

Presentation of paper “LOOKING BEFORE YOU LEAP” at the CBNRM workshop, Maputo, 8-9 October 2001

Thelma Trench October 2001

Context: Outline of presentation as Thelma did it

Here to present work done recently by Legal Entity Assessment Project (LEAP). Very raw still. Welcome challenges and discussion.

LEAP is a group working in KZN and talking nationally with others on issues around the long-term viability of communal property institutions set up to hold land as part of the land reform programme of the South African government.

LOOKING BEFORE YOU LEAP

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

Prepared for the CASS/PLAAS CBNRM Programme in Maputo, 8-10 October 2001.

October 2001

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Start by explaining some of the things LEAP has already said, as may be unfamiliar to some, and we use them in the paper.... sustainable livelihoods and sustainable development built on tenure security...setting up new legal entities or communal property institutions... first main purpose...

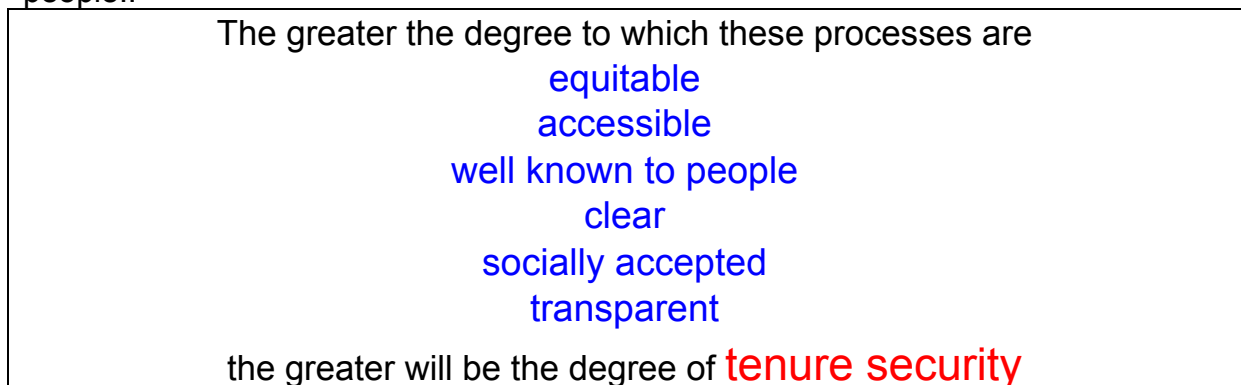
Tenure security is the foundation of sustainable livelihoods and sustainable development.

In setting up new legal entities to hold and manage land, the main purpose should be to secure tenure for the group and for the members of the group.

LEAP understands that.... asserting, in which a claim is made... justifying, which puts forward the basis for the claim....

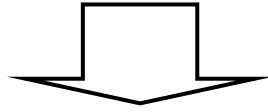


As an indicator of tenure security LEAP uses... greater the degree to which processes for asserting justifying and realizing rights are..... well-known and clear to people..



There are dangers in neglecting existing rules and structures for accessing and protecting rights. Likely to result in multiple purposes for making claims and explaining the basis on which rights are justified.... likely to lead to uncertainty....

“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”.



- **Indeterminacy** around responsibilities, rules and rights
- **Competing and conflicting local institutions** laying claim to different memberships.

South Africa is creating in law new CPIs, to which it has devolved responsibilities around land and resource tenure:

- * conservation
- * mediating competing claims
- * enforcing decisions on rights

To secure tenure in new common property institutions LEAP has taken the position that it is necessary... [norms] i.e. understand the basis on which different interest groups make claims. Recognized that LEAP needs to get clearer on state role-> provided energy for working on this paper.

Both

Start with an understanding of local history, norms and practices, and work with authorities and rules already familiar to people.

Adapt, don't replace.
Accept incremental change.

and

The state has a role in developing and enforcing local tenure rules, arrangements and records.

CBNRM discourse talking a lot about devolution and decentralization. Is this.... new institutions such as CPAs....

?

Is focus in CBNRM literature on devolution and decentralization of state authority paying enough attention to the role of the state in creating a coherent institutional framework?

How does the state define and fulfill its role in doing this?

How do new institutions relate to those already in existence?

?

Insert: MAP of Mdukutshani in mid 1970's

Case study on Mdukutshani.

- * Bounded by Msinga on one side poor, hot dry, overcrowded, and white owned labour tenant farms on the other
- * Inkosi areas with ridge in between, roughly isigodi areas, note Ncunjana lay on privately owned farms at that time

Structures responsible for Mdukutshani....

Structures

**Owner: Church Agricultural Projects (Pty) Ltd
Board of Directors
including induna from each of areas under
Inkosi Mthembu and Inkosi Mchunu**

**Leaseholder:
Mdukutshani Trust**

**Manager:
Committee including**

- CAP directors,
- Mdukutshani Trustees
- additional members

Insert: MAP

Used by about 200 people for winter grazing, firewood, and muthi plants. Users from each isigodi used specific camps.

Each user group under a committee:

- ensure tasks done
- regulate grazing

Two people to liaise with Mdukutshani Committee

Superb basal grass cover, mended fences, firebreaks burned

Described in a CBNRM case study.

Members of Ncunjana isigodi built their homes on CAP Farms.

Used area of grazing bounded by gorge of Isikhehlenge.

1989 - 2001

CAP and Mdukutshani started to raise the question of ownership of the farm....

Discussions on options for transfer included those who had lived on or used the farm.....

- * users of grazing camps
- * those evicted under previous owners
- * those currently resident (mostly Ncunjana)
- * izinduna Mchunu and Mthembu

Insert: MAP of Mdukutshani 2001

CAP keep portion on which homes and hall built

Land on which Ncunjana people built homes would be donated and title transferred to a CPA

Remainder:

leave ownership with CAP
open access to grazing and other natural resources

no-one settled; no-one enforces; anyone who wants to uses grazing. Fences flat and missing; grass grazed flat

Why? History of violence on and around farm.

Land belonged originally with Ncunjana who in the 1980's were not camp users throughout their original boundaries. Because originally Ncunjana land the camp users could not take transfer. The fact that the camp users were using the camps meant that transfer to Ncunjana would be a problem.

Predicted consequences: If CAP transferred ownership formally to tribal structures resp for Ncunjana isigodi which then tried to enforce controls --- ukuqhatha

Here no competing claim (show); transfer of ownership to residents possible

Here (show) ----> transfer of ownership would raise possibility of competing claims between Ncunjana and current users with high risk to social stability

Note that in fact the claims remained **implicit** – an explicit claim could be understood as an act of aggression.

Solution that CAP retains ownership and open access is allowed.

LEAP understand this as a **risk-minimizing decision** and notes

- the costs to the natural resource base and
- the trading of the possibility that Ncunjana and members of the other izigodi asserted competing claims.

Look back at 1980's when it was working well.... some reasons familiar to CBNRM in written paper, also explanations from LEAP theory

Why did this CBNRM model collapse

In the 1980's.....

Processes for asserting, justifying and realizing rights to land and resources were clear and enforced...

....in an institutional context of locally negotiated institutions with clear linkages to the state, including

- Dep Agric: tech services and support – grazing capacity, systems, erosion control
- All local people knew who were the authority structures; and where to get help with enforcement
- Authority structure a coherent combination of traditional authority (izinduna, inkosi and tribal court) and external capacity (Mdukutshani staff, magistrate's court and police)

Some CAP directors raised questions about the appropriateness of their ownership of the farm... [basis shifted] and there were risks in claiming potential rights

Why did this CBNRM model collapse

1989 – the turning point

Questions were raised about the justification of current assertions to land and resource rights

- > old and new types of **justifications** of rights to land and resources emerged with the possibility that they could be **asserted**
- > the **basis** for claiming rights to resources and land shifted
- > the **independent authority** stepped back

Linking...LEAP sees Mdukutshani staff role as indicating a possible role for the state.

?
Is the transfer of title –
i.e. devolution of ownership, rights and duties
– always good?
?

In South Africa state devolving rights, responsibilities and duties on state land, some of this to traditional authorities. Is the transfer of title always good? Mdukutshani suggests some things that the state needs to do.... Stay aware of possibility that Assess risks that different parties might face.

State role in devolving ownership (drawn from Mdukutshani)

- Determine boundaries
- Define who has rights to land and resources within the boundaries
- Define who has authority over the spaces within the boundaries
- Assess risk of asserting claims

Stay aware of possibility that transfer of ownership negotiations could revive old grounds for claiming or result in new ones. Note that rights might be traded if risk of violent conflict is high.

Even where state not devolving ownership....

State role
as an independent authority
(drawn from Mdukutshani)

- negotiating institutional frameworks and agreements for resource use
- management and regulation
- providing technical support and linkages

- supporting enforcement
- use of other structures for enforcement

Linking...Legitimacy of Mdukutshani staff as independent authority partly from close working relationships with tribal authorities...

Tribal authority role

(drawn from Mdukutshani example)

- (maintaining) **general social cohesion**
- **dealing with conflicts and disputes** – providing a framework of familiar justice

----> **helped to create** and maintain **conditions in which independent authority** active in community based natural resource management **might work**

Broad role for the state in starting where people are at, but not leaving it there...

Broad role for the state in setting up new CPIs 1

Make sure that the existing processes for asserting justifying and realizing rights are clear to all members and then question how equitable, socially accepted and accessible they are.

---> Assessment of the degree to which people make use of traditional tenure processes and institutions.

Role in conscious and negotiated change.... [adaptation] of both structures and authorities as well as processes

Broad role for the state in setting up new CPIs 2

Negotiate and facilitate a process of institutional adaptation



agreement on changes and procedures for changes

[records] e.g. PILAR project which some may know. [Linking to exclusion} Some groups we have worked with have chosen to keep areas around allocating and managing land as an internal affair, even where relationships with tribal authorities remained close. Desire for exclusion which the state has a role in supporting.

Broad role for the state in setting up new CPIs 3

- Support use of processes
- Back up outcomes through public records and accessible adjudication functions
- Supporting groups in maintaining the right to exclusion

Welcome challenges hope to use in finalizing paper.