

Using local practices and records to secure individual tenure rights in common property situations

- Lessons from the case studies on what might work on the ground.

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1 Introduction

In South Africa, as in the rest of Africa, communal tenure systems fulfil social and economic functions for a large number of citizens. “Communal” means, in most cases, a “*mixed* tenure regime, comprising individual, family, sub-group and larger group rights and duties in relation to a variety of natural resources” (Cousins p154 *Evolving Land Rights*). The White Paper states that tenure reform must allow people to choose the tenure system that is most appropriate to their circumstances and it recognises that communal tenure plays an important part in the livelihoods of the poor.¹

The Department of Land Affairs (DLA) is seeking to reform tenure in communal areas in order to make it more secure. The DLA is currently drafting major legislation aimed at securing tenure by attempting to clarify ownership and administration of communal land. Recognising that the current land administration system in communal areas is rudimentary, chaotic and unsupported while a sophisticated registration system was put in place for ‘white’ areas, the systems for registration and administration are one focus in the new legislation.

Two projects working in KwaZulu Natal have been working on aspects of tenure security within common property systems. These projects are Piloting Locally Administered Records Project (PILAR) and the Legal Entity Assessment Project (LEAP). Their work suggests there are two particular aspects that need to be addressed. These are the security of the rights of the group against the outside (e.g. other people or groups, or the state) and the security of members of the group in relation to each other and their own administrative structures. While the former is important in the land reform process (and indeed there are groups losing their newly acquired land on economic grounds), that is not the focus of this discussion. Here we focus on “internal tenure”; what is required to strengthen this, and what role policy and law can play.

It is helpful to think of tenure rights as being secured through a set of processes in which people assert, justify and realise their land rights. These processes make up a set of practices, which take place locally within an institutional context. The local institutions will frequently be nested within, linked to or in contest with, sets of other institutions. In this paper we focus on the role records of internal land holdings and rights can play in the processes of negotiation and adjudication. We suggest they provide an important basis for clarifying, justifying and protecting tenure rights. They can provide a linkage into the formal system and its considerable resources, and be bridge across the divided ‘dual systems’ for registration. This is working from the assumption that what is needed is not to “upgrade” communal systems to private tenure but that there needs to be mechanisms to allow people to place themselves in, and to be able to move along, a continuum of mixed tenure systems as their needs change.

In this paper we assert that in order to be effective it is important to work with and from existing systems and to build upon them, rather than expect that they can be “demolished and replaced by efficient new systems”. The scale is immense and resources limited with little sign that the state wants to increase its role to any great extent. Experience both here and elsewhere in Africa also tells us that attempts to change tenure tend to result in a “defaulting” back to what is known, often with increased confusion and conflict over procedures and adjudication authorities. This is a very real danger given the realities of a limited state commitment and the politics surrounding traditional authorities.

PILAR has worked intensively with the Ekuthuleni community in exploring tenure and recordal options, and it can offer some practical lessons based on experience to the DLA. It is also able to identify a number of challenges to be thought through. Through this paper the two projects offer insights and lessons from their combination of conceptual and practical work to the new legislation that seeks to support communal tenure systems.

1 The importance of communal tenure

Communal tenure in South Africa has had rises and falls in favour. This section will look at the issue from a pragmatic perspective of choice. This involves assessing what issues inform whether South

¹ White Paper on South African Land Policy (1997): 33.

Africa can choose either to replace or to ignore communal tenure by analysing what is likely to remain the same politically, socially and economically for the foreseeable future and what the forces are that are changing this situation. This assessment then allows us to assert some practical, general principles that inform the two projects with which this paper is concerned.

Changes and continuities in social relationships and institutions affect the configuration of all tenure forms, including communal tenure in South Africa. Communal tenure is deeply embedded in social relationships defined by kinship ties. These shape norms around how responsibilities and rights are understood and allocated. Although kinship ties do, and are, changing, they also provide a base of constancy that enables individuals to understand and mediate their relationships in and between families, sub-groups, communities and broader society. Kinship relationships therefore form a solid block of norms and conventions that change very slowly, unless (like any other relationship base) they are subjected to extreme pressures and stresses.

These relationships and institutions also provide a degree of stability in contexts that continue to be defined by insecurity and violence.² Likewise, tenure insecurity is also both recent memory of colonial and apartheid dispossession and current reality of weak property rights and institutional support³. Both these situations create uncertainty in a political economy context of rapid change and social reconfiguration. Traditional norms, practices and institutions provide a familiar and important terrain and base from which to engage and relate to these realities and changes. The adaptability and negotiability of land rights acquired in communal tenure also means that people can trade-off various risk and opportunity factors at very local levels.⁴

The social relationships described here and the need for social stability are powerful forces of continuity, which are entrenched by poverty and the neo-liberal minimalist state, which has very few resources to mobilise for anti-poverty social investment and restructuring. Because poverty imposes constraints on people's options and choices, a realistic tenure reform process has to take into account what poor people need and can manage. The only alternative to this is a state with considerable resources to invest in pro-poor tenure reform, which is a highly improbable option.

The question that then arises is whether anything needs to change at all and if so, what? The quick answer is that just as there are forces that consolidate constancy, which are beyond any person or government's immediate control, so there are similar forces that create conditions for change. A key factor here in terms of tenure is a change in people's expectations around land rights. People expect that a democratic government will provide secure land access to those deprived of it previously. A symbol of this is title deeds. Title deeds carry the idea that property can only be properly defended through possession of records and that property is a basis for relating to a modern economy, both of which are reasonable conclusions in a post-apartheid state with a modernising global economy.

Related to these changes in expectations are changes in family and social structures while economic deregulation has also resulted in increased retrenchments and unemployment. The total effect of these changes is the creation of vast numbers of rural people who need both stability and an independent base for economic production. Secure land is one component of such a base. There have also been increasing numbers of women who have children out of wedlock and who get divorced. These changes have had a direct impact on communal tenure resulting, in some places, in women's increased independent access to land.

In areas that have densified over time, the traditional communal tenure has undergone rapid change. An extensive informal land market has developed and in some places this has been accompanied by the emergence of new self-appointed land allocators, which often have negative impacts on weaker people and families as accepted procedures and norms break down and opportunities grow for the powerful to exploit and gain. Peri-urban and rural densification has also been accompanied by demands for development, which elections in 1994 reinforced. Communal tenure has thrown up serious challenges for development, which indicates that it must be able to provide a technical platform on which development can proceed.

² See Trench T and Hornby D (2001): "Looking before you Leap"; LEAP, Pietermaritzburg.

³ See the "Landless People's Charter", August 2001, National Land Committee, Johannesburg.

⁴ The Mdukutshani case study showed that traditional communities were able to trade off secure and exclusive access to grazing for broader social stability. See Trench T and Hornby D (2001).

Processes for change and continuity are rich picking fields for politics, which also has an impact on how these processes relate and unfold. The fact that a number of Traditional Authority structures have opposed the Communal Land Rights 'Bill' is an indication of this. We want simply to note here that a key feature of the political field surrounding tenure reform is the management of the tension between sustaining the status quo and responding to change. Continuity and change are both necessary and the tension is inevitable.

Given this, a few principles are worth reiterating. Communal tenure provides the poor with a crucial livelihood asset that cannot be alienated through sale or failure to repay mortgage. Communal tenure is not simply a cheap, under-developed freehold option. It has its own rules, institutions, norms and values. It has certain advantages that other tenure systems do not have, along with relative disadvantages. As a group-based system with exclusion rights, it provides a base for the accumulation of social capital, which creates conditions for social stability at a time of rapid change and economic instability, which tenure systems enabling individualised ownership do not provide.

However, this does not mean that communal tenure shouldn't change. Communal tenure has proved itself to be very adaptable, as is evidenced in the various permutations that arose under colonial and apartheid states. The issue is rather that the change should be carefully negotiated and managed to secure outcomes that are derived from adaptation that all people in the tenure system have control over and that give these tenure rights recognition in the outside world. This means that judgements about communal tenure systems should be informed by pragmatic realities rather than predominantly the values that society as a whole is battling with (such as gender equity and democratic accountability).

This is not to say that these values are unimportant but rather that such judgements do not help the fundamental issue of how to secure tenure for poor women and men in situations of formal and informal tenure systems and within the constraints of a neo-liberal state. The reality is that effective change requires that the processes people are familiar with form the starting point of any intervention for change. Values can be incorporated into these processes gradually, as goals to be achieved rather than as evaluations on which to base rejection of what is familiar locally.

2 Looking inside

Communal tenure is often represented by the image of an un-elected, sometimes corrupt, traditional leader who has total control over the rights to, and allocations of, land within his (or her) area of jurisdiction. The reality is much more complex. Land reform has resulted in communal property associations and trusts that own and manage land on behalf of members or beneficiaries. Practices around land rights and allocation under traditional authorities vary widely across the country and are embedded in other institutions such as families and the economy, which have undergone major changes resulting in new rights and duties around land. Recognition of this complexity also involves recognising that communal tenure provides a range of land and resource rights. Some of these are highly individualised and exclusive, such as residence and arable fields. Others are more shared and inclusive, such as access to commonage for multiple resources including thatching and grazing and seasonally exclusive arable fields. Along with a generally unrecognised complexity, communal tenure has also received very little institutional or financial support from the state although it provides fairly secure access to land to a huge number of very poor South Africans.

In this section, we look at the work of two projects that, in different ways, are attempting to look at what needs to happen in order to secure the tenure of members of groups. The projects, the Legal Entity Assessment Project (LEAP) and Piloting Local Administration of Records Project (PILAR), have found it necessary to work with the current realities in the communities or groups they have worked with. Although both projects recognise the importance of securing the outer boundary of the area in which communal tenure operates, the focus is on securing the tenure rights of members. Where the outer boundary both geographically and procedurally defines the group, the inner tenure relations are concerned with defining rights and duties of members in relation to each other and to the institutions responsible for managing those rights, such that these inner tenure rights have recognition beyond the group. It is these relationships particularly that have received very little attention from both land activists and the state, and which tenure reform needs to address.

3.1. The Legal Entity Assessment Project (LEAP)

LEAP was established in response to widespread concerns about the long-term viability of common property institutions (cpis) being created through land reform. It assessed a number of cpis in KwaZulu Natal, and has since analysed the outcomes of these assessments with a range of actors (communities, service providers, DLA officials, lawyers and academics) in order to develop sensible strategies for appropriate interventions. LEAP is currently working closely with the DLA's Tenure Directorate as they prepare to undertake a review of Communal Property Associations in order to inform their own interventions to improve their effectiveness.

While the outcomes of LEAP's assessments at community level were highly diverse, the common reality to highlight here is that there is an immense gap in every case between what is practised in communities and what is written in formal documents such as constitutions or trust deeds and business plans. Some of the most important reasons for this are:

- Unrealistic and utopian value-based expectations of the cpis, with no practical criteria to give meaning to these.
- Processes for setting up cpis in land reform projects reflect a lack of understanding of tenure and of institutions. Establishment of legal entities has become a "milestone" on the project cycle time-line that is completed as fast and cheaply as possible, with successful registration as the driving force, rather than thoughtful institution building processes and well discussed agreements.
- The CPAs tend to be set up as if in an institutional vacuum rather than linked into other institutions of land administration, such as local government or tribal authorities. Furthermore, although the CPA Act provides for a monitoring and support role, the DLA has not allocated resources to fulfil these obligations. This has led to some communities "defaulting" back to using institutions that existed prior to setting up the new institution (in more and less clear ways). In other cases new "hybrid" structures have emerged with greater or lesser stability, while in others old and new structures compete resulting in unclear authority lines, which undermines all authority.
- The founding documents frequently define membership in contradictory ways while designation memoranda define settlement rights in ways that are different from community practices. This sets the stage for a lack of clarity about the basis on which people can make claims to land rights or use. Thus there is legal ambiguity, which would affect member's rights should they (in the unlikely event) seek recourse through the legal system.
- There are numerous problems with founding documents. They are inaccessible to a largely unilingual membership in that most are written in English and incomprehensible legalese, and they are often physically unavailable on site. They say little or nothing about key issues of land rights management procedures and linkages to external land administration institutions. They are not logically set out in a meaningful manner; while including great detail on issues that should be elsewhere or which do not apply. They reflect outsider's concerns or the need to meet registration requirements rather than community agreements.

LEAP now asserts that tenure security should be the major concern when working with communities on setting up or adapting institutions to hold land in land reform. While securing the tenure of the group against outsiders is clearly important, the more complex issues lie in "internal tenure". The focus of the CPA Act, and therefore of the various constitutions, is on the procedural rights of members, such as voting, attendance of meetings and financial management. The need for, and complexity of, clear definitions of membership and their substantive rights is poorly addressed, which is reflected in most of the cases LEAP assessed where membership is contradictorily defined and substantive land rights hardly addressed. Almost no attention has been given to the processes for securing tenure internally either legally or in practice using procedures and concepts people are familiar with. LEAP sought to

define useful indicators for this aspect, and found that these may provide some guidelines for practitioners working on institutional establishment.

Indicators

Tenure is secured through:

- the processes through which community members assert their interests and rights to land
- the basis upon which these are justified
- the institutional processes and mechanisms by which rights are realised

The measures for tenure security then are the degree to which these processes are socially accepted, known, equitable (or non-discriminatory), clear and consistent, accessible, used, transparent and enforced.

This leads LEAP to suggest that as internal tenure security is important, the focus for attention must be the definition of membership and of rights and on how institutional tenure processes work. Membership creates the basis for an assertion of rights, although the entitlements of membership may differ from person to person depending on group rules and norms. Definition and records of rights creates the basis for justification, which may involve adjudication and arbitration (or dispute resolution). Institutional processes decide on and arbitrate on the validity of the assertion, on the nature of the right and on the means for enforcement, and carry this enforcement through to the realisation of the right. Local institutions need to be linked into an institutional network to provide for recourse for dissatisfied members and for support to structures for administration and to implement decisions.

This emphasis on tenure processes and the institutional arrangements for these led LEAP to begin to work closely with the PILAR project, which has been working in more detail on the means by which people can justify their tenure rights, and the implications this has for institutional arrangements.

1.2. Piloting Local Administration of Records Project (PILAR)

3.2.1. Project background

PILAR began in 1999 when the Ekuthuleni community near Melmoth, KwaZulu-Natal, requested AFRA to help find ways to give members of the ward ("isigodi") records of their individual rights to land that would be legal, affordable and sustainable.

The Department of Land Affairs, the owner of the land, had agreed to provide land reform grants to the 230-odd households to buy the land and to establish a CPA to hold it on their behalf. An assessment commissioned by the DLA found that:

- a powerful and vocal minority of residents wanted their own title deeds,
- the majority did not want the Nthembeni Traditional Authority (under whose jurisdiction the area fell) or the Inkosi to hold the title for the area,
- the majority did not want strangers to have uncontrolled access to the area, and
- the majority did not want the community to stop respecting the traditional authority structures.

The community decided to opt for a CPA because most people wanted communal tenure to continue but did not want the ownership to vest with the traditional authority structures and they were concerned at the costs and future implications of individualised ownership. Many people, however, were not happy that a CPA would not legally demarcate and record individual rights. Some wanted records as a basis for obtaining credit while others (particularly widowed or separated mothers or women in polygamous marriages) were insistent that without records they would never have secure tenure for themselves or their children, particularly daughters.

3.2.2. AFRA's research

AFRA undertook action research in the area with the objective of monitoring the impact of tenure reform on local tenure rights and practices, and the mediating affect these local rights and practices would have on government's implementation of tenure reform. At the time, the Land Rights Bill was

being drafted, with promises that it would go before parliament in early 2000. Following the election and changes in political leadership, the work on the Bill was shelved while discussions took place about transferring communal land to "traditional communities". AFRA's research had by this time nevertheless uncovered considerable information about how local structures, rules and practices determined and managed land rights of members. In summary these were:

- Access to land is contingent upon community membership, which the Inkosi controls on advice from the induna.⁵
- Members are entitled to residential land and access to commonage. Arable land is subject to availability and negotiation with those who have it.
- Demarcation of land parcels involves parties to the transfer, the headman and *an ibandla* (group of neighbours who clarify existing boundaries and witness the new).
- Household transfer rights include giving, loaning and bequeathing land and selling top structures.
- Households have strong, exclusive residential rights, seasonally exclusive rights to arable land, shared rights to grazing land and natural resources.

Areas of internal contestation over rules of allocation and transfer, which may be indications of changing practices, were:

- Whether abandoned land reverted to the Inkosi or to the original owner.
- Whether unmarried men and women could be allocated land.
- Whether loans were permanent or temporary transfers.
- Whether payment for land to "owners" was legitimate or not.
- Whether payment to the headman was legitimate or not.
- Whether "owners" can allocate land without the headman or not.
- Inheritable rights to wives in polygamous customary marriages and civil marriages.

Areas of internal contestation over substantive rights were:

- Land allocated through disputed rules
- Boundary disputes with neighbours
- Rights to arable fields
- Claims from neighbouring wards
- Trees – seeding and fruit

The research led to the conclusion that while only a few people had experienced serious threats to their tenure security, there was a fairly high degree of anxiety about tenure insecurity. This anxiety appeared to relate mainly to unclear adaptations of rules and procedures, which led to individual rights holders believing they had little recourse if things went wrong. The adaptations themselves indicated processes of change in response to internal and external pressures. Some of these pressures included single women with children wanting more secure rights to land for themselves and their children, people who had accessed land outside of the traditional authority wanting guarantees that the rights were permanent⁶ and farmers wanting to use their land for collateral.

3.2.3. What the community wants from records

AFRA thus undertook to seek ways of giving members of the planned CPA records of their substantive land rights. In addition to the records being able to be used in a court of law, community members at a workshop said that the records would need to have the following information in order to secure tenure:

- Name and signature (ID number, head of household, family including children, relatives and wife.)
- Description of land parcel (situation, size and extent, land use)

⁵ At Ekuthuleni nobody can remember a newcomer being refused membership. It is alleged in other traditional authority areas that there is a tension between payment of a membership fee and the desire for political control.

⁶ Some of these people had occupied the land for more than one generation but continued to feel that their occupation was at the mercy of the land "owner's" generosity.

- Boundary makers (such as pegs, trees, fencing)
- Servitudes (for roads, water, electricity, telephones)
- Correct procedures for land allocation (the headman, *ibandla*, owner and allocatee should be present at the demarcation of boundaries.)
- Unique number for each record

They said principles governing these records should be:

- Protection (of children, those who have been allocated land, family)
- Land development (productive use of agricultural land, roads and services)
- Records (a central holding point, each household with its own record, copies, adaptable)
- Rights (all people should be respected, fresh assessment of boundaries)

A central concern emerging from all groups (women, the youth, the committee, non-paying tenants or "ababhekiwe") was that the respective roles of the association and committee set up in terms of the CPA Act and the traditional authority should be very clear to everybody. These two institutions could function effectively only if there were co-operation between them. Community representatives requested that the state provide support to obtain this clarity and co-operation. The absence of this would lead to both institutions performing allocation and adjudication functions, which would result in overlapping rights and conflict. This alerted AFRA to the need for records to be embedded in an institutionally clear and coherent environment.

3.2.4. Seeking ways to create legal, affordable and sustainable records

AFRA undertook two processes in its attempt to give effect to the community's request for records. It consulted a wide group of stakeholders in order to obtain a clear set of legal and technical options with which to proceed. It unpacked processes in both the formal and informal tenure systems with the objective of trying to find opportunities for bridging the two systems and to develop a set of options to present to the community.

Outcomes of stakeholder consultation:

- Government departments are very keen to find solutions to what they perceive as a tenure problem in communal areas. The Surveyor-General and Deeds Registry Offices are concerned to extend their services to the poor and those racially excluded in the past while maintaining the accuracy of the cadastre. The Department of Local Government and Housing has concerns about a technical platform on which to extend municipal and planning services into communal areas. The Department of Environment and Traditional Affairs, which has surveyed tribal areas on Ingonyama land in KwaZulu-Natal, notes the difficulty of defining rights based on fuzzy boundaries and fundamentally different conceptions of rights.
- Members of communal tenure, even CPAs and community trusts, do not have real rights in the absence of legislation defining the content of the rights individuals hold in communal areas and procedures for demarcating and registering such rights. Furthermore, government departments do not have the authority to undertake any procedures that could secure these rights outside of existing legislation.
- Real rights in land currently require surveying, registration and consent procedures. These are too expensive for the poor (requiring professional input) and are long, complex processes that conflict with community practices (particularly consents to subdivide), which creates the conditions for default.
- Current legislation and bureaucracy enable only an exclusive choice between formal and informal tenure, which locks people into one or the other system.

The conclusion was therefore that there is no way at the moment to provide members with legal records of land rights that would have public legitimacy (with credit institutions or courts) and which the state would back with resources for demarcation and registration. However, there are ways to strengthen the land rights of members through community structures providing records that create trails of evidence and that could be used to prove rights. These records may improve possibilities of municipal services and credit access. The property right in a CPA would remain a personal one, however. As a result,

AFRA undertook to unpack both formal and informal tenure systems in order to develop options to put to the community.

Three options

There were three options within the current legal and bureaucratic framework. The first two involved individualisation of ownership, which would give members their own legal title deeds while the third involved the CPA giving members unofficial records of their rights.

Immediate individualisation

The first involved stopping the process of transferring the land to a CPA and re-applying for designation approval to individualise the ownership. Stopping the CPA process would mean a lengthy delay in transferring the land out of the state's ownership and a new application carries the risks of not being approved. However, having the state's support for a land reform process means that the requirements for various consents are suspended (through Act 126 as amended), thus saving time. It also means that state resources can be used to reduce surveying and registration costs.

Transfer to CPA and subsequent individualisation

Secondly, the land could be transferred to a CPA, as planned, and then the CPA could subdivide and transfer portions to its members. The designation approval for settlement means that the consent for settlement on agricultural land has already been approved for the specified number of beneficiaries. The major advantage of this route is that individual members could decide when they wanted to individualise their ownership. However, the absence of state support at this stage would mean that the CPA (or member) would have to carry the full costs of surveying and transfer. Estimated costs of surveying the boundaries of members' portions without modification ranged from R2-5000.00 a parcel.⁷

Making ownership cheaper

A number of ways of reducing costs and improving sustainability of the tenure system were explored. Before looking at communal tenure options, these are worth outlining briefly.

The costs of individualising ownership could be reduced through legal amendments to existing legislation and adaptation to current practices. Government stakeholders and community members explored the possibility of demarcating sites on community maps or orthophotographs and registering these as layout plans with the Surveyor General. The key concern was how to relate the drawn demarcations to points on the ground and most people felt that the photos would only be indicative of boundaries, which would have to be demarcated on the ground. Surveyors frequently do demarcation and adjudication themselves, but this is a costly alternative and surveyors do not always understand how land rights work in communal tenure systems. The alternative is to use community practices around demarcation following explicit agreements about what they are. This would also involve community level adjudication, although it may be necessary for some dispute resolution and mediation support to be available for resolving old boundary and rights-holder disputes. Surveyors are then used to survey agreed boundary points. The possibility of other less accurate technology (such as hand-held GPS) were also explored with the understanding that rural land for residential and agricultural land does not have to be as accurately surveyed as urban land used for business purposes because it is not as valuable.

Finally, a variety of creative tenure mixes were discussed as ways of reducing costs and improving sustainability. One such option was to survey and transfer residential sites. The local structure would manage the communal tenure arrangements on behalf of the legal entity owner (if it is not the same body). Individual members would have seasonally exclusive rights to arable fields that are demarcated on locally administered orthophotos and through locally accepted practices, and shared rights to

⁷ This is unusually high because the terrain is extremely hilly, the current boundaries are not straight lines and there are considerably more than two boundary points and the size of parcels range from a small residential site to about five to ten hectares.

commonage. These land rights and processes for administering and changing them would have to be agreed to and probably written down in a constitution.

Problems of ownership

The key obstacle identified in the formal ownership option was the sustainability of the tenure. Land at Ekuthuleni is a primary livelihood asset around which household social and economic relations are organised. A married man and his family are entitled to their own portion of land, which is a key reason given for why households with male children do not give their land to strangers or distant relatives who may be needy. Once-off transfer of land to a household without recognition of the need for subsequent subdivisions and transfers to children will result in the tenure defaulting to some version of communal tenure as households continue to settle future generations of children informally on their own portions of land.

Individual records with communal tenure

The third option then is a locally administered records option in which the local administering institution (a CPA committee or traditional authority or hybrid) with identified external support records members' rights and maintains a register of members. This would require various levels of work around rules or norms, institutional arrangements and technical options.

Rules and norms about who can be a member and what the land rights and duties of members are (particularly in terms of who land can be transferred to) would have to be made explicit and be agreed to. Practices around subdivision and allocation would have to be reviewed to ensure that the rules are agreed to as a basis for consistent application. These agreements would then inform a procedure to record the processes that resulted in the existing demarcations and would create principles for resolving boundary and rights holder disputes.

There are three key institutional questions. Firstly, who provides support to enable norms and practices to be reviewed and agreements to be reached? Where do people who have grievances with the procedures go to obtain recourse? Where are records held and administered? Each of these questions suggests a role for a state or public body. In the absence of such authority, the local structure could attempt to undertake these functions, possibly with the support of municipalities. However, the risk of powerful people using procedures to extract land from others is very high in systems with no external support, which is precisely the basis of one of the criticisms against traditional authority administration of land rights.

Technical⁸ options depend to a large extent on the nature of institutional support. The less support, the more it is necessary for communities to use what resources they already have. This means:

- very simple registers and demarcations at one extreme
- surveyed parcels and registration procedures for exclusive land rights at the other
- a range in the middle

But all these require some external (preferably state) support to be effective. In the first option, CPAs could be supported to maintain registers of members who have land rights through the required annual reports to the DLA, particularly if this process resulted in members receiving individual records of their substantive membership rights. Many traditional authorities are already maintaining registers of members and these could be supported to include information on land rights. Current laws governing the more complex options would also need to be amended to increase sustainability by reducing survey, registration and consent costs and creating better synergies between local practices and formal processes (particularly in terms of consents for subdivision).

At a recent community workshop on 17-18 November 2001, these options and their various implications were put to about 60 community representatives. After exploring each option, the representatives decided that the most appropriate route would be to begin to formalise the communal tenure despite the fact that records produced locally would not facilitate easy access to mainstream credit institutions. The decision⁹ was based on a number of considerations, namely:

⁸ We understand technical roughly to mean both procedure and equipment to effect procedure.

⁹ The workshop facilitators arranged for group work to maximise participation. They also noted that there was fairly active and widespread participation in the decision-making process.

- Transfer to a CPA would create a base for community unity, which would enable more effective implementation of traditional practices around land allocation and dispute resolution.
- The informal system allows flexible and affordable access to land for women and the youth.
- Formalising the communal tenure means obtaining public recognition of "our way of doing things".

In addition, the decision was taken to amend the constitution (after transfer) to enable children to become new members with their own land allocations. Other amendments that have been proposed are to clauses allowing sales in order to regulate who in households has the right to consent to transfers that alienate household rights.

This outcome is significant for a number of reasons. It reasserts the importance of working with practices people are familiar with in order to secure tenure. It also asserts the importance of communal tenure as an option under a variety of management options (CPAs, traditional authorities, trusts). Finally, it counters suggestions that all rural people want individualised ownership. They do want evidence of their individual rights, but this does not have to be in the form of title.

Lessons from PILAR and LEAP

It is important that interventions to secure tenure work with processes that are known and accepted in communal tenure systems and that the changes enable people to move in and out of different tenure forms as their needs dictate. Currently, people are boxed into an exclusive choice between formal or informal (communal) tenure. Tenure reform should aim to offer practical options to bridge this exclusiveness. But this needs to be based on an in-depth understanding of what exists and what can change without too much disruption to social and economic stability. It also needs to be recognised that tenure security is not a once-off event. It is a set of processes and institutions that regulate property relations between people on an on-going basis so that transactions are predictable and outcomes clear. The bridging therefore needs to assess which processes and institutions in both the formal and communal tenure systems can play a role and how these roles can be co-ordinated on a permanent basis. The following diagram represents some of these issues:

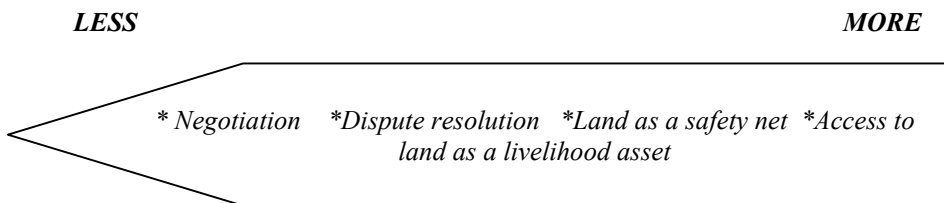


SOME PRINCIPLES

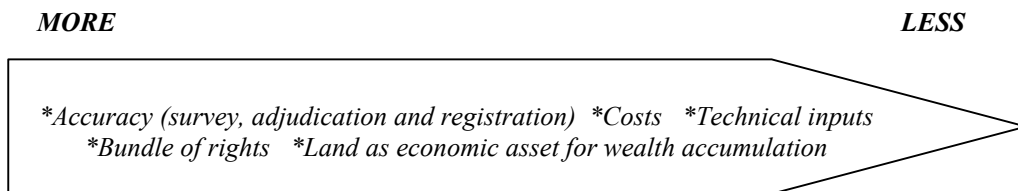
- | |
|---|
| • Options for tenure systems need to be appropriate to what people want to use their land for. |
| • Tenure CAN be secured through many different types of systems. |
| • "Informal" systems would benefit greatly from equal allocations of state resources for securing tenure. |

THE TENURE CONTINUUM

- Membership definition and criteria
- Effective local institutions



FORMAL: Title → Lease → Sectional → → → Individualised → Shared : INFORMAL



Public record ←
Improved credit access ←
Development base ←

**MORE SECURE
FOR OUTSIDERS**

The above diagram shows tenure systems on a continuum in which the extreme ends are most appropriate for particular types of purposes. 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. Communal tenure on the other hand requires greater negotiation and dispute resolution support but is most appropriate for land that is to be used as a livelihood base in a set of relationships that constitute social capital. The major gap is options in the middle that enable people to move along the continuum and thus to adapt their tenure system as and when required, rather than to opt out of one system in order to enter another. The question that needs to be addressed therefore is how to build continuum bridges from one extreme to the other?

The approach of reforming tenure by building bridges or creating greater choices around options for adaptation creates a number of fears about the possibilities of destroying what already exists. Practitioners in the formal system express anxieties about destroying the cadastre, without which property transactions would not be recorded and property itself as a set of rights and duties would be at risk. On the other hand, proponents of communal tenure are concerned that the destruction of traditional practices and institutions will damage the basis on which the poor are able to secure land and the structures of power and foundations for African politics and culture. These fears are real and legitimate. Bridging tenure systems does mean that change is incorporated as an inevitable. Our contention is that the real issue is not change but how the risks of change are managed. The notion of commonhold as a legal tenure form enables some of these risks to be minimised. The maintenance of the outer boundary and the legal definition of rights at current levels of accuracy would leave the cadastre in tact. Simultaneously, commonhold should improve possibilities of collective, local decision-making about what adaptations to make and how to manage the change process.

In addition to commonhold, however, there are specific technical, institutional and legal lessons that emerge from PILAR and LEAP, and that may assist in drafting a realistic legal framework.

a Technical

Less costly survey options need to be explored. These might include less accurate GPS and mapping, both of which have successfully been used in tenure systems in other countries. The knowledge to assess these exists and should be deployed to look at options that would suit South African communal tenure purposes. Demarcation responsibilities can also be shared with communities, as long as procedures are agreed to and minimum standards for verification are developed.

Registration systems should incorporate local adjudication processes around conflicting or competing rights. In this way, local structures would carry responsibility for guaranteeing that only property rights that are free of disputes locally are registered. Other possible rights holders would have to be investigated through usual methods or through new land rights officers trained in this regard, although this should be a once-off process concerning the transfer of the property to the group.

The registration system needs to be decentralised in order to be sustainable. Community members need accessibility to the public records and to the procedures of registration. (There is already a process to decentralise this function, which corresponds with the need expressed in the Ekuthuleni community. It doesn't incorporate changes to procedures in order to allow for adaptation to the requirements of communal tenure, however.)

b Institutional linkages

There are two key issues here. The first is that the absence of state support has created tenure systems that are virtually closed to outside observation. In order to move towards greater transparency, equity and due process, there needs to be clear linkages between local juridical functions and external judicial structures so that individual members can seek recourse if they need to.

The second issue concerns the authority to adjudicate. While it is important to build on local structures and practices, the layers of decision-making internally and externally and how they relate to one

another must be clear. The question of where authority resides for which functions must be clear to all structures and members in order to avoid overlapping rights and adjudicatory structures.

c Law

Legal instruments are required to give effect to commonhold as a tenure form, and to mechanisms that enable groups to adapt their tenure systems. These include amendments to survey and registration legislation as well as to land use and planning legislation. In terms of commonhold, legislation must give effect to agreements around where authority resides for adjudicatory functions.

Some thoughts

Communal tenure will continue to be the tenure form that the majority of citizens live in. It is not a second best system. It has numerous strengths. It has however been neglected by the state and receives virtually no support. An important focus of tenure reform should be to increase the tenure security of members of common property systems, and to increase the options open to people within a continuum of tenure systems, with appropriate levels of state support. This will require new legislation, changes to legislation, attention to developing institutional clarity and dedicating support to common property institutions.

To work on such reform in an effective and appropriate way the focus needs to be on local practices and institutions for managing the processes individuals use to assert and justify their rights. This will allow a realistic assessment of what needs to change and what can remain the same in order to secure the tenure rights of individuals in communal tenure systems. These practices and institutions take one into norms and rules governing communal tenure in terms of membership and who can get what types of rights to which land. A concrete place to start is with individualised rights to actual parcels of land and to the processes of demarcation, allocation and dispute resolution. From these, various conclusions can be reached about what technical, legal and institutional interventions make sense for a particular community.

Tenure reform needs to increase choices for more people, not close them down. If the proposed new legislation meets this challenge, it will enable meaningful change that will contribute to the disenfranchised becoming full citizens of our country.