

LOOKING BEFORE YOU LEAP

An analysis of some of the consequences of state devolution in
land and resource tenure.

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1 Introduction

South Africa is creating in law new community-based institutions¹ for land and resource tenure². These institutions are expected to conserve resources, mediate competing claims to them and take responsibility for enforcing decisions on rights to them.³ While the law requires groups to have democratic and equitable procedures, it does not explain how to relate these new institutions to those already in existence, such as traditional practices, norms and authorities. (Cousins T and Hornby D: 2000: 10) These existing institutions shape land and resource tenure in specific localities, creating the possibility of multiple, unintegrated institutions dealing with tenure in a particular group.

The Legal Entity Assessment Project (LEAP) argues that to strengthen tenure security in common property institutions (CPIs), it is necessary to start with an understanding of local history, norms and practices and to work with authority structures already familiar to communities as far as possible. LEAP also argues for the importance of state support in developing and enforcing local tenure rules, arrangements and records, but recognises that it needs to get a clearer idea of how the state should do this.

This paper argues that the focus in the community based natural resource management (CBNRM) literature on the devolution and decentralisation of state authority and responsibility over natural resources to communities does not pay sufficient attention to the role of the state in creating and maintaining a coherent institutional environment.⁴ This is particularly important where many institutions are involved in a community in the processes for asserting, justifying and realising tenure rights, which can lead to overlapping and competing rights to land and resources. (Toulmin C and Quan J: 2000) Forced to deal with the risk of such confusion escalating into open conflict, communities may adopt risk minimising decisions and strategies. These include relinquishing control over the resource, which results in open access, or trading the entitlements of democracy in the face of dominant structures and people monopolising de facto control. This defeats the purpose of both community based natural resource management and the state's intention to strengthen democracy at local level. To prevent this, the state should devolve authority responsibly through developing and supporting coherent institutional arrangements that widen choices for decisions at local level. This may even entail the state retaining its ownership of land rather than transferring it to the "traditional" communities occupying it if such devolution of ownership creates ambiguity around tenure processes at local level.⁵

¹ We understand institutions to mean the basic rules and practices that structure action in society.

² For example, Communal Property Associations in terms of the Communal Property Associations Act, Catchment Management Agencies in terms of the Water Act, co-management of marine fisheries in terms of the White Paper.

³ Both the state and the private sector are involved in defining the rules in many examples of CBNRM particularly where the resource is considered to be valuable, such as wildlife. Resources such as grazing which contribute significantly to rural people's livelihoods are often not given this attention, and the community institution is left to mediate competing interests on its own.

⁴ The Legal Resources Centre has argued that the key failure of Communal Property Associations is inappropriate institutional design (Pienaar K: 2001).

⁵ Media reports over the past two years suggest that the Department of Land Affairs is considering transferring ownership of land occupied by "traditional communities" to traditional authorities. It is

The paper begins by summarising briefly the key arguments for devolving and decentralising state responsibility over natural resources. One of the key mechanisms for devolution is the creation of legal entities of which this paper briefly considers only one, namely Communal Property Associations (CPAs). Drawing on LEAP's conceptual framework, the paper begins to explore what some of the institutional functions of the state may be in relation to securing tenure. These tentative conclusions are then tested against a case study in order to attempt to further define what the role of the state should be in land and resource tenure. The emerging lessons from the case studies are drawn out in order to demonstrate what the consequences of the state vanishing⁶ from the local level or aborting devolution⁷ may be. (Jones B: 2001)

1. State devolution and decentralisation in CBNRM

This section critically traces the emergence of CBNRM as a concept, and explores the notions of devolution and decentralisation, which are at the heart of CBNRM, before assessing CPAs as a concrete mechanism for devolution.

We understand decentralisation to mean the delegation of central state powers to government at a localised level and in which accountability remains upwards. Devolution means the creation of relatively autonomous realms of authority, responsibility and entitlement and in which accountability is downwards to members.

1.1. Holding it together

CBNRM began to emerge in the 1980s as a "third way" to sustain common property. This followed the dominance of the previous two options influenced by Hardin's "tragedy of the commons". These were the state which, with its authority, expertise and other resources, could shape and enforce decisions about using the property or the private sector which, in pursuit of economic gains, would pay the costs of resource management.

In Africa, Hardin's thesis was applied practically in a colonial political economy that saw the state excluding indigenous, often poor, people from accessing resources they had traditionally used, while concessions were granted to white colonial entrepreneurs to commercialise various resources. (Morombedzi J: 2000)

Hardin's thesis was challenged theoretically when a distinction was drawn between common property and open access.⁸ (Bromley and Cernea) This theoretical challenge

expected that the draft proposals for the Community Land Rights Bill, expected to be released for public comment later this year, will address this.

⁶ The vanishing state refers to the global trend of a minimalist state, which in many parts (and sectors) of Africa has meant the absence of state resources at local level.

⁷ The term refers to a devolution process that is incomplete. One particular version of this incompleteness is that the state devolves responsibility to communities without providing the resources to manage the responsibility. Jones B: *Workshop on Governance in Community-Based Natural Resource Management*; PLAAS, University of the Western Cape; 10-14 September, 2001; Cape Town.

⁸ Open access, it was argued, is not property because property is defined in terms of a set of exclusive rights which others have a duty to uphold and rights holders cannot be defined in open access

was accompanied by mounting evidence in the 1980s that effective collective action around resources was possible. It was also becoming evident that the state was failing to "micromanage the environment" and protect biodiversity (Barrow and Murphee: 2001: 25). As the IUCN comments: "CBNRM was advocated as a solution to the persistent failure of the government-led natural resource management." (IUCN SA: 1999: 24) General concerns were also being expressed about the performance of the governments of less developed countries as a result of their domestic fiscal crises and responses to internationally driven economic reforms. (Carney D: 1995: 1)

In this context, notions of decentralisation and devolution of state control and authority over natural resources grew as a potential solution both to resource depletion and to democratic governance. Indeed, some authors have argued that CBNRM by its very nature embraces concerns about both democracy and resource conservation - "Good decentralisation and local democratisation are environmental concerns". (Ribot J: 2001: 29)

CBNRM thus emerges in a context in which the state is seen as having failed both as protector of natural resources and as a legitimate vehicle for pursuing the collective will of its citizens. The logical theoretical and practical conclusion is then that the state must diminish its role in the governance of people and resources, which is a conclusion that is consistent with the minimalist state of the neo-liberal paradigm.

As a result of the minimalist state paradigm, failures in CBNRM are often attributed to failures in decentralisation or devolution. Thus, "poorly structured decentralisations are threatening both environmental management and equity ... and local democratisation" and "many governments ... are devolving insufficient benefits to motivate local actors to carry out new environmental management responsibilities". (Ribot J: 2001: 30)

These assertions and observations may indeed be true but what is neglected is detailed analysis of what the appropriate role of the state should be. This neglect is not theoretically inevitable as is evidenced in systems theory approaches to conservation biology. For instance: "CBNRM as a strategy reflects in social and policy terms the parallel nestedness of organisms, species, associations and ecosystems in the natural universe. Biological systems ... need to be maintained within conceptions that comprehend the connectedness between micro and macro levels." (CBNRM Workshop, 1998)

This suggests an institutional analysis in which the state⁹ is a key player in natural resource management together with communal property institutions. It also suggests the ideal of an institutional coherence and clarity as something to work towards. It is our contention that the state has a key role in creating the conditions for institutional coherence and that this role needs to be clarified at the multiple levels of the state in order to keep relationships and responsibilities clear. Such clarity would enable easier assessments of which functions and powers the state should decentralise and devolve, and to whom, and which it should not.

situations. The defining characteristic of common property, on the other hand, is multiple rights holders.

⁹ The state may play this role at multiple levels, such as national, provincial and local, and through multiple functions, law, policy, policing, justice, administration.

1.2. Communal Property Associations

If devolution and decentralisation are central to CBNRM, then the possibility of community is what makes them realities. "The term CBNRM implies a community [that is] ... institutionally structured so that collective interest subsumes and reconciles internal division." (IUCN SA: 1999: 23) In South Africa, the key institutional structure that has been used for both land ownership and CBNRM is the Communal Property Association (CPA).

The CPA Act (28 of 1996) sought 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". (CPA Act: 1996: 1) LEAP has argued that the legislators assumed that the process of creating a constitution, or a legal body of locally determined rules for self-governance, would enable the constitution of a group in which collective interest would subsume and reconcile individual interests. (Cousins T & Hornby D: 2000: 3) It was also assumed that it was possible to line up the collective (or universal) interest with the new values of democracy, equity and due process enshrined in the national Constitution. The CPAs formed in terms of the Act would therefore be more than juristic persons, they would also express the universal will of the group and thus abide by democracy and equity.

These legal intentions have proved difficult to realise in practice. The social and political values had appeal, especially for very vulnerable people, but translated into decision-procedures and systems that are largely unfamiliar to people constituting many of the new associations. This unfamiliarity is compounded by the fact that members of new associations often do not have access to their constitutions or understand the language in which they are written. Furthermore, the CPAs have also been loaded with numerous other expectations such as managing development, securing the tenure of the group and individual members, and managing the land and its resources sustainably. (LEAP, 2000)

While the Department of Land Affairs has a legal obligation to register and monitor CPAs and to provide support in resolving disputes, in practice political priorities have focused capacity on addressing racial imbalances in land ownership¹⁰ rather than on supporting groups that have acquired land. Debates about tenure reform, for instance, have sometimes focused on whether to transfer land to tribes rather than on what institutions are required for regulating and administering land rights. The national office of the department is only now, five years after the law was enacted, working on systems and procedures for obtaining annual reports from CPAs as required by the law.¹¹ Likewise, an information system for managing the registration of CPAs is only now in the process of being set up at the national office. The fact that the national office is responsible for these functions raises questions about whose purposes they serve. Most rural communities are unable to communicate easily with the national office and often don't know that their communal records are held there. Even

¹⁰ This has been mostly through effecting transfer of title and start-up funding.

¹¹ This is not the fault of the two officials responsible. The responsibility lies rather with those making political choices that result in key tenure support programmes having only two officials to implement them.

consultants and practitioners struggle to get copies of community records when they are able to break through these barriers.

If we assess CPAs in terms of decentralisation and devolution, what conclusions can be drawn? The concept of community may appear to imply a homogeneous entity with a single will and interest but most analysts and practitioners agree that real communities are made up of people of different ages, sex, wealth, power and hence interests (eg. Murphree M & Barrow E: 2001; IUCN SA 1999: 21). Despite this recognition, the state insists on the creation of a single legal persona with a single interest and will. The state provides a legal framework and minimal initial resources to enable this, but effectively devolves the ongoing task of constituting the collective will or interest to the community institution. This requires that the community institution take responsibility for mediating and resolving conflicting individual interests.¹²

The state, however, has not decentralised or resourced those functions that might support this community responsibility. These include registration of the CPA constitutions and members, monitoring and dispute resolution. It also needs to include clearer recording of members' tenure rights and community processes for asserting, justifying and realising these rights. The failure to resource these functions and to decentralise them means that the community institutions must also take full responsibility for democracy, equity and due process, which are the constitutional procedures for ensuring that the collective will is legitimately derived.

The state has thus devolved to community institutions responsibilities that impact critically on land and resource tenure without decentralising the functions that could support them to carry out these new responsibilities. Key here is the mediation and resolution of conflicting rights and interests so that the legal personality can act as the collective will.

3. Worlds apart

LEAP was set up in 1988 in response to concerns about the long-term viability of institutions (particularly CPAs and community land trusts) established through land reform to hold and manage community land. Accompanying the concern was a call for community capacity building (“aftercare”) to enable communities to fulfil their obligations in terms of their constitutions.

In order to assess the nature of the problems, LEAP undertook seven community constitution assessments, examining practices within the community and comparing these with the written documents. LEAP soon found a vast discrepancy in the rules, procedures or practices and structures created by the constitutions and those operating in communities. The new community institutions were very often only a paper reality and had little bearing on how effectively communities are managing land, natural resources and internal and external relationships.

¹² Although our focus is on interests in land and resource tenure, these are obviously not the only interests that local institutions deal with.

In trying to make sense of the numerous purposes and expectations attached to the new institutions and the absence of indicators to measure the development of viability, LEAP asserted that the primary purpose of communal property institutions (CPI)¹³ is to secure the tenure of the group and its members.¹⁴

The tenure of the group is easy to measure since it is indicated by the registration of the property in the name of the CPI.¹⁵ Assessing the tenure status of individuals and households within the CPI is much more complex. Both community practice¹⁶ and the constitutions appear to relate the right to land and resources to membership of the group.¹⁷ Definitions of membership, however, have proved to be complex and difficult with multiple definitions in constitutions resulting in serious ambiguities and contradictions. Furthermore, the membership lists and definitions in constitutions seldom correlate with any accuracy to actual membership or to local practices around membership. Even if these problems are resolved, there is still little clarity in terms of law and public record about what legal rights members have to land and resources. LEAP has concluded that these ambiguities and uncertainties, combined with the lack of institutional support from the state, create an indeterminacy that puts the tenure of members at risk, at least legally and formally if not in members' perceptions. (Cousins T & Hornby D: 2000)

The tenure of members is also at risk in practice through the creation of new institutions that exist in parallel to old institutions and that replicate the functions of the old. LEAP argues that "what was surprising ... was the seeming assumption that the new CPIs could exist in parallel with traditional systems without intrusion, confusion or conflict. The transformed social order that was to be realised through CPAs is directly at odds with the modes of governance derived from lineage and custom that frame most rural people's lives in KwaZulu-Natal." (Cousins T & Hornby D: 2000: 6) The neglect of existing institutions and creation of new ones is likely to result in multiple processes for asserting and justifying rights to land, and in multiple adjudicatory structures for the resolution of competing rights. Under such conditions, the possibility of latent and explicit conflict is high. Fear of conflict is likely to create an environment for risk-minimising decision-making in which "imposed" values and resource sustainability are sacrificed in order to ensure safety.

¹³ LEAP began to use the term communal property institutions in order to indicate the variations in institutions holding and managing common property, including CPAs, Community Land Trust, Traditional Authorities and municipal commonages.

¹⁴ This assertion is under review since it was challenged by the Legal Resources Centre which argued that the tenure of individuals can only be guaranteed by the state and not the CPA, and that the CPA Act does not provide for tenure security of members. LEAP accepts the argument in relation to CPAs as legal entities but is less convinced when considering the role of CPIs generally with respect to securing tenure because tenure is not simply a legal relationship but is also defined through accepted norms and practices. The issue is what the law should regulate.

¹⁵ The ongoing exclusion of outsiders from the group's resource requires more than a once-off event like registration. LEAP still needs to understand better what the implications of this are for group tenure.

¹⁶ By community practice we are referring to the type of informal procedures associated with access to tribal land in KwaZulu Natal.

¹⁷ It has been argued that members of CPAs have no rights to land - they only have rights to membership. Rights to land can only be acquired through allocation in terms of the constitution. (Pienaar K: 2000: pers com)

As a result of these layers of complexity in the establishment of new institutions for land and resource tenure, LEAP argues that communal property institutions should be developed from existing processes and structures for the assertion, justification and realisation of property rights.¹⁸ Although LEAP has yet to define these terms with any precision, they are roughly understood to mean the following¹⁹:

- Assertion: a person, household or group requesting or taking rights to land or resources. (It may be a request for, or "taking" of, a specific piece of land or resource, or to some land or resource generally held by the group). Assertion also involves procedures to be followed in making the assertion, such as: a person approaches the landholder who takes him/her to the induna.
- Justification: the basis or evidence on which the request or claim is asserted and in terms of which the "asserter" believes he or she is entitled to satisfaction. A justification draws on the rules or principles of decision-making which inform the asserter's expectation that the assertion will be realised.
- Realisation: the secure possession of the land or resource right. At times this is the outcome of adjudication and is often indicated by residence or use.

Constitutional values such as democracy and equity need to be viewed as long-term goals, which would be achieved through support for gradual institutional change. Measurement of this change would be indicated by the degree to which these processes are known, accessible, equitable, clear, used, socially accepted, transparent and enforced.

In summary, LEAP argues that communal property institutions need to be developed from existing local institutions regulating tenure because these are known and their use will avoid the creation of multiple institutions. This is important because multiple tenure institutions give rise to overlapping and competing rights to land and resources and an environment in which resource decisions tend to be risk-minimising rather than option-maximising. This will mean working with traditional tenure practices and norms and possibly structures of authority in KwaZulu-Natal. It also means an acknowledgement that the achievement of democratic and equity values is a long-term goal, which are secured through gradual institutional adaptation supported by the state.

2. Mdukutshani - the case of the lost grass

Mdukutshani is in the dry, ecologically fragile district of Weenen (the "place of weeping"). It borders the Msinga District, which is part of the former KwaZulu homeland and has been described as "the hottest, driest, most over-populated, over-grazed and poorest part of KwaZulu". (Kockott: 1993) The farms shared boundaries with the tribal areas on the east and north and with "white-owned" labour tenant farms on the other sides.

Mdukutshani describes both a place - the place where the grasses were lost - and also a Trust that leases land at nominal rent from the Church Agricultural Project (CAP)

¹⁸ These processes are defined and carried out differently by different communities and LEAP acknowledges that bridging differences in language and concepts is methodologically difficult.

¹⁹ These definitions assume processes that have legitimacy either locally or nationally. Aggressive territorial acquisition could use the same processes.

(Pty) Ltd, a non-profit holding company that bought three farms making up 2500 hectares with donor funds in 1975. Mdukutshani was set up with the objective of using the CAP farms to develop models for agricultural settlement and to provide resources to residents of neighbouring communities. The Mdukutshani project is managed by a committee, which is composed of CAP directors, Mdukutshani trustees and additional members. The directors include the two chief indunas (principal headmen) of the two chiefs of the neighbouring tribal areas, the Mchunu and the Mthembu (Oettle N: 1998: 133-135), whose dividing boundary runs along a mountain ridge across the farm.

Mdukutshani, over a period of years, established local institutions for managing resource access. These involved people from each of the neighbouring izigodi (tribal wards) using specific camps on the CAP farms that were adjacent to them for winter grazing and collecting muthi plants and firewood. These user izigodi were the Mashunka (of the Mthembu) and the Mathinta, Nqomukantaba and Gujini (of the Mchunu). Each user group had a committee to ensure that tasks relating to the maintenance and regulation of the grazing were carried out and two liaison people were appointed to communicate with Mdukutshani. The arrangements serviced about 200 users and worked so well during the 1980s that they became the subject of a CBNRM case study, which described the situation as follows:

"The fences are repaired before the livestock is permitted into the camps, usually in June. Wire is provided by Mdukutshani, and droppers are cut from the reserve. No hunting is permitted on the reserve, and it appears that the neighbouring communities benefit from having a steady supply of small game that migrates out from the reserve. "The system 'works with almost no maintenance by Mdukutshani staff and the veld cover has improved dramatically during the years that Mdukutshani has been managing the farms'. The excellent condition of the basal grass cover is evident, and officials of the Department of Agriculture confirm that the system is 'almost perfect' for the improvement and maintenance of the veld." (Oettle N: 1998: 137-8)

During the same years, members of the Ncunjana isigodi asked for refuge after being evicted from neighbouring farms that were also part of the Ncunjana isigodi. They built their homes in an inaccessible corner, in defiance of legislation controlling the numbers of black families on farms. Over time they used an area for grazing that was separated from the grazing of the other izigodi by the natural barrier of the Isikhehlenge River.

In 1989 CAP and Mdukutshani started to raise the question of ownership of a large portion of the farms because some trustees thought it no longer appropriate that the users didn't own the land. In exploring options for transfer, they held many meetings with users of the grazing camps, with those who had been evicted from the farm under the previous owners, with those currently settled on the farm (mostly Ncunjana people) and with the izinduna (headmen) involved.

The solution that emerged reflected an attempt to work with the tenure realities on each portion of land. Thus, it was decided that CAP would keep the portion of the farm on which homes and halls had been built by the Trust. The land on which the Ncunjana people had built their homes would be donated to them and title transferred to a CPA made up of the households living there, and negotiations with the Department of Land Affairs to effect this are underway. The solution for the

remainder of the farm, which had been used by the neighbouring izigodi as grazing camps, was to leave ownership with CAP and to open access to the grazing and other natural resources to Ncunjana people.

The solution of opening access arose from complications around who to transfer the land to. This was related to the fact that the land lay within the boundaries of what in traditional history was considered to be the land of the Ncunjana isigodi, and which the boundaries of the white-owned farm had cut into. The current users were not from the Ncunjana isigodi. The parties to the discussion about this portion pointed out that if CAP transferred ownership formally to the tribal structures responsible for the Ncunjana isigodi and the structure then tried to exercise control over all rights-holders, this would be ukuqhatha – setting people on to fight each other. The best solution was therefore that CAP continued as the legal owner with the land being used for grazing and gathering resources rather than settlement because “cattle can share, people can’t”.

Two other social features of the area informed this outcome. The first was a history of wars over tribal boundaries fought on the ridge of the Mdukutshani land between the Mchunus and Mthembus. In one of these, the battle of Ngongolo in 1944, 76 men died when 8000 warriors from the Mchunus and Mthembus clashed on what was "white" man's land. (Malan: 1980; Alcock C: 2001) More recent killings to settle conflict arising from other causes on or near Mdukutshani also meant an awareness of how dangerous it could be to upset certain groups or people.

Today, no one has settled on the land but no one enforces the boundaries either. Anyone who chooses to, uses grazing and other resources. The fences have fallen down and the grass, which was the pride of Mdukutshani in the 1980s, is grazed flat. An induna and an old livestock owner who grazed his cattle on the farm agree that there is no control of the resource and attribute this to the fact that there is no longer an authority that is strong enough to do this. They say that in the earlier days the originator of CAP, Neil Alcock (and later his son Makhonya) was the authority and things were done properly.

These comments don't reflect a diminished status for the traditional authority in the area. On the contrary, Inkosi Mchunu is deeply traditional and evidently highly respected, and has worked for years in one of the poorest and most overcrowded parts of KwaZulu-Natal. He and his izinduna have had to govern a group of people living in overcrowded conditions as a result of absorbing high numbers of evicted labour tenants over the last decades, with increasing impoverishment and the social disorder that accompanies it. The limited resources of the traditional authority therefore go largely into preventing complete social disintegration both by enforcement of law in which they co-operate with the police and by keeping traditional values and practices alive. These overriding imperatives reduce the capacity of the traditional authority to regulate and enforce common property tenure rules.

3. Hard choices, soft landings

Mdukutshani has been both a CBNRM success and a CBNRM failure in two decades, with many ups and downs between. Some of the reasons for the success, which are familiar in the literature, appear to be:

- Local institutional arrangements were developed on the basis of careful negotiation with potential users;
- Users carried responsibility for maintaining and regulating the resource;
- User groups were defined locally and each had a specific piece of land they were responsible for;
- The resource had a clear benefit or value to users as winter grazing in an arid, over-grazed environment;
- User groups were relatively small.

Other reasons for success which are less often cited in the literature include:

- The active provision and acceptance of technical services and support from the state in the form of the Department of Agriculture on grazing capacity, grazing systems and erosion control;
- All local people were able to identify the authority structures clearly and users knew where to seek support for enforcement;
- The authority structure was a coherent combination, in form and practice, of traditional authority (the izinduna, inkosi and tribal court) with external capacity (Mdukutshani staff, magistrate's court and police) to engage in and enforce decisions.

The net effect of these locally negotiated institutions with linkages to the state was that the processes for asserting, justifying and realising rights to land and resources were clear and enforced. With this level of clarity, it is not surprising that Mdukutshani staff were able to say "the system maintains itself".

The key turning point in this success story was the Trust's questioning its ownership of the farms in 1989. This started a process that required clarity on who the rightful owners of the land were. It set in place, in other words, a process of interrogating the justifications for current assertions to land and resource rights, which opened space for new types of justifications and therefore new assertions. These together constitute new bases for claiming rights to resources and land and the basis for the expectation that the rights will be socially guaranteed.

Prior to 1989, specific users from defined izigodi could legitimately assert rights to use specific camps on the CAP farms for winter grazing and natural resource harvest. These assertions could be justified on the basis of agreements and authority structures that had been negotiated between CAP directors, Mdukutshani trustees and other additional members. The Ncunjana people resident on part of the farm could legitimately assert the right to reside on that portion and to use specific parts of the farms for grazing and resource harvesting. This assertion could be justified on the basis that they had obtained consent from CAP (as refugees of evictions) and also that they were residents of the Ncunjane isigodi (and this part of the CAP fell within the isigodi boundaries).

After 1989, an old basis for claiming re-emerged from the notion of original "ownership" - whose land is it. The Ncunjana could potentially assert a right to residence, grazing and natural resource use on all the grazing camps (except that used by the Mashunka). This assertion could be justified on the basis that the tribal forefathers had agreed to the boundaries of the Ncunjana isigodi and this land fell within the isigodi. Residence on land is what defines one's tribal identity and therefore

Ncunjana people would have the right to residence on and use of all the land of the isigodi.

The justification of an assertion draws on the principles or rules informing decision-making and constitutes the basis of the expectation that the right will be socially guaranteed. The moment there is a multiplication in the rules and ambiguity around who has the authority to make decisions about assertions of rights, there is the possibility of competing claims. The additional basis for assertion at Mdukutshani meant the possibility of competing claims between Ncunjana and current users.

It needs to be said that the Ncunjana never made an explicit claim to land rights on the CAP grazing camps. The concept of claiming in English carries connotations of an administrative process of adjudication and resolution following assertion, connotations that is of neutrality. The concept in Zulu connotes challenges to identities based on territory and carries implications of antagonism and aggression. This doesn't mean that the term claiming - as assertion and justification - isn't useful. On the contrary, much of the institutional focus is to prevent potential claiming from becoming explicit because it carries such serious threats to safety.

The potential for an Ncunjana "claim", then, was that the land had traditionally belonged to the isigodi. This informal ownership could not be extinguished or alienated in the post 1989 deliberations because it is the basis for tribal identity. This, together with the existence of other bases for claiming user rights, meant that ownership of the land could not be transferred out of CAP without great risks to social stability. The specific outcome was also influenced by the absence of residential rights to the camps. Residence is both an act of possession and an assertion of identity. The fact that the users were not resident on the land meant that access to use the resource could be opened to Ncunjana in recognition of their history but an explicit claim to tribal identity and therefore residence could not be made.

This solution to "lose" the boundaries and exclusivity had also been the solution to the tribal conflict between the Mthembus and Mchunus earlier in the century where a piece of land is set aside for grazing and resource use but not residence. The rationale behind this is that "cattle don't know boundaries". The natural resource consequence is that the resource base cannot be managed effectively because it ceases to be property when access is opened up.

This outcome at Mdukutshani was not inevitable or necessary. It was based on a series of discussions and negotiations in which people weighed up risks against resources for managing those risks. If CAP were exiting from ownership and authority, the framework that had determined processes for asserting, justifying and realising rights would have to change. A logical place to look for new processes would be traditional institutions, structures and authorities. Had there been new capacities offered to replace CAP, or had the tribal authority had the resources and capacity to deal with competing rights, the outcome may have been different. In the circumstances, it was a rational trade-off between safety, tribal identity and "long grass at the beginning of winter".

4. Making it happen

This paper set out to argue for the responsible devolution and decentralisation of the state in support of secure tenure of land and natural resources. Mdukutshani highlights some of risk-minimising decisions that people make at the cost of control over the natural resource base. Other LEAP case studies demonstrate that people also make risk-minimising decisions at the cost of democratic entitlements. (LEAP: 2000) It is therefore important to get clarity on what the state's role should be to enable people in common property institutions to make resource optimising decisions. In this section, we offer some tentative steps in defining what the role of the state might be.

The state operates at many levels and has many functions. The linkages horizontally and vertically between these levels and functions are often fragmented and erratic. We don't intend to unpack these or their implications in this paper although this complexity obviously frames any proposals we make.

The first most obvious question arising from Mdukutshani is whether the transfer of title - devolution of ownership rights and duties - is always good. This question speaks directly to the proposed Communal Land Rights Bill that the Department of Land Affairs is in the process of drafting. It seems that the DLA's intention is to transfer ownership of state land to "traditional communities" on the grounds that holding land on behalf of black people is an apartheid practice that is no longer appropriate. Mdukutshani illustrates what the state will need to do in order to withdraw its presence and transfer ownership, namely:

- Determine boundaries
- Define who has rights to land and resources within the boundaries
- Define who has authority over spaces within the boundaries

Each of these determinations or definitions could revive old grounds for claiming or result in new ones. To avoid these the possible consequences of these determinations, Mdukutshani people opted for fuzzy boundaries and open access where the risks were too high. The transfer of ownership of state land will need to be accompanied by a careful, locally determined assessment of risk to social stability.

Whether or not the state devolves ownership, it has a role to play at the level of common property institutions. Again Mdukutshani is instructive. Neighbouring izigodi and camp users recognised the Mdukutshani staff as independent authority figures standing outside the tribal authority structures. This independence didn't mean working against the tribal authority. On the contrary, the legitimacy of Mdukutshani's authority came partly from its close relationship with the tribal authority. The independence meant being able to bring in additional capacities, resources and linkages. These included negotiating institutional frameworks and agreements for resource use, management and regulation, providing technical support and linkages, supporting enforcement and the use of structures for enforcement. The tribal authority remained responsible for general social cohesion, dealing with conflicts, disputes and other land allocations, which created the conditions in which Mdukutshani could work. This relationship between Mdukutshani and the tribal authority is suggestive of the type of institutional nesting that might support common property regimes.

Where the state is establishing new CPIs, at least three types of role are important. The first is an assessment of the degree to which people make use of traditional tenure

processes and institutions. This involves assessing how local institutions structure the processes for asserting, justifying and realising tenure rights and resources. The state's function here would be to explicate these processes so that they are known, transparent and clear to all members and then to interrogate how equitable, accessible and socially accepted they are. This creates the basis for the second role, which is to negotiate and facilitate a process of institutional adaptation. The precise nature of this task will depend on the resource, the purpose of the tenure and the nature of the group with rights to the common property. The third role for the state, once agreement is reached on changes and procedures for change, is to create institutional support for carrying out agreements.²⁰

The above roles for the state are derived from the Mdukutshani case study. However, LEAP's case studies also show that even where people start from a base of traditional tenure processes and institutions, many groups choose to establish an independent legal entity to own the land. This may be because the choice of a tribal authority owning the land on behalf of the group hasn't been legally possible to date. However, LEAP's experience also suggests that many people do not want the tribal authorities to own the land although they do not want to cut ties altogether. It would appear that a factor in this independence is a desire to exercise the group property right of exclusion.²¹ If this right is threatened the state has a clear role in supporting groups as a whole to maintain it.

Finally, the role of the state seems to include neither blanket transfer of land to tribal authorities nor neglecting the fact that many have well-established tenure processes and institutions which are embedded in people's language and understanding of how tenure works.

5. Conclusion

The state is in a difficult situation. In the name of both democracy and privatisation, it is under enormous pressure to devolve authority and responsibility to governance structures as close to people as possible and to divest itself of its assets. It is under equal pressure to provide a stable environment in which transactions are predictable and understood.

The devolution of authority and responsibility for tenure security to community institutions does not bode well for stability and predictability if changes in the tenure regime result in multiple tenure institutions and in the creation of new bases for claims to land and resources. Potentially competing claims with high risks for social instability must be guarded against by an individual approach to each CPI and avoidance of a "one institution fits all" approach.

In addition, we argue that the state has a key role to play in providing institutional support to all common property institutions, but particularly where integration of

²⁰ LEAP argues that useful indicators of tenure security for members then become the degree to which processes are transparent, equitable, known, transparent, clear, accessible, used, socially accepted and enforced.

²¹ The right to exclude is one of the community constitution rules that is working in many places. Where it is not, this is often the consequence of the state failing to support the attempt to exclude, or people feeling unable to approach the state. (LEAP: 2000)

multiple CPIs is necessary. A careful unpacking of the institutional structuring of processes for asserting, justifying and realising rights at community level should enable greater clarity of what functions the state should devolve and decentralise, to whom and for what purpose. Where the risks to social stability, democratic entitlements and natural resources is too great, the state will need to consider how to adapt existing institutions over much longer time frames than is envisaged.

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