

Common property institutions:

Improving and assessing organisational performance
in providing security of tenure

The Legal Entity Assessment Project (LEAP)
KwaZulu Natal, South Africa.

IASCP Conference June 2002

January 1999:

LEAP concerned with setting up better legal entities to enable groups of people to hold and manage land

June 2002

LEAP concerned with better institutional arrangements for securing tenure for groups, households inside groups and individuals inside households.

LEAP welcomes dialogue, please get in touch.

At the Conference

Talk to Tessa Cousins or Ndabe Ziqubu.

After the Conference:

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1. Context that shaped LEAP thinking

1994: Leveling of the property rights playing-fields

1994 ---> Political pressure to achieve land transfer as soon as possible

Assumption: Law can prescribe and legislate a particular social order into being

Communal Property Associations Act No. 28 of 1996

“To enable communities to form juristic persons, to be known as communal property associations in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution; and to provide for matters connected there-with.”

Prescribed requirements for constitutions

- fair and inclusive decision-making
- equality of membership
- democratic processes
- fair access to the association's property
- accountability and transparency

Also the SCHEDULE.....

“Purpose loading” - multiple purposes and expectations of what the new legal entities would do

- enable transfer of land for the group
- securing the group's tenure
- provide security of tenure for the members of the group
- provide democratic accountable, equitable governance
- manage natural resources sustainably
- manage development
- ensure gender equity
- meet objectives of equity, democracy and non-discrimination

Not explicit:

How to integrate new communal property institutions with institutions currently or potentially active in tenure e.g. customary practice.

No practical indicators to measure progress, success or failure or to inform priorities in practice

New legal entities set up...

2. Practical consequences at the official level

Legal entity establishment a **milestone** in the process of land reform.....

feasibility ✓

legal entity establishment ✓

transfer ✓

planning ✓

implementation and spending budgets ✓

EXIT

- Priorities: Speedy land transfer, low cost
- Rushed establishment processes
- Focus on registration of documents rather than workable local institutional arrangements

Constitutions documents - form

- written in English legalese
- arrangement not logical
- often unavailable on site

Constitutions documents – content

- Wildly inappropriate provisions
- Ambiguous and contradictory definitions of membership ---> the basis on which people claim rights is unclear
- Little or nothing about substantive rights
- Little or nothing about procedures for managing land rights

New legal entities....

....**linkages not made clear** with existing or potential future tenure institutions

....**not integrated** into support systems for freehold tenure

....**not monitored**

Legislated state support for communal property associations not materializing

3. Practical consequences on the ground

Local leadership and members coping differently

SOME hybrid systems of rules and authorities around land allocation and management of rights, with mix of new and old

SOME:
less stability

SOME: created or used their own external support systems

SOME: Old and new structures competing ---> uncertainty about rights, authorities and processes

SOME: attempt translation of their own constitutions into Zulu

SOME: reverted to earlier practice and existing authorities

MOST:
tenure of groups and of members insufficiently protected

SOME: Too risky to claim entitlements or enforce rules e.g. limiting grazing

SOME: Difficulty coping unaided with enforcement of rights against outsiders (illegal land allocations, land invasions)

SOME:
Other purposes of legal entities not being achieved

SOME: Local government unsure who rights holders are for service delivery

MOST: difficulty coping unaided with issue of records and registration

SOME: unable to raise credit using land as security

MOST:

- didn't understand the new arrangements
- didn't have access to documents
- struggled to get outside help

4. LEAP thinking in new ways.....

Communal property institutions for what purpose?

Purpose:
Secure the tenure of the group and its members
Secure tenure in such a way as to enable development

Tenure affects all members fundamentally, and management and development of the land build on this foundation

What is tenure security?

Sets of processes and institutions that regulate property relations between people on an on-going basis so that transactions are predictable and outcomes clear.

How do we know when people have got tenure security? How do we measure tenure security? How do we help people strengthen it?

Indicators of tenure security

These statements describe the key aspects of an ideal situation with respect to tenure security. In assessment these are used not as absolutes, to make to make simple yes / no statements about tenure security, but rather to describe trends to help assess whether the movement is towards or away from tenure security, and where strengths and weaknesses in the system lie. In setting up institutions, or seeking to strengthen their effectiveness, these indicate the areas to concentrate attention on.

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

The processes

Tenure security: becomes a reality through certain key land administration processes common to both formal and informal systems:

Application:

Definition: A formal request

- to get or to give land
- to change land use
- to get help in resolving a land dispute

Recording:

Definition: Creating evidence about

- the extent of a right (demarcation)
- the owner of the right (registration)
- the nature of the right

as a basis for adjudication.

Adjudication

Definition: Resolving doubts about the rights held, which can involve dispute resolution

Transfer

Definition: The moment when rights or the physical occupation of land move from one land holder to another.

Land use regulation

Definition:

- The rules /practices about how members/individuals can use different portions of land

Complex local processes and institutions link to external processes and institutions.

Local processes and institutions existed before land reform and continue when outsiders go away.

Processes and institutions allow for property relations which change all the time – tenure is dynamic.

5. What this means for practice

Start by understanding people's existing institutional arrangements for tenure

Understand existing local definitions of membership and rights.

Membership accords rights to members and excludes non-members. This is the basis on which people assert rights.

Understand existing local procedures and authorities for land administration.

Understand why.

Adapt, don't replace.

Indicators as goals to achieve, not criteria to reject what exists now.

NOT Have these been delivered?

BUT Are we moving towards or away from them?

From the base of secure tenure, negotiate new institutions to meet multiple new purposes e.g. trade in land markets, delivery of services.

Create constitution documents which fit practice

Form

- local language
- important things first

Content

- clear definitions of membership
- clear naming of substantive rights
- clear land administration procedures and authorities

Get clear on external support and linkages and how these link to internal systems

Records and documents supporting justification of rights

Registration systems supporting justification

External recourse in disputes, for decision-making and enforcement, enabling rights to be realized

- These should be locally used and recognized

About LEAP

- LEAP stands for **Legal Entity Assessment Project**.
- LEAP is a project with specific objectives and a time-frame, not an organisation.
- LEAP started in 1999 in response to widespread concerns inside and outside government about the performance of legal entities in land reform.
- LEAP works with people from national, provincial and regional offices of Department of Land Affairs, with service providers in the land reform sector, with academics from Universities, with lawyers and with people from other NGOs in order to better understand the situations of community institutions set up under land reform and work in their support.
- LEAP has a Steering Committee which meets every three or four months and advises and guides the project on strategic direction.
- The institutional home of LEAP is the Midlands Rural Development Network. A LEAP Review Committee inside the executive of the Midlands Rural Development Network monitors progress towards objectives and approves expenditure monthly.
- The LEAP Core Team carries out day-to-day work and manages implementation of the project. Tessa Cousins is the Co-ordinator. Donna Hornby works mainly on conceptual development. Nondumiso Mqadi is responsible for field reality work. Thelma Trench is responsible for dissemination. Ndabezinhle Ziqubu links LEAP to the PILAR project of AFRA. Everyone helps with fieldwork and does anything in an emergency. Mbongeleni Hlongwa helps with fieldwork part-time.

Emerging need and the development of LEAP

After 1994, people formed groups to lobby for and benefit from state grants for them to acquire and develop land. They needed to form juristic persons or legal entities to hold, own and manage land on behalf of members of groups. In 1996 the Communal Property Associations Act was passed and widened the choice of possible legal entities for this purpose to include **communal property associations** (CPAs). It wasn't long before people working with legal entities at different levels were starting to worry about their performance, their founding documents, and their need for aftercare.

LEAP Phase 1, November to July 2000:

The KZN PDLA, AFRA and MIDNET made an agreement to support an assessment of what the reality on the ground was. This would tell us what needed to be done.

- We did field research in seven CPAs and Trusts, to assess legal entities
- A big group of people from inside and outside government worked with us on a preliminary and rough analysis of what we had found. We were able to name some of the problems with land reform legal entities.
- We recognized that we needed a conceptual framework to make sense of our thinking about what we had learnt, so that we could focus our future work more effectively.

LEAP Phase 2, November 1999## to October 2001:

- We worked on development of a conceptual framework, mostly a long search for indicators.
- We did a lot of work on assessment, plain language and translation issues around the faulty founding documents (constitutions) of established legal entities.
- We held workshops with people from the case study areas of Phase 1.
- We collaborated with KZN DLA and consultants on modifications to the terms of reference for setting up legal entities and writing plain language documents for newly established legal entities.
- We published a number of guides and conference papers, notably "Leaping the Fissures: Bridging the gap between paper and real practice in setting up common property institutions in land reform in South Africa".

LEAP Phase 3, June 2001 to July 2003: LEAP is now in its third and final phase, which is due to end in June 2003.