable and appropriate solutions for poor and vulnerable people, and for land administrators and managers.

In the land reform context, there are concerns about the tenure security of members of groups who have gained land, and even where tenure is functionally secure, concerns that it seems to be an inadequate base for securing development. In the housing programme context, there are concerns that housing is not viewed as an asset despite the wide-spread provision of individual ownership through the housing subsidy scheme. Additional concerns are that the property market is functioning poorly at the lower end and that informal settlement upgrading may create new conditions for exclusion.

In addition, and across the rural-urban sectors, there are concerns that the land administration system, underpinned by the cadastre, does not have the mechanisms to "recognise" land tenure rights of individuals or groups who live in contexts that function outside the official system. A large percentage of South African continues to occupy and hold land outside of the official system in spite of the state attempts to extend a regulatory framework over all land and tenure systems.

2.2.2 Land policy environment

The post-1994 period saw a rapid and intensive process by the State to fulfil constitutional requirements to provide land tenure security to all South Africans, regardless of their social or economic status. A spate of laws was promulgated to provide wall-to-wall tenure security across the different spatial and land use zones.

The new rights framework for land reform laws secures or strengthens *possessory* rights in certain contexts, without extending real rights. Hence there are laws covering categories of occupiers of privately owned commercial farms (Extension of Security of Tenure Act), labour tenants (Land Reform (Labour Tenants Act), occupiers of communal land (Interim Protection of Land Rights Act), as well as administrative processes to upgrade urban tenure to title. In addition, the Restitution of Land Rights Act provides for restitution of certain categories of land rights lost as a result of enforced racial segregation. There has thus been a strong political commitment to recognizing a wide range of informal land rights which were previously unrecognised in law or which were recognized under old-order racially based legislation, such as the system of Permission to Occupy (PTO) in rural areas, or Deeds of Grant in urban areas.

Political commitment to provision of tenure security for all was, in the early years, premised on a human rights approach to a range of developmental issues, including land issues, and this fell squarely within the parameters of the Rights framework as interpreted in the Bill of Rights in the Constitution.

The South African government has in the past year enacted two national laws that have major impact on people living in communal areas, while some provinces are attempting to develop more appropriate strategies for managing land use. The laws, the Communal Land Rights Act (ClaRA) and the Traditional Leaders Governance Framework Act (TLGFA), will potentially impact on how the rural poor in South Africa hold land rights and how those rights are administered. The province of KwaZulu-Natal is also developing Land Use Management

Schemes (LUMS), which, for the first time, will apply land use regulations to customary land.

While the intention of government is to secure property rights to facilitate development, to extend democracy into rural areas under traditional administration and to ensure sustainable land use into the future, many civil society organizations are concerned that these measures will, at worst, deepen insecurity and poverty and at best, fail to improve the lives of people living in communal areas. CLaRAdoes not appear to address some of any of the fundamental problems relating to tenure in the country. Instead, it transfers land into group ownership in the ROD system in what has been called "the transfer model". It then further individualises and transfers individual portions of land to particular people or households. These portions may be held in ownership through title or Deeds of Communal Tenure. The Act thus replicates rather than resolves all the problems of titling. Within this framework, the Act provides for a process in which "old order" or de facto rights can be identified and, confirmed, converted or transferred into "new order" rights capable of registration. What it does not provide for is either the criteria for determining what evidence counts in identifying an old order right or what processes should be followed for adjudicating multiple old order rights all competing for recognition as a new order right. These types of evidence do not currently exist in the common law making up the ROD system leaving the arena wide open to be shaped by consultants and lower ranking officials.

However, there is also a serious tension in ClaRA. While on the one hand it appears to institutionalize a process for individualizing and titling remaining customary-type rights, it also together with the TLGFA appears to consolidate and extend the powers and authorities of Traditional Authorities over land. ClaRA allows for "traditional communities" to appoint their traditional councils as land administration committees, in a move many critics have argued removes democratic choice from communities. In the hands of traditional councils, land administration committees (LAC) could fulfill all the functions of ownership. The precise role of these land administration committees in relation to individual or household rights to own individual portions remains unclear with ClaRA authorising the LAC to allocate and record property rights of members while simultaneously enabling these "member's" rights to be registered in the Deeds Office.

The biggest challenges for South African land policy therefore continue to be how the state reconciles the common law with customary law and individual rights with group rights. The new laws in South Africa do not replace the common law governing property in South Africa. These are "prescription-like devices … which protect the *status quo* of possession on an interim basis" (Carey Miller, 2000, 207) pending formalization into permanent real rights. Even where formalised, the process of formalisation into real rights itself poses problems. The primacy of the common law governing property rights in South Africa has had the effect of privileging "ownership" evidenced in Deeds Registration. The fact that land tenure reform legislation enables the movement of customary tenures from a legally inferior status to registerable real rights through group or individual registration has provided some relief but has missed some important principles of customary law, particularly regarding the negotiability around layers of different use rights for different users which tend to evade codification and exact spatial definition. It is even argued that this movement into a registered domain threatens rather strengthens tenures that are currently off register and sets up extreme vulnerability of certain groups within the larger community.

Critical in understanding this apparent paradox is the way in which property law is structured in South Africa. Van der Walt (1999) argues that the land reform programme has continued to privilege 'ownership' as set out in the common law above other property rights and property systems and this upholds the "hierarchical structures of power that underlie land distribution patterns". In order to analyse transformation one must take into account the "backdrop of underlying power relations that are embedded in existing law". He suggests a "use-rights oriented model" that will potentially break down the "hegemony of the ownership oriented system". The latter involves a hierarchy of stronger and weaker rights. The former involves a "fragmented use-rights system which will produce a range of land rights that are intrinsically incapable of being classified as weaker or stronger, with each right being recognised and protected (often by legislation) on its own merits and according to its own context."

Translating this into the detail of local tenures, Pienaar (2005) maintains that "state support to user-rights may ensure that they are given proprietary content and can receive the same protection as ownership rights". In terms of tenure, this might translate, for example, taking steps to capture internal use rights by describing and defining them rather than leaving them to the discretion of constitution or policy-making either at a local or national level. Recording rights as an exercise in itself may reduce vulnerability and help to eliminate discriminatory tendencies in local practice or national policy. Many practitioners think that a variety of incremental improvements to tenure security through the legal protection of existing rights and the provision of intermediary forms of tenure are seen to be a more sustainable policy approach in the South African context. "The South African challenge is to use the law and create institutions to ensure that the land rights of all citizens are safeguarded equally which means giving legal content to the poorly defined [personal] rights [that currently exist]. Poor people in communal areas and beneficiaries in land reform projects need legal institutional support for their land tenure and management arrangements so that both the community as entity and the individual members who use the land may have legally secure tenure to their land". (Pienaar, 2005).

The policy environment in South Africa therefore continues to be challenged by the extent and scope of state legal and administrative intervention that would be appropriate for individual rights within group-based transitional and customary tenure contexts, with many arguing against attempts to record, define and codify customary or neo-customary values in a way that would destroy more flexible local practice.

2.2.3 Housing policy environment

Tenure is often concealed within the housing issue in South Africa. One of the cornerstones of the state's extensive housing policy and implementation framework is the housing subsidy system, in terms of which qualifying beneficiaries have been entitled to a once off capital subsidy that has translated into a fairly standard one-house-per-plot physical product in generally peripheral locations where land is cheaper, with individual title. In limited cases the subsidy has also been used for more medium density developments with either rental or co-operative tenure arrangements. Although individual title has been the dominant form of tenure by far, there have been delays in many instances associated with title registration. Access to a housing subsidy project has by and large been the dominant route to officially recognized tenure in urban South Africa. In recognition of some of the flaws associated with the first ten years of delivery as well as the changed context over the ten year period, and

recognising the successes of delivering 1.6 million housing opportunities, "Breaking New Ground" (BNG) has been introduced.

Approved in September 2004, BNG is the government's "comprehensive plan for the development of sustainable human settlements" over the next five years, and is the most significant housing policy statement since the Housing White Paper of 1994. BNG identifies that despite delivery at scale, the size of the backlog has increased, largely due to urbanisation and the changing nature of demand. It notes significant regional differences in population growth trends and that spatial concentration is increasing. [1] The strategy emphasises that the 1.6 million subsidy-houses that have been built have not become "valuable assets" in the hands of the poor, noting also that housing projects are often viewed by municipalities as liabilities because of non-payment of municipal services and taxes. It notes, and analyses, slow down in delivery and under-expenditure of provincial housing budgets in the past few financial years.

The strategy expands the housing mandate to accommodate lower-middle income groups (defined as those households earning between R1500 and R7000 per month) via access to a credit & savings-linked subsidy, the details of which will be finalised under the umbrella of the Financial Services Charter. It also collapses the previous subsidy bands so that all households earning below R3500 will be able to access a uniform subsidy amount.

Breaking New Ground aims to shift housing delivery from product uniformity to demand responsiveness in recognition of the multi-dimensional needs of sustainable human settlements. Tenure preferences is one of several dimensions of diversity that the strategy identifies, although it does not unpack the nature of those preferences. It is not clear whether informal tenure arrangements are included. Enhancing access to title is one of several strategies for addressing the aim to create linkages between primary and secondary residential property markets. Although the strategy identifies that access to title is a fundamental principle of national housing policy, it appears to conflate security of tenure with access to title. Its rationale behind the importance of access to title, on the other hand, is a fairly standard de Soto-type interpretation of the benefits of title, emphasising in particular the benefit of participation in the residential property market. This interpretation does not appear to explicitly recognise either the operation of informal land markets or the circumstances under which land serves more as a safety net and livelihood asset than an economic asset for exchange and wealth accumulation.

The strategy is based on the notion that complex demand requires a complex supply response and as a result, identifies the need for sharper instruments. Three new instruments are introduced namely rural housing, informal settlement upgrading and social (medium density) housing. Furthermore, the NDOH is in the process of clustering its work into four programme areas which will give structure to new and existing programmes and instruments and organise

[1] There are significant regional differences in population growth trends and spatial concentration is increasing. (Gauteng is growing at twice the national average. The Western Cape, KwaZulu Natal and Mpumalanga also have population growth rates above the national average). Over a quarter of the households in the country's nine largest cities, representing 1.2 million in total, were living in informal dwellings in 2001. This is equivalent to over one-third of all informal dwellings nationally. The greatest growth is occurring in South Africa's secondary cities.

its engagement with stakeholders. These emerging areas are financial services / markets, incremental housing, rural housing, social/ rental housing.

The informal settlement upgrading instrument, located within the incremental housing area, is based on the recognition that informal settlement upgrading was previously neglected and on an identified need to be positive and proactive. This stated need seems somewhat at odds with the aim of the programme which is to progressively eradicate informal settlements. On one hand the underlying eradication logic is that increased supply, via delivery of the state assisted housing programme at scale, will result over time in the decrease of informal settlements. This logic is explicit in a footnote that recognizes that high rates of urbanization within large cities and secondary towns will also necessitate the introduction of a fast-track land release and service intervention mechanism to "forestall" the establishment of informal settlements. However, this logic is not comprehensively applicable as it ignores the varied reasons for informality and the associated livelihood strategies that it can support. Greater attention to these factors may result in a less linear supply/demand assumption (nothwithstanding the enormous demand in the face of supply constraints). On the other, the logic resides in the notions of inclusion/exclusion. Inherent in this logic is the notion of the inequalities associated with the dual economy. Again, this logic is inaccurately linear. The policy objectives of "integration", "stabilization", "co-operation" need greater exploration as they appear to be supportive and proactive but their translation into practice may be more complex.

The strategy proposes a non-prescriptive upgrading process which supports a range of tenure options and housing typologies. In good locations, preference will be given to social housing / medium density solutions in order to maximize locational value. Municipalities will be responsible for implementation, commencing with nine pilot projects, one in each province and building up to full programme implementation status by 2007/8. The joint National Department of Housing, the Western Cape Provincial Government and Cape Town Metropolitan Council N2 initiative is the lead pilot and covers the informal settlements in Gugulethu, Cross Roads, Khayelitsha, and Langa.

The repetition of the terms tenure "options", "choice", "preferences", in several places in the document is significant. Certainly tenure choice is one response to the inflexible and standard nature of the programme to date. However, the strategy's overall engagement with tenure is limited in several ways. Firstly on its own terms, its engagement with what the content of options, preferences or choices might be beyond individual title is limited to the rental and co-operative ownership types in the social /medium density housing programme which is directed toward the achievement of urban restructuring. In addition, our previous work indicates the importance of process and informed choice, which the strategy does not address, although this may be better placed in a business plan type document rather than in a strategy. Secondly, the strategy's engagement with tenure is limited to tenure form or option. Although the availability of choice in tenure forms is important, tenure form in isolation from the tenure arrangements within which tenure is embedded is limiting. In addition, there needs to be much greater clarity on why diverse tenure forms are being supported, including security and access to the economy and the benefits of development. This will entail examining many assumptions including those about title and the general position in the document on diversity. Thirdly, policy attention needs to be given to the ability to enforce a socially meaningfully and socially legitimate tenure system, rather than only emphasizing tenure options (as is currently the case) or what forms of tenure bring security (as has been suggested in the preceding point). Fourthly, the strategy's engagement with local and off-register tenure

arrangements is limited to a reference to "backyard rental accommodation" which includes backyard shacks, student accommodation and granny flats. Informal rental accommodation is implicit in the reference to backyard shacks and yet it is noteworthy that the term "informal rental" has not been used, although it is common in the urban housing discourse. This point in turn identifies that the strategy's engagement with "informal" tenure arrangements is almost non-existent. This may be intentional given the informal settlement eradication objective. However, a strategy that aims to be positive about and supportive of informal settlements needs to begin with what exists and what exists is a range of diverse, local, off-register and unofficial tenure arrangements.

It is too early to tell whether or not the informal settlement pilots will deliver appropriate tenure arrangements, or even alternatives to the currently dominant ownership paradigm. Alternatives to the official models are being explored, however, for example the case of New Rest in Cape Town. However, the New Rest model is being implemented outside of the lead pilot project.

2.2.4 Weakening of civil society organisations

Despite concerns about the appropriateness and effectiveness of the South African state's approach to tenure, the voice of civil society is muted. A key factor in this is that two major networks have struggled to survive in the past year. The National Land Committee, consisting of eight provincially based affiliates, closed its national office recently in 2005. The NLC has been at the forefront of progressive rural land struggles around tenure security, and was instrumental in shaping land policy after 1994. The urban sector has also experienced difficulties with its national office closing unexpectedly in 2004 at a time when urban evictions and "distressed sales" of homes acquired through post-1994 housing policies are on the increase. Most municipalities are severely lacking the capacity to deal with servicing, rates and land use management issues in their areas of jurisdiction. Other national networks such as Sangoco and the Peoples Dialogue/ Homeless People's Federation/Utshani Fund Alliance are clearly currently weaker than in the past, and none provide strong, clear civil society advocacy voice on land and tenure concerns. These developments point to the need for finding new ways of approaching the substantial tenure challenges for the poor in South Africa. Clearly new ways of working collectively need to be found, for the need remains.

2.3 Tenure security and vulnerability

Of particular concern to Leap is the intersection between where the interaction of gender, poverty and HIV/ AIDS and land tenure security.

Land and housing are essential livelihood assets. Households need to be able to get and hold rights to these in both urban and rural areas, in order to have secure shelter and get access to services, to provide a base for economic activities in urban areas and food production and access to natural resources in rural areas (Drimie 2002a, Strickland 2004). Women are discriminated against in terms of gaining and keeping (maintaining) secure property rights and their use and control over land may be restricted, both where statutory and customary law and land administration apply.

Women's land rights operate in heterogeneous, difficult and dynamic contexts, which make it difficult or dangerous to generalize. Different geographical, historical, political and legal realities shape the ways in which land rights within any country have been constructed and are changing; what may work in one country may not necessarily work in another; family and marriage patterns are undergoing uneven processes of social change. "Land has different meanings for different women and men. It serves many, often competing purposes, including historical redress, social justice, unlocking economic growth, securing livelihoods." It is also important to differentiate between women, whose land rights are mediated by class, marital status, and the age and gender of their children and whose issues around land rights change at different times in their lives (Walker, cited in WLRSEA full report 2003). The ways in which women can mobilize in defence of their rights varies greatly.

The social embeddedness of customary systems is the source of both their strength and their weakness in terms of securing the tenure of the vulnerable. Local and customary systems have some benefits for women trying to defend their land rights. They are accessible, affordable, flexible and "composed of people who are well-informed about local household dynamics and needs and may use that knowledge to support women in particular cases" (Strickland, citing Rose 2002 and Walker 2002). However in the context of HIV AIDS certain customary practices may put women's land rights and health at risk (Strickland 2004). Drimie (2002a) notes cases of compassionate intervention by traditional authorities on behalf of households struggling with HIV in KZN, but comments that this "is not to be dismissed, neither can it be considered reliable".

The answer is not to ignore or try to sweep away customary systems, as this can undermine women's customary tenure without providing accessible, alternative guarantees through formal law or tenure regimes. Codification or registration of customary practices has also given problems in pilots (Whitehead and Tsikata 2003, citing Lavigne-Delville 1999) because it removes land tenure management from its socio-political context and turns it into an administrative act, producing a "radical transformation of the ways of managing land rights and hence the very nature of local landholding systems." The very act of codification contradicts the "layered" processes surrounding land tenure in customary systems, which largely elude fixed statutorily defined procedures for securing tenure.

Whitehead and Tsikata (citing others' discourse) note that that statutory law also discriminates against women. For example, land titling and individualization in Kenya (a process backed by statutory law), has been found to erode women's land rights. Formal legal cultures, concepts and institutions are not friendly to women, and outcomes when using them are mixed. Joint titling has helped a few married women who have had access to it, and who are supported by the land administration system (examples in WLRSEA full report 2003). However, property grabbing by relatives can occur, even where women's property and inheritance rights are established by statutory law, suggesting how social norms, local customs and institutionalized practices can influence decisions concerning property transfers (Strickland 2004 citing others).

The nature of the interaction between formal law and customary systems and practices may erode women's fragile existing land rights as well as create opportunities for them. There are cases of confusion in inheritance arising from multiple forms of marriage and unregistered marriages (Strickland 2004). Whitehead and Tsikata (2003) cite critiques of legal pluralism which has allowed male-dominated society to resist women's claims by "vacillating between the two systems and effectively postponing or neutralizing any reforms" and the imposition

of Western notions of ownership in land relations in Africa, which has resulted in a shift from the social-embeddedness of pre-colonial times towards individualization, has confused notions of land tenure, and eroded safeguards in customary law, which have disadvantaged women.

For South Africa, Walker (2003) has critiqued DLA gender policy and land reform in South Africa, noting breakdowns in the way the task was conceptualized and the lack of practical guidance to those who had to carry it out. Government policies are intersecting untidily with larger processes of social change in rural areas, "creating new spaces from where women's claims for stronger land rights may be advanced".

Walker (2003) interviewed women from early land reform projects, which targeted poor to very poor people from landless or tenure insecure households, and makes some important points challenging dominant paradigms informing interventions.

- One of the measures for women's involvement that DLA utilized was to get one or two women onto community land reform committees. The results were variable and not particularly successful.
- In contrast with this, women were often active in getting their husband's names onto beneficiary lists, as a means to secure the interests of their households.
- The DLA gender unit advocated independent rights in land for women (not an option offered to people who acquired group title, so that the following discussions record women talking about an idea, not experience). Most of the women she interviewed in preferred the idea of ***joint*** rights in ***household*** land rather than independent rights in individual land… and 'have strong interests in *community* rights in land themselves". Some also mentioned *individual evidence.* Walker's findings echo Jackson's (2003): "While the patriarchal household may be a site of oppression for women, it is also a source of identity and support, providing membership in a social network that is often the only effective resource poor women have".
- Women held a range of views on the inheritance rights of girls. "Concern for the continuity and integrity of the patriarchal household if daughters inherited co-mingled with the desire to boost their daughters' life chances and recognize their contribution to household well-being."

Walker noted the level of satisfaction women expressed with very modest gains from land reform. For them, the indicators of progress are found not in large developmental ambitions, but in basic social and subsistence gains."

Drimie (2002 b) explains that HIV/AIDS and poverty have a bi-directional relationship. In the context of HIV/AIDS, household livelihoods come under even more strain as breadwinners die, households suffer discrimination which may lead to loss of employment or customers, the burden of caring for the sick increases for women and takes them away from income-generating activities, and medical and funeral costs rise. "Mental 'models' of what target households look like may not fit the reality of households distorted by pressures imposed by HIV AIDS, so that they are not engaged with successfully or even reached" (Drimie, 2002b).

Secure land rights are particularly important to prevent HIV-AIDS and to mitigate its effects on survivors in affected households. The HIV epidemic places many more women and children than ever before in positions where recognition of their rights to land and home would give them a much wider range of options for survival, while at the same time making it

harder for them to hold onto such rights. Property grabbing from widows and form orphans is widespread: they lose land and housing in disputes with relatives and other opportunists. The stigma associated with HIV AIDS may be advanced as a reason for depriving women of property rights (Strickland 2004, also citing Drimie). In some places cultural norms are changing and there are examples of support to women and for orphans from local or traditional authorities or community elected leadership (##ref Alliance report). Women who have property rights to land are in a stronger, although not unassailable, position (WLRSEA full report 2003, Drimie 2002a).

Children are both immature and below the age of legal competence to be able to protect their interests (Smith and Brisbane, 2003). An Msunduzi Aids Partnership action plan for Pietermaritzburg distinguished between tenure security (i.e. security of inheritance of the property rights of children) and occupational security (security from eviction). The action plan noted that the national housing subsidy scheme is largely based on freehold ownership and suggested signing of wills together with deed of sale when applying for a government housing subsidy. The action plan noted that problems still arise in property succession between the promotion of individual freehold ownership and customary law; and that many people are reluctant to take out wills even if they are fortunate to understand housing consumer rights and responsibilities, because it implies wealth, and can cause jealousy and in extreme cases a motive for murder (Smith and Brisbane 2003).

Households cope with additional financial burdens by selling off assets, although land may be the last thing they give up (Drimie 2002a). In rural KwaZulu-Natal, HIV/AIDS is leading to changes in how land is used and to changes in the tenure arrangements around it. Where households fear to lose land rights because their capacity to work is reduced, non-use of land is temporary and total non-use of land by HIV/AIDS affected households rare, except in some households consisting of orphans. Under-utilization is more common than non-utilization (e.g. part of a field sown, poor weeding), and HIV/AIDS-affected households used four main options to prevent non-utilization and minimize under-utilization, three of which relate to tenure arrangements: hiring casual workers, renting out land (only in some traditional authority areas), entering into share-cropping arrangements, and selling land.

"Arguing against development policy and implementation positions that continue to see HIV and AIDS as a responsibility of the health sector or a “special needs” portfolio issue, Ambert (2004) emphasises that HIV infection and AIDS impacts thrive in conditions of socio-economic vulnerability and inequity. Comparing HIV prevalence in the age cohort 15 to 49 in urban informal settlements (an average of 28%) with formal urban settlements (an average of 15.8%), she notes that the pandemic is concentrated in informal urban settlements. These environments are associated with a range of socio-economic factors that make individuals more prone to contracting HIV, such as migration, mobility, poor access to health services (such as STD management services) and socio-economic deprivation.

She emphasises that the impact question is not a one way relationship. As well as HIV and AIDS impacting on the sustainability of communities and their development conditions, development conditions also affect HIV prevalence and the impact of AIDS on individuals, households and communities.
Ambert identifies that free-standing and infill informal settlements, backyards, overcrowded formal housing and hostel accommodation are characterised by inadequate access to water and sanitation services and energy. These conditions make HIV positive and negative

individuals particularly vulnerable to contracting opportunistic diseases such as TB and compromise the provision of home and community-based care.

She emphasises that the pandemic exacerbates poverty and vulnerability. This includes tenure vulnerability. For example, HIV illness and AIDS decreases formal and informal income generating opportunities among those who are sick and those who care for them.
She paints a picture of increased fluidity and diversity in household composition in response to HIV and AIDS. Households are not equally equipped to accommodate vulnerable family members. For many, "coping" with this additional burden requires that vulnerable family members (including orphans) are passed-around households for short periods of time. It may translate into increasing mobility of individuals affected by HIV and AIDS. Managing the economic hardship requires spreading household members spatially, in order to improve access to economic opportunities and social services across the urban landscape. Coupled with decreasing housing affordability, this is likely to further increase informal housing development processes. Cross (2002) asserts that tenure rights accessed through a third party (for instance backyard dwellers, sharers, sub-letters) and informal tenure arrangements become particularly vulnerable in a context of HIV and AIDS."

Soberingly, Drimie (2002 a) notes that there is still very limited information of real changes, and that this is a hindrance in countering the developmental impact of the epidemic.

3. Multiple tenure arrangements in South Africa

Leap asserts that there are multiple tenure arrangements operating in South Africa. "Arrangements" refers to processes, rules and procedures associated with tenure. Leap has developed a categorisation of these arrangements, which is an attempt to facilitate an enhanced understanding of the diversity which exists on the ground. Categorisation should be seen as a heuristic device rather than as a description of reality – the categories are helpful for depicting how tenure works in practice. In reality any one situation (or community) could have two or more arrangements operating at any one time, and these can be used against each other, or in support of each other.

The arrangements can be clustered into four categories:

- Customary tenure arrangements;
- The tenure arrangements association with the registration of deeds – the ROD system.
- Local and off register tenure arrangements in rural and urban areas
- Transitional tenure arrangements;

3.1 Customary tenure arrangements

The importance of re-examining customary tenure systems in South Africa lies in its widespread use and application. The majority of rural South Africans live on land under a customary tenure system. The 1996 census data indicates that around 15 million people lived in customary areas, approximately 83% of the rural population.

May (2000,23) also observes that the majority of the poor are "African, rural and women". Using 1995 data, he estimates that although 50.4% of the population was classified as rural, 71.6% of the poverty share, based on 'money-metric indices', was in rural areas (ibid).

Characterising South African tenure as a dual system tends to put customary tenure derived from African customary law on the one side, and individual tenure derived from Western law on the other. Customary tenure is often depicted as the chaotic Other, eluding bureaucratic control and regulation, while individual tenure is described as formal, with registered titles, and susceptible to minute regulation and future planning.

But this is not a true picture of South Africa's tenure landscape. Formality could better be defined as organized regularity, which would thus include those customary systems that have known and used procedures for land allocation, boundary demarcation, adjudication and dispute resolution, although the system does not deliver registered tenure. On the other hand some tenure systems defined as "formal" have in reality become informal over time. This happens when the property information has declined to such an extent that people with registered tenure, such as ownership evidenced in a title deed, once more find themselves regulating their property informally.

Formality provides a strong indicator of the degree of functional tenure security a person or household is likely to experience. Formality suggests that the system is known, accessible and used, and that it provides a social legitimacy that can underpin functional (if not legal) tenure security. Particular communities in the rural landscape described above fit somewhere on a continuum of formal but usually unregistered tenure. Thus many rural South Africans have a relatively high functional tenure security that is outside of legally secure tenure.

Most investors, both state and private sector, equate formal tenure and tenure security with legal, registered title or real rights. The effect of this is that customary systems tend to be bracketed off from systematic investment opportunities, resulting in the ongoing reproduction of what President Mbeki calls the dual economy and the ineffectiveness of the state in dealing with the inherited structural inequalities. For this reason that many analysts and policy makers see the solution to the development "problem" in the individualization and registration of all rights on the continuum. However, such solutions have been shown incontrovertibly to be inappropriate in developing countries. There are three main reasons for this: affordability to developing countries; the poor often do not sustain, i.e. uphold the legal formalities associated with registered rights; and processes of individualizing and registering land rights often damage poor people's livelihoods and can reduce their tenure security, creating conditions of greater instability for vulnerable people.

This gives rise to a quandary. The received wisdom that individualization and registration = investment and development does not doesn't appear to work well in many developing environments, including South Africa. On the other hand, the current land management system in South Africa continues to funnel development resources into particular types of tenures, despite their unsustainability and apparently without a coherent cognizance of the bigger land management issues that need to be addressed.

Leap believes that a contributory factor to this apparent paradox is the dearth of precise understanding of how customary institutions organize property rights. A second gap in understanding relates to how customary property systems articulate with property systems derived from Roman-Dutch (R-D) law. While it is possible to assert that ownership in

customary systems is socially embedded in ways that are very different from the Roman-Dutch derived tenure system, the precise problems of articulation require a deeper understanding. Leap has argued that customary ownership is firstly inter-generational in the sense that the family, past, present and future, has an active stake in the land and secondly, is linked to a notion of belonging to a particular piece of land that is ritualized through highly gendered practices of ancestral worship. Questions of articulation would need to identify how these notions of ownership contradict, support or elude Roman-Dutch derived notions

To do this, more rigorous analysis of customary tenure from general descriptions to more clearly defined problems of integration within the post-apartheid political and economic structures is necessary. It is Leap's contention, for instance, that elements of customary tenure can be found in urban informal settlements, and that these contribute to the particular outcomes of state attempts to upgrade and individualise tenure in these settlements. In a similar vein, the political imperative for the state to secure tenure and transfer state land to people previously denied the right to own land will confront a terrain already occupied by customary systems, practices and institutions. This will shape the outcome of policy implementation in unexpected ways unless these "confrontations" are better understood.

Why does this articulation matter? The state's focus of intervention in customary tenure systems is through the enactment of laws as noted above. Each of these legal interventions makes assumptions about customary systems that will impact on the possibility of their success. For example, ClaRA, assumes that it is possible fairly simply to bring a customary tenure system into the Registration of Deeds system. For such an assumption to hold true, the conceptions of property, ownership and evidence would need to be congruent between the systems, and yet there is little research to show whether or not this the case. The TLGFA, on the other hand, assumes that traditional structures can be democratized by forcing changes to representivity and processes for achieving representivity.

Legal and political dualism is likely to continue unless the tensions and incongruities are more precisely identified and solutions to integration found, and this will affect a very significant proportion of poor people in South Africa negatively.

3.2 Registration of Deeds (ROD) system

The legal property system in South Africa creates hierarchies of property rights. Land rights under the 'ownership' legal paradigm (the ROD system) are the strongest rights. These rights are defined by the common law of ownership as developed through the Roman-Dutch law on property. Van der Walt argues that the framework for the effective implementation of apartheid land law was provided by the seemingly 'neutral' structure of civil-law property institutions. He argues that "Black land rights, for the most part consisting of either traditional tribal land rights or statutory land 'rights such as site permits, residential permits, lodger's permits, hostel permits or certificates of occupation, were weak and insecure because they were defined and treated as unrecognised and unprotected property relations. In terms of the hierarchical civil-law system of property rights, none of the Black land rights was secure or strong in the sense that they could compete with or be weighed against 'traditional' civil-law land rights, nor were they suitable in the sense that they could support those living on the land or provide legal security for bonds or loans. Most Black land was cut off from markets and from economic infrastructure. By definition, living on Black land meant poverty." (Van der Walt, 1999). Rights of ownership are real rights, and are maintained by state

administrative systems, whereas rights to “use” land owned by others are classed 'personal rights' of a lesser and "private" status, without proprietary content and thus lacking the same legal protection and administrative support as ‘real rights’. (Pienaar, 2005).

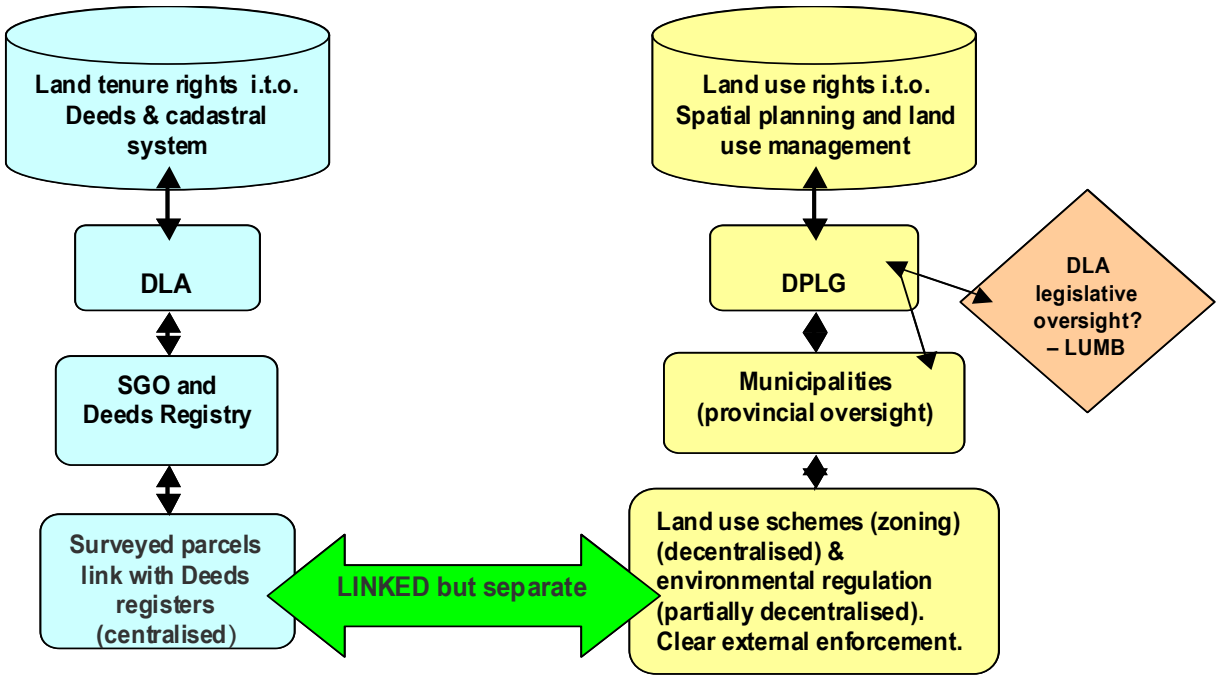
Viewed from the perspective of the broader land management framework, this hierarchy of rights which privileges ownership or real rights in land is reflected in the technical processes that define and register the rights and capture the information. A juridical (legal) cadastre underpins secure land rights in South Africa, meaning that land has to be “cadastred” if it is to be recognized by the land management system. The cadastre is a form of land tenure literacy - where there are no land parcels, officialdom system cannot “read” the system. The problem is that cadastres don’t easily adapt to systems that allow a layering of rights, such as multiple, differentially entitled owners with different rights to different uses that are socially determined. This system also has difficulties with user rights that are linked to people and not to parcels.
The South African formal property system is organised around a conventional cadastral model, namely, a land information system that has two key components or subsystems: a spatial component, the geometric description of the land parcels, linked to the textual component, the records or registers, describing the nature of interests and ownership of the land parcels. The Surveyor General’s office (SGO) houses the spatial component and the Deeds Registry is the custodian of the Deeds information. The SGO and Deeds Registry are both centralised. The South African cadastre demands stringent technical sophistication such as high-accuracy surveying based on a geodetic network of co-ordinates and legal conveyancing. While this constitutes high protection for those who can afford to use the system (it regarded as among the most accurate in the world), the system has failed to make an impact on the property rights of the poor.

Evidence from titling experiments in South Africa over the past century suggest that registration and titling of land in former black rural and informal urban areas has had mixed results. Of particular note is that the formal registers have not been maintained. Informal sales or intra-family transmission, without registration, are the more usual methods of transferring land in this sector.

Customary tenure legacies also impact significantly on the efficacy of the system in former homeland rural areas. Various customary forms of land holding that depend on social indicators and not technical indicators (such as land parcelling through survey) for allocating and enforcing land tenure have survived in various forms all over South Africa. In some regions and particularly in urbanising contexts, these “social tenures” have adopted certain tenets of a fixed cadastre system, while others remain more rooted in historical African land tenure practices. One key distinguishing feature of customary tenures is that rights are “layered” both socially and territorially, rather than parcelled and registered. These systems rely on a logic that differs significantly from the formal registration system.

The anomalies that arise from this difference are carried into the whole land management environment. There is disjuncture at numerous intersection paths, including spatial planning and land use management. The latter in turn relies on a cadastre in the form of land parcels to carry the necessary land information to activate its functions, for example, through town planning schemes and zoning. The implications of this argument is that the current formal land management system in South Africa does not have the mechanisms to “recognise” land tenure rights of individuals or groups who live in contexts that function outside the formal system, that is outside the cadastre.

Figure 2 The "two streams" of authority for key Land Management Functions in the formal system



If the cadastre is not working for the poor or for those whose land tenure is dependent on customary principles that are "off-cadastre" or "off-register", what does this mean for cadastral reform in developing countries. Should the whole concept be dropped, or should it be adapted? There is a whole body of emerging literature on the titling and cadastral model in developing countries – some argue for a radical shift away from the cadastre concept, while others are argue that the cadastre still has a place. The latter argue for a modified cadastre alongside other land information systems that are not derived from the cadastre. This is an "incrementalist" approach – strengthen or adapt existing institutions to work for the poor, and this means allowing non-cadastral systems to sit alongside the cadastre.

In South Africa at the moment, there is an uneasy fit between the cadastre and new legal principles embedded in post-1994 land law that strengthens possessory rights and which have very strong anti-eviction principles. However these do not translate into rights of tenure that are recognised by the official registration system. The group ownership model is rooted within the cadastral model, but only for the outside property, while rights inside are still legally ambiguous.

Thus at this stage it is still the case that registered documents (deeds, linked to survey information) still have higher legal priority than unregistered documents. Unregistered documents not only lose priority, but also lose all legal status. Rights that are protected in terms of laws such as the Interim Protection of Informal Land Rights Act (IPILRA) are "prescription-like devices … which protect the status quo of possession on an interim basis" (Carey Miller, 2000, 207) pending formalization into permanent real rights. These are therefore pre-emptive rights but not real rights. The Communal Land Rights Act, on the other hand, is firmly rooted in the cadastral model.

3.3 Local and off register tenure arrangements in rural and urban areas

The importance of examining local and off-register tenure arrangements is twofold. Firstly we do not know enough about them. Secondly, they are widespread and on the increase. For example, the number of households living in shacks in informal settlements and backyards increased from 1.45 million in 1996 to 1.84 million in 2001, an increase of 26%, which is far greater than the 11% increase in population over the same period (Breaking New Ground).

Whilst much of this section focuses on urban informal settlements, in some rural areas, through past planning interventions, there are very dense settlements that have taken on some urban characteristics. The Urban Development Framework (Republic of SA, 1995. The Urban Development Strategy of the Government of National Unity, October 1995, Ministry in the Office of the President.) refers to these places as "denser settlements" and defines them are areas of population resettlement under apartheid that now effectively function as urban areas - but are lacking in the corresponding urban facilities (RSA, 1995 p 49). In the urbanisation literature reference is made to a process of "displaced" urbanisation (Mabin and Murray) which argues that despite state strictures black people did urbanise in the apartheid era. The displaced view holds that the tidal wave of urbanisation was displaced to the bantustans where people experienced partial labour market inclusion and controlled residential exclusion (Murray, 1987). Thus the numbers of people affected by the following analysis is even greater than those counted as urban dwellers.

Although we do not have enough systematic knowledge and understanding of local off-register tenure arrangements, there is a wealth of case study material that provides insight into aspects of how such arrangements operate, in all their variety, although the nature of this material means that the evidence is fairly scattered and that a consolidated record is by and large absent. What is clear is that:

- Local, off-register arrangements exhibit more variety than the term “informal settlement” is able to convey.
- An emphasis on place (“informal settlement”), as opposed to arrangements, means that not enough is understood about local rules and procedures. Although case study material exists on aspects of informal systems, a systematic body of evidence is not yet available. As a result, policy and programme interventions offer fairly standardized and inflexible options.
- There is a link between these local and customary systems, partially captured in recent research by the notion “neo-customary”.

3.3.1 Classification

Durand-Lasserve and Royston (2002) offer a three part classification of informal settlement. This aids in identifying the variety in informal processes, which the term informal settlement denies. These are informal rental, squatting and informal subdivision.

Unauthorized land development or **informal subdivision** is identified as the main type of informal settlement. Unauthorized land developments are a widespread phenomenon on the fringes of most developing cities. Most often, such settlements have developed on private agricultural land, frequently outside the municipal boundaries. In most sub–Saharan African

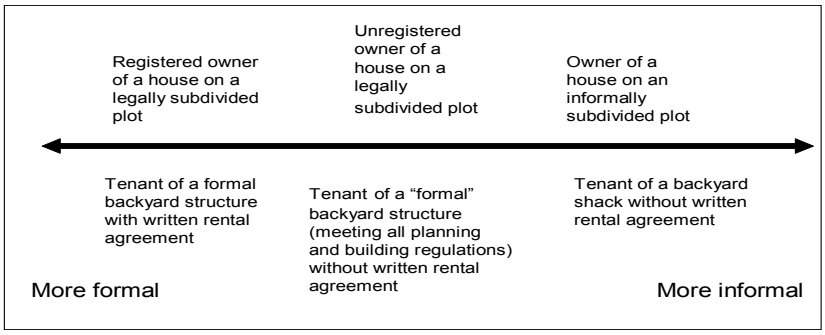
cities, customary owners are the main providers of land for housing, even if their right to the land is not formally recognized by the state. This most systematized expression of an informal system at work, is least recognized in the South African context, although it certainly exists, Zandpsruit and Weiler's Farm being two examples and several settlements of the South African Homeless People's Federation being others. There is no data available that quantifies the extent of this category of informality in South Africa as the 2001 census does not disaggregate informal settlement in this manner.

Squatter settlements are a second type of informal settlement, found on the urban fringes or in centrally located areas, mostly on public land but also – less frequently – on private land, especially when disputed. These can be the result of an organized 'invasion', or a gradual occupation. Contrary to common belief, access to squatter settlements is rarely free. An entry fee must generally be paid to an intermediary, or to the person or group who exerts control over the settlement, and sometimes also rent. The 2001 Census counted 1.38 million households in informal settlements in South Africa, although it does not disaggregate squatter settlements and informal subdivisions. Tenure security can range widely, from settlements on public land that have a degree of formal recognition to settlements on private land faced with the threat of eviction.

Informal rental housing is a third category and covers a wide range of situations and levels of precariousness. Rental is the most common form of tenure in formal as well as in informal settlements. Tenants and subtenants form a heterogeneous group. They can be found in unauthorized land developments, in squatter settlements or in dilapidated buildings in city centres. Backyard shacks, prevalent in some of South Africa's cities, are an example of informal rental housing. The 2001 Census counted 460 000 households in backyard shacks and 530 000 households in formal backyard structures and rented/shared rooms within houses, a total of 990 000 households. Tenure security can vary greatly.

The following figure locates examples of informality on the continuum proposed by Leap in order to demonstrate the point about variety. (The examples are adapted from Urban Sector Network and Development Works, 2003).

Figure 3 Continuum on informality



3.3.2.Nature and characteristics of local off-register systems

Although this classification assists in promoting recognition for the diversity of informal settlement types, which the undifferentiated application of the term "informal settlement" tends to ignore, there is a need for much greater clarity on the systems, processes and procedures which operate within them, especially in the South African context.

The official emphasis tends to be on place not system, thus informal *settlement* rather than *systems* of tenure, land rights, land administration or land management. As a result, local rules and procedures are seldom recognized, much less understood. Officially, informal settlements are unsightly places to be eradicated via upgrading. This position, although more implicit in Breaking New Ground (the new comprehensive plan for housing), is regularly explicitly reinforced by public ministerial statements. But it goes back further than this, to one of the cornerstones of the 1994 Housing White Paper – the notion of backlog.

Backlog remains central to the understanding of housing demand and is the basis for targeting future delivery. The conceptualization of backlog relies on the notion of "inadequate shelter", a category into which informal settlements fall. Recent work commissioned by the national Department of Housing questions the notion of backlog as an expression of demand (Charlton et al, 2004;Tomlinson, 2004; Shisaka, 2004), but this has yet not translated into an official alternative. Charlton et al (2004) make the point that the backlog may over-count housing demand in the sense that people who are currently housed, albeit "inappropriately" (in shacks) are included. Motivating a more inclusive stance, or greater recognition for informal housing solutions, they argue for "different ways of counting". The importance of this argument for our analysis is that it demonstrates how stark and uncompromising the lack of recognition is.

Although there is local variety in response at a municipal level, informal settlement residents often carry the stigma of "queue jumpers" who should be waiting patiently for their names to come up on a waiting list rather than jumping the housing subsidy queue by invading land or squatting. It is often only at the point of development intervention that the informal systems in operation become officially visible, and often unfortunately because of conflict that arises when powerful interests operative in the informal or local rules and procedures are threatened. Examples of violent conflict recently in Zandpsruit, north of Johannesburg (Development Works, 2005) and in the early nineties in Phola Park, east of Johannebsurg (Baskin, 1993; Royston, 1998) bear testimony to this.

In the literature there is not consolidated evidence about the livelihood strategies that underpin the land management and tenure systems in these environments (but see Charlton et al, 2004). Recent research commissioned by the national Department of Housing does however emphasize the importance of "informal rental" (Shisaka, 2004) and backyard shacks have much greater recognition in the policy discourse than previously (for example NURCHA and the National Housing Finance Corporation research interest is a possible basis for a future official response). In addition to informal rental, crime related livelihood strategies are also something of an exception, largely because of the sometimes violent clashes associated with such strategies, which make them visible. Examples include a market in arms fuelled by the Inkatha/ANC violence in Phola Park (Baskin, 1993; Royston, 1998) and illegal trade in rhino horn in the Winterveld (Simone, undated).

From an international perspective, Payne (1999) points out how urban land policies have not been based on firm evidence because surprisingly little was written about urban land tenure in developing countries before the 1980's. He refers to the pioneering UN study of urban and policy and land use control of 1973 that identified a range of different formal and customary tenure systems, but omitted any significant discussion of informal tenure systems or what he calls informal tenure sub-markets.

The following two case studies provide evidence of the functioning of local, off-register rules and procedures. Firstly, in a study of what she calls alternative extra legal land markets in Folweni, Rutsch and von Riesen (2004) describe how well structured and functional it is. Folweni is a former homeland (R293) town on the south western side of eThekwini. They describe how residents have constructed a land transaction system for themselves there because they held lesser forms of tenure and held land outside of the main market. One of the characteristics of this system identified by them is its adaptability. For example, the influence and status of the Traditional Authorities as the brokers in peri-urban land transactions has waned with the extension of local government to the area and elected local councillors have taken over this role. Theirs is now a critical role in the brokering and validation of informal land sales. They reports that residents in Folweni would prefer to conduct their sales formally and in a legal fashion, if the current system will meet them half way.

Secondly, current research that Development Works is undertaking with Planact in Zandspruit and Zevenfontein in Johannesburg (Royston, forthcoming) provides more evidence of what we know to be widespread in informal settlement environments - there are rules and regulations for the purchase and resale of land, for allocation and demarcation, and for recording. These are varied in nature and in their codification and enforcement. For example, in the Zandspruit public transit camp there has been an "official" process of registering residents operating alongside another one, evidenced by the current mismatch between the register and what is on the ground. Recordal, or evidence of rights, takes numerous forms including "green cards", "A" and "B forms", relocation letters and in the case of the formal extension to the transit camp, title deeds. In the private sites, where official recognition is less obvious, there seems to be considerably less coherence in the manner in which access is managed, tenure is less secure and people have "purchase receipts" as their only evidence of ownership. A market in land exists, although its extent is uncertain at this stage. In fact, this market has some characteristics of a futures market as informal sale seems to take place not only on the basis of sites but on the possibility of a site. Periodically it seems, the municipality provides stickers to indicate some form of official recognition and qualification. Somewhat bizarrely this has led to a market in stickers. Residents therefore describe (with not inconsiderable rancour) how some people have stickers on suitcases, as well as stickers on shacks. In Zevenfontein the stakes surrounding the registered list of residents is much higher, as it has created insiders and outsiders with immediate ramifications. "Approved beneficiaries" will go to Cosmo City – a long awaited mixed use and mixed income development in relative proximity to the current site is location on the informality scale. As a result, the community leadership governs access to the settlement in exchange for the certainly of relocation for those that are "qualifiers". Maintenance of the register, and the process of sale and acquisition, has therefore become a community responsibility.

In her research Huchzermeyer (2002) makes reference to the functioning of informal settlements prior to intervention, which provides some insight into the informal processes at

work. However, she also notes that very little research has been conducted on the way in which space is managed in informal settlements.

An important dimension or aspect of informal systems is the issue of registration. Durand-Lasserve (forthcoming) notes how land transactions in the neo-customary sector are being progressively formalised though the use of witnesses to transactions being institutionalised, frequently authenticated by local government administrations. Usually, a "paper" of some sort can be provided. To defend their rights people often draw on the paper and on customary evidence. Christian Lund (1999) points out how in Africa informal recording of property transactions on paper seems to develop in parallel to the state's generally less than successful efforts at formal recording of the land tenure situation. In the tribal context, which he is referring to, the authority of the chief gave the record status – challenge the chief's record, and you've challenged the chief. In addition, informal practices of public validation by a variety of politico-legal institutions were developing.

3.3.3 The customary / informal link

A recent investigation (Durand Lasserve, forthcoming) identifies informal systems in African countries as neo-customary under certain conditions. The researchers, noting the emergence of hybrid systems in and around African cities, refer to neo-customary practices for providing land for urban and peri-urban housing. Neo-customary practices are a combination of reinterpreted customary practices with other informal and formal practices. This fluidity in classification is in tune with the continuum concept. Examples are where land rights were initially delivered by customary systems, and where practices that have been part of a customary system are currently being used. Durand-Lasserve notes that all case studies confirm that commodification is the important factor that transforms customary into neo-customary land delivery systems.

Reviewing research in some Western Cape settlements, Huchzermeyer (2002) identifies a process of entry into informal settlements which she captures as "sponsorship and screening". She notes that in the Durban context this process has parallels in rural tenure systems. In the late eighties and early nineties in informal settlements in Durban, exploitative practices of rent tenancy based on a private ethic gave way to a land ethic closer to the communal land holding in rural areas, under the leadership of mass democratic movement structures.

The formal has some difficulty engaging with the hybrid, what Durand-Lasserve calls the neo-customary. Land management and planning reference models make integration of neo-customary models difficult, compounded by lack of resources, a low level of registration of titles and lack of appropriate LIS and cadastres. While local paper records are emerging everywhere, the lack of formal registration can lead to multiple allocation of land, lack of access to credit and governance difficulties related to the ability to tax and cost recover of urban services. Importantly, he argues that credit can be given without formal title, taxes can be charged without formal ownership registers, and some services can be paid for without them. The limitations exist where the formal sector's views of the neo-customary systems do not provide a basis for overcoming the obstacles. This research therefore emphasizes the importance of mindset and attitude in addressing the issue of access to development.

3.3.4 Why do local systems exist?

Explanations for the existence of informal settlements (noting the inadequate focus on systems identified previously) emphasize urbanization, economic decline, market failure and the failure of public policy. Several sources also locate the persistence of informal settlements within the bigger picture of the informalisation of African cities.

High rates of urbanisation are aggravated by declining disposable incomes among low wage earners, which condemn the majority of urban dwellers to a downward spiral of marginalisation (Khan, 2003). Accelerated globalization and structural adjustment policies combining deregulation measures, privatisation of urban services, massive state disengagement in the urban and housing sector, and attempts to integrate informal markets – including the land and housing markets – into the sphere of the formal market economy and ineffective corrective measures or safety net programmes, have further increased inequities in wealth and resource distribution (Durand-Lasserve, forthcoming). These factors, and the increasing impoverishment which they define, combine to negatively influence land access by the urban poor, and increasingly low and middle income earners. Public policies aimed at integrating irregular settlements within the city have been undermined by a decrease in revenue of urban households. In short, in the vast majority of sub-Saharan African cities, the urban poor as well as large segments of low and middle income groups do not have access to land provided by the public and the formal private sectors (Durand-Lasserve, forthcoming). As a result, they have little option but to resort to the informal sector to satisfy their land and housing needs.

According to recent UN estimates (cited in Durand-Lasserve, forthcoming), Africa has the world's highest urban growth, with an annual average of 4%. Thirty-seven per cent of the total population of Africa currently live in urban areas and by 2030 the urban population is expected to account for more than half of the total population. Over the next two decades, nearly 90 % of the population growth in Africa will take place in urban areas. A high rate of urbanisation combined, in most countries, with consistent economic decline over the last two decades has resulted in a rapid increase in the number of urban poor: in sub-Saharan African countries, it is estimated that more than 40% of urban residents are living in poverty. These factors contribute to the increasing informalisation of African cities. For example, in African cities, more that 75% of basic needs of the population are provided for by the informal sector and include services such as water, energy, neighbourhood security (Khan, 2003). It is estimated that the informal sector in Sub-Saharan Africa employs 60% of the urban labour force. It is clear that a large and increasing number of residents will continue to reside in informal settlements to get easier access to place of employment. In Sub-Saharan Africa, between 25% and 70% of the urban population live in informal settlements including squatter camps. The total number of people living in informal settlements is increasing faster than the urban population, with informal settlements accounting for more than 50% of spatial growth in developing cities (Durand-Lasserve and Royston, 2002).

Dominant in many of these explanations is the notion of land demand. However, the official discourse seldom unpacks the variegated nature of that demand. People's own attempts to satisfy it, in a context of limited affordable and appropriate official supply, tend to be viewed in an unfavourable light, as the earlier critique of the notion of housing backlog demonstrates - informal settlements are "counted" as backlog, as they represent "inadequate shelter".

There are other ways of approaching the question, such as anthropological and socio-cultural ones. For example, Robins (2003) assesses the advantages of living in informal settlements, noting that it has benefits to poor people, as they avoid numerous obstacles to their livelihood strategy, and also costs this way, and it allows for a short term commitment which suits those who need to remain mobile. His literature review draws attention to the complex and diverse ways in which individuals and cultural groups make decisions in relation to housing. He cautions against making sweeping generalisations about cultural beliefs and practices and identifies that faulty assumptions are frequently made. Anthropological critiques draw attention to socio-cultural obstacles to creating formal low-income markets. They also draw attention to problems with rational choice theories, noting that housing is often not perceived simply as an individually owned asset, but is also a social and cultural asset. When there are multiple stakeholders with many interests in the property transacting is complex and can be seen as anti-social. The property can also be part of building and maintaining complex social networks that contribute to livelihoods. This is true of communal property generally, not just housing and it is an area of exploration for the Leap's next phase.

3.4 Transitional tenure arrangements

The term "transitional land tenure arrangements" refers to land settlement contexts where past interventions have had a marked effect on current land tenure arrangements. These interventions may be induced by both external and internal pressures which have brought permanent and incontrovertible changes to customary principles of land tenure, whilst not overruling them completely. In this configuration, rights holders express a desire to move along the continuum to more formalised recordal of land rights and regulation of land use, whilst also maintaining some elements of (adapted) customary tenure. There is also a tendency towards more individualised land use rights and fixed spatial demarcation thereof. This "hybrid" land tenure context raises policy questions beyond land tenure forms, viz. wider land policy questions such as land use management and cadastral reform.

The term "transitional arrangements" is arguably applicable to all tenure arrangements that are functionally outside the formal ROD system. All tenure arrangements are transitional to greater or lesser degrees. In most situations past interventions are likely to have had a marked effect on current tenure arrangements. This section is therefore not so much an attempt to capture a particular category of tenure, but rather to describe a set of processes that affect tenures that are in a state of flux to a greater or lesser extent, both in urban and rural contexts. Thus a reading of this sub-section should balance an understanding of the extensive nature of transitional arrangements, with attention to how understanding the characteristics of these arrangements aids in deepening knowledge of South Africa's diverse tenure landscape.

Some land tenure systems have moved incontrovertibly away from customary principles. However, these systems "in transition" resist full incorporation into the centralized Registry and spatial cadastre. There is much evidence, based on situations where titles were issued historically (e.g. in the Eastern and Western Cape and Kwazulu-Natal) or more latterly in urban housing programmes, that these transitional systems are unable to fully embrace the principles of a national land registry system and tend to revert to more localized, affordable and practically workable arrangements.

Many, if not most, rural and urban settlements in South Africa are characterized by semi-formalised land tenure arrangements. This reflects a different pattern of settlement from most

other African countries as a result of the dispossession of greater tracts of land from customary settlement by settlers and colonial governments. The other side of this coin is that a far greater extent of the land in South Africa has been formally surveyed, thus falling under the cadastral system in one way or another, than is true of the rest of Africa. This means that there is only a limited sense in which solutions are likely to found in other African contexts.

These settlements range from dense rural settlements to informal or semi-formal urban settlements. The land tenure rights might include pre-CLaRA "old order" rights such as Permission to Occupy (PTO) rights (which now occupy an ambiguous legal position), quitrent tenure, and lapsed or semi-lapsed "freehold" titles. They may also include a range of other informal rights or extra-legal arrangements that have over time become quite formal and individualized. They also include more recently formalized tenure systems that evade full integration into the formal land management system, e.g. rural and urban housing projects or tenure upgrading projects. These hybrid tenure systems affect a large percentage of rural settlements and most newly formalizing urban settlements. It is estimated, for example, that most settlements in the former Ciskei, and possibly the majority of settlements in the southern districts of the former Transkei are affected by some kind of transition from customary to more individually recorded and fixed spatial land tenure arrangements. One could expect a similar ratio in all provinces with the possible exception of Kwazulu-Natal.

There is a growing body of literature that deals with tenure in transition, such as the work of Catherine Cross, Cheryl Walker and others, but this writing has yet to be absorbed into a more holistic analysis of land tenure in relation to an alternative land management structure in South Africa.

Transitional tenure systems have the potential to reveal alternative tenure systems and forms, and may reveal what adaptations may be possible or appropriate at points in between the two extreme ends of the more conventional continuum. There may be clues as to what elements of an alternative tenure system are operating optimally and robustly, and what elements detract from tenure security in a transitional environment. A study of transitional tenure systems may provide indicators of what factors distinguish customary systems from the formally legally recognised registration system. Is the movement away from customary principles a factor of changing governance institutions, changing person-person relationships or changing person-land relationships? Or all three? Is it a push for more individualised rights and exclusive ownership, and if so, what forces drive this change? How do these changes impact on access to land by gender? Are these tenures suspended between customary tenures and registered formal tenure or do they represent potentially new forms of tenure in themselves? If so, what are the possibilities of recognition in their own right rather than viewed as incomplete versions of the either of the two polarities on the continuum?

Systems in transition display a diversity of characteristics. A distinguishing feature is that some communal land use forms and regulation continue to prevail to a greater or lesser extent. These systems tend to display aspects of customary tenure and aspects of registered tenure in so far as there tend to be *both* shared and layered access to some land regulated via a local community structure according to shared rules *and* spatially defined land units that tend to be more open to informal market forces and out of the regulatory control of the local allocating structure, be it a traditional authority or some other community structure. The ratio of the first to the second differs greatly from context to context. Social regulation is much stronger in some than in other contexts. Fixed spatial definition linked to an "owner" who is free to transact the property is much stronger in some than in others. In other words, where

customary principles predominate, a solution based on a cadastre would clash with local rules and practice and would, in all likelihood, be ignored or subverted over time. Whereas in communities with fixed spatial referencing without traditional allocating authorities, a cadastre of sorts might be the more meaningful intervention.

Communal Property Institutions (CPIs) have attempted to capture both aspects and can thus be considered transitional tenure systems. However, the manner in which Communal Property Institutions or Associations (CPAs) are interpreted and implemented can differ according to the situation, history, social and power dynamics on the ground; as well as by different official interpretations of the law, or by the nature of the facilitation provided by NGOs, etc. CPAs have both governance and ownership functions – they are not only holders of property, but exercise land administration as a land owning body as well, unless the Constitution stipulates otherwise. This contrasts with the CLaRA where the landowning entity is separate from the land administration committee. The implications of this are potentially serious and need to be evaluated.

In non-regulated transitional tenure arrangements, such as Permission to Occupy rights (PTOs), there are further anomalies. Though the land rights may be formally recognised by the state (e.g. in terms of IPILRA or an upgrading process), rights holders may allocate and exercise their rights in ways that are different from the state's regulatory framework. Officials (state or municipal) may interpret the land rights that are in the process of being absorbed into the formally recognised state land registration system (or in the queue) differently from the reality on the ground. The state land information system thus captures a misleading picture from the start. There is a gap between the legal and practical realities.

The gap between law and practice might not lead to widespread tenure insecurity on the ground, providing the rights are locally recognised. On the other hand it could promote tenure insecurity among vulnerable categories within the local group, such as women and HIV/Aids affected households. There is also widespread evidence of rapid turnover of state subsidized land in serviced areas through informal land markets (known as "distress sales"), resulting in poor families losing their access to legally acquired land and subsidies, and returning to informal settlements.

Transitional tenure contexts are most susceptible to the "planning paradigms" municipalities have inherited from the municipal land use planning approaches of the previous urban municipal systems. The White Paper on Spatial Planning and Land Use Management (2001) has introduced a normative and more flexible approach to planning where the emphasis is on forward planning and multiple land use approaches, rather than land use control and single use land units. The Integrated Development Plans (IDPs), Spatial Development Frameworks (SDFs) and related sector plans are supposed to apply these principles. However, in reality, municipalities have not been equipped with new systems to apply the new approaches, and still tend to revert to "land use planning schemes" and "zoning" as the only means to "pick up" land information into their land information systems. Planning still tends to be applied in a rigid fashion, resulting in the tendency to apply "township establishment" to rural settlements that are "cadastreless". This method invariably clashes with local practices, especially where aspects of customary "layering" of land rights continue to prevail. This means that an enormous state investment is made into formal planning, the objectives of which are to bring the settlement within the state regulatory framework. However, more often than not, this proves to be a "snapshot" intervention which proves to be unsustainable within a very short period of time as land use invariably reverts to local practice.

An example of this "municipal planning approach" is to be found in the Amatole District Municipality's "Land Reform and Settlement Plan" (LR&SP) in the Eastern Cape. This is the land sector planning component of the municipal IDP. The LR&SP is an example of a well conceived idea of promoting forward planning for land reform based on principles of decentralization, intergovernmental co-operation and normative planning. In reality, the LR&SP is being used by municipalities to apply rigid, formal planning approaches to bring rural land "into the system" via township establishment. Even judged against its own merits, however, the plan has failed to deliver the desired results. A contributory factor from an institutional perspective, is that key land functions have not been decentralised (Kingwill 2004) leading to conflicting interpretations between the Department of Land Affairs and municipalities as to the scope of legal intervention as well as roles and responsibilities.

In Kwazulu-Natal, similar disjuncture between rural land use and formal municipal land use planning and management is being experienced, albeit within a different framework, in this case Land Use Management Systems (LUMS) and Traditional Councils.

There is a plethora of laws that impact on formal planning in transitional contexts, many of which combine planning with land tenure upgrading or devolution. Examples are:

The Upgrading of Land Tenure Rights Act, 1991 (Act No 112 of 1991)
The Land Reform (Labour Tenants) Act, 1996 (Act No 3 of 1996)
The Communal Property Associations Act, 1996 (Act No 28 of 1996)
The Interim Protection of Informal Land Rights Act, 1996 (Act No 31 of 1996)
The Extension of Security of Tenure Act, 1997 (Act No 62 of 1997)
Transformation of Certain Rural Areas Act, 1998 (Act No 94 of 1998)
The Traditional Leadership and Governance Framework Amendment Act, 2003 (Act 41 of 2003)
The Communal Land Rights Act, 2004 (Act 11 of 2004)
The conventional land use planning laws, such as the Development Facilitation Act, 1995 (Act No 67 of 1995), the Less Formal Townships Establishment Act, 1991 (Act No 113 of 1991) and provincial Ordinances.

The combining of "planning" with "land tenure" is of particular interest in that this is a feature only of post-apartheid land tenure legislation and former homeland "old order" legislation. Previously there was a clear distinction between planning and tenure. Authority for planning and tenure, however, continues to reside with different authorities at different levels of government (Kingwill 2004).

These multiple authority levels are compounded in communities with multiple governance structures for allocating and adjudicating rights. Multiple regulatory institutions affect the way in which rights holders: i) wish to transmit their rights to others; ii) protect rights within the community or family from being transmitted to others; iii) resolve overlapping rights; iv) draw subsidies from the state for land or housing development, or v) access private or public services. In situations where there is more than one recognised system of authority, such as the national Department of Land Affairs, Provincial departments dealing with housing, local government and land administration, Municipalities, Tribal Authorities/Councils or one or more local community structures, different segments of a community, or even one individual or household, may appeal to different authorities for intervention. Rights holders act opportunistically in order to achieve the most desirable outcome.

While these institutional uncertainties might not amount to tenure insecurity at scale, it can lead to tenure uncertainty at a local level. At a micro level, it can mean tenure *insecurity* for certain groups who are vulnerable to eviction or downward raiding of property, and also members of the family, particularly women and children. The latter is compounded in the case of families affected by HIV/Aids.

The gap between law and practice also has implications for the benefits of accessing services. In South Africa, formal planning is the pathway to servicing. Servicing is usually accessed after formal planning, which is interpreted to mean formal settlement lay-outs, surveys according to the national standards, and formal conveyancing of title through the centralised Deeds Registry.

However, there is increasing evidence that these formal procedures (lay-out planning, surveying and titling) are "points of entry" into formally recognised state systems. Once the subsidies have been accessed and bulk infrastructure established, these tenure systems tend to lapse back into more locally recognised systems. For example, land transfers are not evidenced through registration in the Deeds Registry, but are evidenced by means of locally recognised systems, such as local witnessing of land transactions, or local allocation of use rights that may not accord with the formal lay-out.

4.1 Problem Statements

4.1 Multiple tenure arrangements

South Africa's tenure landscape is characterised by multiple tenure arrangements operating in a range of different situations and fulfilling a range of livelihood purposes, that are largely unrecognised by the state (and other players such as formal lenders). This is in spite of the fact that the majority of South Africans live in tenure situations that are beyond the officially recognised system. Leap characterises these arrangements as transitional, customary, local off-register and ROD.

The structure of land tenure in South Africa is conventionally characterised as a "dual system", the reasons and solutions for which vary depending on the angle of the analysis. Customary tenure, derived from African customary law - which allows for shared and layered land use and ownership – is usually depicted on the one extremity. On the other is individual tenure, exclusive in ownership and use, and derived from Western law. Customary tenure is typically described as informal and depicted as the chaotic "other", eluding bureaucratic control, regulation or individual initiative. Individual tenure, on the other hand, is perceived as formal, ordered, registerable (therefore officially accountable) and predisposed to minute regulation and future planning.

In reality, there are multiple tenure systems, which are more accurately placed in a multi-dimensional relationship to one another and where a movement towards formality or towards informality may apply to either customary rights, registered individual titles or other forms of tenure which are neither one nor the other. However, LEAP's research in Kwazulu-Natal has

questioned this dichotomy. LEAP's contention is that not only tenure systems with registered rights should be defined as formal. Formality could better be defined as organized regularity, which would thus include those customary systems that have known and used procedures for land allocation, boundary demarcation, adjudication and dispute resolution, although the system does not deliver registered tenure. On the other hand some tenure systems defined as "formal" have in reality become informal over time. This happens when the property information has declined to such an extent that people with registered tenure, such as ownership evidenced in a title deed, once more find themselves regulating their property informally. This happens when rights holders are unable to use, access and afford the system, i.e. the system becomes unsustainable. This phenomenon is frequently seen in urban housing projects for poor people.

Leap therefore argues that:

> ***There are multiple tenure arrangements operating in South Africa, with varying degrees of security, but most of them are not recognised, supported and valued, resulting in gaps between law and policy on one hand and practice on the other. This carries the risk sidelining many vulnerable people, households and communities from development opportunities. Coupled with the recognition granted to title, especially individual title, this phenomenon reproduces the dual economy and perpetuates inequity.***

4.2 Vulnerability and tenure

The inadequate support to the various tenure systems has a differentiated impact on women, men and children, particularly certain categories of women, and most acutely in the context of increasing poverty and HIV and Aids.

The meaning and content of the term 'customary law' has great power in discourse and is contested, as is policy which promotes evolution of land management practices from customary law. Whitehead and Tsikata (2003) critique the possible effects on contemporary African rural women, of policies of "a return to the customary' which results in 'reformed' or 'modified' customary law. They propose managed change rather than a 'flight into the customary'; democratic reform and state accountability to women's interests and voices, with attention to the potential abuses of power in indigenous institutions, the possibility of women's representation in such structures, and the ways in which local and national power relations feed into modified structures. They note that progressive policy making on land and that on gender each have their sets of institutions, networks, resources and discourses, and it is time for informed dialogue between them.

Information on how customary land tenure institutions actually work within the modern nation state is limited (Whitehead and Tsikata 2003). Limited studies suggest that in practice at the local level women have sustained their claims to resources by employing arguments from both statutory and customary systems and have made some gains. "Forum shopping" describes situations where "individuals are using different courts and other dispute settlement and deploying arguments grounded in either 'customary' or 'modernist' principles, whichever is to their advantage." This conveys a more messy reality in which there are no very rigid boundaries between the plurality of legal fora where different principles of legitimacy and of the basis for claims are brought into play. The processes by which interests

and claims are made and secured are more important than their content; and how accessible and responsive they are.
People vulnerable to tenure insecurity in the face of HIV-AIDS seem to draw on elements of the formal, informal and traditional tenure systems and relationships in securing their tenure or disposing of property rights, although the geographical patterns and trends are not clear yet. The need for recourse and changes in land administration in both urban and rural areas is clearly growing, and traditional authorities in at least some areas in KZN and people in at least some urban areas are adapting tenure practice to meet new needs. However Drimie 2002a warns that the epidemic results in a much greater number of disputes around household land rights and puts greater pressure on local land administration systems, including traditional authorities, and social support systems, including the extended family. These are gradually eroding due to poverty, the scale of the HIV/AIDS epidemic and stigmatization of the disease. Land administration systems run by the state are directly affected by the loss of productivity and personnel, and the redirection of time and budgets into coping with this.

Leap therefore argues that:

> ***South Africans do not all experience the impacts of the failure to recognise, support and value the multiple tenure systems operating in South Africa in the same way – tenure insecurity in urban and rural contexts intersects with poverty, gender and HIV and Aids in complex ways that appear to exacerbate vulnerability. This is inadequately understood and therefore policy interventions often fail to mitigate vulnerability and instead contribute to it.***

5. Points of Departure for Phase 4

5.1 Understanding, recognition and integration

5.1.1 Understanding

Leap's work in phase 4 will have an overarching focus: ***an enhanced understanding of the multiple tenure arrangements that characterise South Africa's tenure landscape.***

In order to work in this diversity and complexity, LEAP proposes to structure its work into a number of different project partnerships in the urban and rural contexts. The project partnerships aim to represent a range of situations (within the constraints of what is practical and feasible) in order to work with the various arrangements and how they operate. They will not provide complete coverage of tenure situations, but will enable meaningful work in a rather wide terrain.

5.1.2 Recognition

Leap will use and further develop the concept of a continuum to describe these realities and to provide guidance in the action research work with partners.

The concept of recognition is an attempt to provide an intermediate tool for describing the legitimacy of tenure arrangements that fall between legally acceptable on the one hand and

socially unacceptable on the other. The term "extra-legal" has often been used to depict this range of tenure arrangements but its focus on legality directs attention only to law rather than the processes and procedures by which a set of tenure arrangements may become socially legitimate. From the perspective of the state, an act of recognition could include service delivery to a group of people living within the city without title, once the city has determined, for example, that the area is suitable for fluid urban-rural migration patterns. Such recognition would begin to provide an incremental base outside of the cadastral model for securing the tenure of the urban poor.

5.1.3 Integration

In work with partners Leap will explore the characteristics of the transitional, customary, local and off-register and ROD arrangements. In addition, Leap considers it important to apply *an inter-systems* approach, i.e. how the various arrangements relate to each other. Questions of articulation between different tenure arrangements need to identify how various notions of ownership contradict, support or elude the Roman-Dutch derived notions that are characteristic of the county's official set of tenure arrangements as found in the ROD system. This is necessary because interventions must address the officially recognised arrangements, which receive political approval despite their failure to service the needs of the majority. Identifying precisely issues of articulation will assist in showing how the official systems fail and what possible areas interventions should focus on.

Furthermore, in reality the land tenure arrangements interact as evidenced in an interactive economy, a mobile population with rural-urban linkages and engagement in labour and consumer markets and a services sector. There is a cadastral network in much of the country, and a demand from urban and rural rights holders for development and basic services. These factors influence linkages between the various tenure arrangements. No tenure arrangements operate completely outside of the broader economy, market and service sector. However, the degree to which the various tenure arrangements are regulated by the state, local government, local structures or Traditional governance institutions varies greatly.

In addition to an enhanced understanding of current reality, Leap will develop and advocate for a more appropriate approach which we define as one which:

- Recognises the reality of multiple tenure arrangements;
- Identifies the relationships between them, including the tensions and incongruities;;
- Finds solutions to integration; and
- Increases tenure security for poor and vulnerable, individuals and groups in order to:
    - Enhance livelihood strategies
    - Enable improved delivery and maintenance of services
    - Enable improved equitable access to economic opportunities

Central to this approach is a shift from thinking about what forms of tenure bring security towards the ability to enforce a socially meaningfully and socially legitimate tenure system.

5.2 Vulnerability

In adopting a focus about enhancing understanding of and recognition for the multiple tenure arrangements that characterise reality, Leap's work in phase 4 will prioritise the impacts on the poor and vulnerable.

In its work with partners Leap will seek to develop a better understanding of the impacts of the ways in which the failure to recognise, support and value the multiple tenure arrangements are experienced by South Africans. The project will explore the intersection of tenure insecurity in urban and rural contexts with poverty, gender and HIV and AIDS in order to identify how policy can mitigate vulnerability instead of contributing to it.

6. Conclusion

In order to respond to the above analysis Leap seeks to undertake an approach which takes into account the realities of the content it works with and of the processes by which adults learn. The content of learning is tenure security in the context of land management in South Africa. This content is theoretically complex, contested, dynamic, and scattered between stakeholders in many places who have widely different interests. Leap will facilitate collaborative learning processes that broaden understanding about tenure security as the basis for action. This understanding needs to be grounded in the reality of poor and vulnerable people.

The action-research model will facilitate understanding of tenure through participatory action research methodologies. Leap provides structures, processes and a pool of skilled people that enable it, as a project, to facilitate a focused but responsive learning process around tenure, at a number of levels. It works on the ground, on conceptual work, on legal frameworks and policies, across a range of situations and sectors. Leap has a conceptual framework, a problem statement and a set of questions that provide focus and enable conversations across these situations and sectors, and enable people at multiple levels to engage productively to move practice towards the project goal.

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