

South Africa

Leaping the Fissures: Bridging the gap between paper and real practice in setting up common property institutions in land reform in South Africa

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Foreword

Two projects in KwaZulu Natal have grappled with different components of tenure security in common property systems. The Legal Entity Assessment Project (LEAP), managed by Tessa Cousins, has been exploring the situation of common property institutions set up under land reform programmes with the aim of improving practices and procedures in their establishment and support. Simultaneously, the Pilot in Land Administration and Records project (PILAR) aims to develop local systems and institutions for recording individual land holdings within common property systems in order to strengthen tenure security for members. This project was initiated by the Association for Rural Advancement, and is led by Donna Hornby. Linkages between these projects arise from the synergy in their objectives and have led to a joint search for conceptual clarity in what is proving to be the complex and messy world of tenure and common property institutions. This paper is a product of that work.

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1. INTRODUCTION

New common property institutions (CPIs) were created in South Africa soon after 1994 to enable self-constituted groups of people a choice about how they wished to acquire, hold and manage land. They were to provide rural people with an alternative to individual freehold, tribal administration and other legal group ownership options. This form of CPI, created through the Communal Property Associations (CPA) Act no 28 of 1996 (the Act), focused on local constitution making as the mechanism for constituting the group and for realising individual and collective self-determination. However, concerns about the viability of these new institutions were voiced within a month of the publication of the Act (Hornby: 1996) and in time became an active discourse that they were failing. (LEAP: 1999).

This paper takes a hard look at the claim that these new CPIs are failing, and argues that there are no meaningful indicators against which assessments of success or failure can be made. It asserts that the tenure security of the group and its members should be the primary purpose of land reform CPIs because secure tenure is the primary mechanism for reducing risk for vulnerable people and is the universal need of the group. Securing tenure of individual members of CPIs rests upon clarity and accessibility of procedures for the assertion and justification of rights and institutional mechanisms for realising and enforcing these rights. Useful indicators of security then become the degree to which these procedures and mechanisms are known, accessible, equitable, clear, used, socially accepted, transparent and enforced. This in turn requires that CPIs are developed from adaptations of current known and accepted local practices within a broader environment in which there is legal, institutional and technical coherence and support for this approach. Without an enabling legal, institutional and technical framework, the tenure security of members of CPIs will not be significantly improved. It is political choice that informs whether or not this will take place.

We begin by analysing what the new CPIs were set up to do and the legal and political framework in which they were created. It goes on to reflect on lessons that the Legal Entity Assessment Project (LEAP) has drawn from assessing the situation of land reform CPIs. Using the focus of tenure security and calling on tenure work elsewhere in Africa, the paper then interrogates in depth how membership has been constituted in land reform CPIs and whether the institutional context in which they have been set up has provided adequate support. It concludes by asserting that community constitutions reflect ambiguous and contradictory definitions of membership without reference to local practices and institutions. The state has not supported CPIs institutionally, acknowledged the importance of institutional linkages at local level or provided legal, institutional and technical coherence. This creates an indeterminacy that puts tenure for members at risk. The analysis leads to some practical suggestions for field and bureaucratic practices. It proposes that prescriptive requirements be replaced by an approach that enables groups to articulate current procedures and institutions, and uses the suggested indicators to achieve gradual adaptation towards greater equity. A framework such as that offered by the draft

Land Rights Bill is needed to provide support for such an approach and thus broader legal and policy reform is necessary.

2. Legislating Social Order

2.1. What the CPA Act intended

The CPA Act was one of the early pieces of legislation developed as part of tenure reform in South Africa after 1994. The Act 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” (DLA, 1996: 1). Policy makers recognised that communal systems fulfill social and economic functions and should be a choice for people as a tenure form. An assumption behind the drafting was that available legal forms (voluntary associations, share-block schemes, sectional titles and trusts) were generally not appropriate due to complex administrative requirements. Furthermore, they noted that trusts (widely used as vehicles for this kind of land holding) place the property in the hands of some on behalf of others, rather than directly in the hands of people themselves. (DLA, 1997: 63)

The legal basis for the establishment of a CPA in terms of the Act is an agreement between the members of the community, which is written into a constitution. However, the Act also prescribes principles to be included in every constitution. These principles are the values enshrined in the national constitution:

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

In addition to this requirement, the Schedule to the Act specifies the matters that must be included in the constitution for it to be officially recognised and registered. These can be grouped as follows:

Membership:

Definition:

- Qualification criteria for membership and a list of names and ID numbers.
- Where this is not possible for intended members, principles must be stated for identifying those entitled to membership.

- Classes of membership (if any), and whether membership is individual or family based.

Rights:

- Rights of members to use of property.
- Differences in rights (if any) for different classes of members.
- Rights of members to sell, and if so to whom.
- What happens to rights on the death of a member.
- What happens to rights and property of members if membership is terminated.

Procedures:

- Procedures for resolving disputes on rights to membership.
- If membership is family based how the unit is represented in decision-making processes of the association.
- Grounds and procedures for terminating membership

The property:

Purposes for which it may be used, physical division and allocation.

Decision-making:

- Procedures governing the AGM and General Meeting must be specified, as must be rules for changing the constitution and dissolving the association. Disciplinary procedures and dispute resolution mechanisms must also be specified.
- The committee: Election, composition, powers, removal and payment must all be specified. Records of meetings and financial transactions must be kept and made accessible to all members.

There is a tension between the Act's intention of enabling the creation of CPIs on the basis of agreements reached amongst self-constituted members and the desire to institute democracy and to protect vulnerable members from abuse. This leads to tight prescriptions on what must be agreed to and the principles that must prevail in reaching these agreements. These requirements, combined with policy objectives (DLA, 1997: v) that land reform projects must be sustainable and improve people's lives, set the scene in which the resultant institutions become overburdened with unrealistic objectives and expectations.

The question is, how did this density of expectation come about?

2.2. The political context

Land NGOs, human rights lawyers and academics drafted the CPA Act in 1995 in the wake of the national South African Constitution becoming law. Thus the Act was passed in a legal and political environment dominated by the heady successes of constitutionalism as a means of creating the citizenship of a new South African democracy based on universal values. It was a time marked by a belief that community and citizenship could be reinvented through constitution-making. Klug (2000: 1-3) argues that there was a consensus that individual and collective self-determination would be realized by adopting the universal values of the new Constitution. Thus the CPA Act reflected a process of self-constitution for rural landholders that was modeled on the successful negotiation of a national Constitution. He goes on to suggest that this paradigm was proposed as the means to resolve locally, through CPAs, a range of tensions unresolved in the national Constitution. These include how groups could hold land communally while solving problems against discrimination of women and the role of chiefs. (Klug, 2000: 1-15)

The paradigm in which the Act was drafted was driven by a key assumption and a critical political choice that were to have major consequences for the processes of constructing CPIs and for their effective functioning.

The assumption expressed in the Act is that ‘the purpose of law is to define how things should be, with the aim of transforming reality accordingly’ (Levigny Delville, 2000: 107). This positivist understanding sees the law as an instrument that can prescribe, and thus legislate a particular social order into being. The Act thus intended to create a social order in land reform projects that was defined by self-determination within the universal principles of democracy and equity.

Underlying this assumption is a firm faith that law can regulate society and regulate it absolutely. There is little recognition here of either the common experience that society can only ever be partially regulated, or of the multiple sources and spheres of regulatory activity that exist in any society. According to Moore (1978:3), social reality is a mix of actions, which are congruent with rules (although they may arise from conflicting or competing rule-orders), as well actions that are “choice-making, discretionary, manipulative, sometimes inconsistent, and sometimes conflictual”. In other words, the law, as a product of legislative activity, is only one source of social regulation and its intent will be mediated by the impact of other sources of rule-making and by discretionary activity on how the law is used, interpreted and manipulated within any particular human grouping.

Legal positivism is ill-equipped to embrace this social complexity precisely because it aspires to social transformation and not merely social regulation. The CPA Act is no exception. However, the failure of legislators to accommodate the complex social reality that the Act intended to transform continues to play itself out in the establishment and

functioning of CPIs through officials at many levels, service providers contracted by officials, and communities engaging with land reform.

In addition to the positivist assumptions expressed in the Act, the legislators also made an important political choice in excluding any role for traditional authorities and customary practices in the new CPIs. This choice was not in itself surprising, and is named specifically in various places in the White Paper. (DLA, 1997:32) Policy makers were concerned about tribal authorities that do not function democratically, are abusive, and operate in ways that undermine constitutionally entrenched human rights. The law therefore intended to provide a means for land owning groups to choose a structure to represent them in making decisions on land access and management issues. (DLA, 1997:63)

What was surprising, however, 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, particularly in KwaZulu-Natal. The White Paper also reflects this unresolved, ambivalent political choice, which accommodates both chiefs and democracy in theory but does not give guidance about how to do this in practice.¹ This has consequences that are discussed in detail below.

Land reform policy was drafted in a political environment in which multiple voices and interests were listened to, as the White Paper "attempted to take account of conflicting demands of various stakeholders." One of these was for "sustainable land use". The commercial farming sector and unspecified provincial government departments specifically noted concerns regarding communal ownership and the problem of "free-riders" (DLA, 1997: vii). Sustainability, a concept for protection of the environment and people, when left undefined can become a threat, wielded to blame and exclude the poor.

As policy and law tried to reflect the many concerns of the varied interests in the country while holding firm to the principles of equity and democracy, so the new CPIs became the terrain on which multiple, conflicting interests and needs would have to be balanced and realized.

3. Reality on the Ground

In response to widespread concerns about the long-term viability of CPIs being created through land reform, the Legal Entity Assessment Project (LEAP) assessed a number of

¹ The current conflict around local government boundaries and elections demonstrates this unresolved nature of the roles of elected and traditional authorities.

CPIs in KwaZulu Natal in order to inform strategies for appropriate intervention. (LEAP, 1999)

3.1 Problems encountered

These case studies provided the basis for a number of interactions with communities, DLA officials, service providers, lawyers and academics, from which the following major problems have been identified:

- *Unrealistic expectations of associations:* CPIs are expected to perform many functions at an early stage, meet utopian value-based objectives of equity, democracy and non-discrimination, and exhibit ‘viability’ and ‘sustainability’. There are no given criteria for measuring levels of outcome.
- *Processes for setting up associations in land reform projects reflect a lack of understanding of tenure and of institutions.* There is no conceptual model for institution building in the project cycle, and officials or service providers demonstrate little understanding of tenure issues in common property systems. It is not practice to build on existing practices or institutions or in reference to them. There is little clarity or subtlety on designing an appropriate legal vehicle, or mix of vehicles, for the situation. Establishment of legal entities has become instead 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 well discussed agreements.
- *The CPIs tend to be set up as if in an institutional vacuum.* The associations are not linked into other institutions of land administration, such as local government or tribal authorities, unless they do this themselves. Furthermore, there is no monitoring of trusts nor is there any support to CPIs. Although the Act provides for a monitoring and support role by the DLA, it has not allocated resources to fulfill these obligations.
- *In the founding documents membership is frequently defined in contradictory ways.* This sets the stage for a lack of clarity about the basis on which people can make claims to land rights or use. Where the documents are not contradictory, they do not provide protection for the bulk of community members as they give rights of alienation of land to household heads.
- *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. Sometimes they contain clauses that the community does not know about because lawyers or officials made additions or changes in order to meet registration requirements, or because they thought they were necessary. These all cause problems in themselves, but LEAP suggests that perhaps even more importantly they reflect attitudes and practices of officials and service providers. The officially constructed documents indicate a clear weighting on the side of imposition and barely acknowledge, let alone attempt to balance, the tensions inherent in the Act between prescription and self-constitution.

3.2 The need for indicators

As an early task LEAP needed to discover the most meaningful indicators for assessment, and was confronted head-on by the multiple purposes and idealistic expectations imposed on CPIs. Goals are a starting place for indicators, and LEAP (2000: 11) identified the generally understood purposes of the CPIs to be to:

- enable transfer of land for the group, thereby securing the group's tenure;
- provide security of tenure for the members of the group;
- provide democratic, accountable, equitable governance;
- manage natural resources sustainably;
- manage development;
- ensure gender equity.

A number of the above do not have indicators, e.g. the goals of gender equity (Hargreaves and Meer, 1999), tenure security and sustainable resource management. Those aspects that do have indicators, such as democracy and accountability appear to relate to what is in the document in relation to the Act and not to practices on the ground. LEAP therefore decided that a sweeping judgement on these institutions as “working” or “not working” is not possible until agreed, clear and appropriate criteria for evaluation have been established.

Certainly the institutions' practices are to varying degrees far removed from their constitutions, but that is not a suitable measure of their effectiveness, as the documents are (again to varying degrees) flawed. There do seem to be a number of both varying and common problems and weaknesses in the CPIs, but the causes of these problems lie at a number of levels, and LEAP has thus come to reflect on the larger legal and institutional picture surrounding the CPIs under consideration.

The search for meaningful indicators led LEAP to suggest that **tenure security** should be the primary purpose of land reform CPIs. The purposes of equity, democracy and accountability should operate to secure tenure rights, rather than be models of an ideal

society. Moreover tenure security and institutions for this purpose are the foundations for building natural resource and development management.

LEAP now asserts that the key indicators should be:

- the processes through which community members assert their interests and rights to land;
- the basis on which these are justified;
- the institutional processes and mechanisms by which rights are implemented.

What needs to be measured then is the **degree to which these processes are known, equitable, clear, accessible, used, socially accepted, transparent and enforced.**

This has led LEAP to suggest that the focus for attention must be the definition of membership and on how institutional processes and linkages work. Membership creates a basis for an assertion of rights. Institutional processes decide and arbitrate on the validity of the assertion, on the nature of the right and on the means of enforcement. (MacDonald C, 2000).

4. Lessons from African Tenure Reform

A current wisdom is emerging from attempts to reform tenure throughout Africa. Historically, colonial land law either disregarded customary land management systems or adapted them to benefit rulers. This legacy of legal dualism continues as a current reality that cannot be ignored. Liberation governments also largely dismissed customary rights and systems in favour of land laws geared towards economic objectives, such as nationalisation (that centralised allocation rights in the state), or individual titling (that was intended to facilitate land markets to encourage investment). These stated objectives were rarely achieved and the interventions, combined with the colonial legacy, often resulted in confusion about who had rights and what the legitimate processes were for asserting, justifying and realising rights (Toulmin C and Quan J, 2000).

A number of lessons were learned from these attempts at reforming tenure, but key for our purposes are the following:

- customary land management systems do provide secure tenure, and sufficiently so to facilitate investment.
- customary rights and land management systems survive legislated attempts to transform or eliminate them, and indeed often re-emerge as dominant forms in “reformed” areas.
- customary land management systems adapt to the local impact of legal, political, economic and social changes and are therefore flexible and evolutionary.

- failure to clarify the respective roles and responsibilities of multiple land management systems results in overlapping, competing and conflicting rights and adjudicatory mechanisms. These are frequently manipulated and exploited by powerful elites.

While tenure security remains a vexed issue in Africa, there is an emerging consensus about the elements that need to be built into any attempt to secure tenure and what the constraints are likely to be. Using this as a framework, we can now attempt to identify what one would need to look for in the legal and administrative processes of establishing CPIs in order to assess the extent to which these principles are incorporated. The three key areas are:

Firstly, adapting to existing realities rather than attempting to replace them involves giving legal recognition to existing rights and building linkages between local landholding systems and formal law (Bruce, 1994). However, this poses significant challenges and risks. Attempts to codify local rules in Niger resulted in the simplification and fixing of an otherwise complex and flexible body of rules. Instrumental approaches of recording existing rights in Ivory Coast resulted in administrative simplification of different levels of interlocking rights thus resulting in the marginalisation of secondary rights. (Lavigne Delville, 2000: 107-108)

Secondly, bridging or harmonising local (customary) and statutory law is enormously complex. Models of private ownership and registration inform statutory tenure law while customary law is by nature procedural. (Chauveau in Levigny Delville, 2000:98) Statutory law thus defines each person's rights specifically and substantively, while rights allocated through customary law are the result of negotiations based on known procedures in which local authorities are arbiters.

Thirdly, legal, institutional and technical coherence requires that tenure laws are consistent with one another, that levels of institutional support and control are clear and support the legal objectives, and that the technical components fit the legal objectives and can be implemented from both a state and public perspective. Legal pluralism poses particular challenges to the possibility of this coherence because there are multiple arbitration authorities. The absence of clear links between these authorities leads to uncertainty about who may deliver rulings and at which level, resulting in unpredictable outcomes and the challenging of all forms of arbitration. (Levigny Delville, 2000: 119-121)

The key constraints to securing tenure are likely to be the costs of setting up cohesive frameworks based on in-depth local knowledge and consultation, and making explicit political choices where confusion benefits ruling and administrative classes and their allies. (Levigny Delville, McAuslan, 2000) An area of fundamental political choice for many African states is that of the relationship between the authority of the state and the authority of traditional leaders. These systems of governance are based on radically different principles of authority and are both of a highly political nature, which makes

harmonisation difficult. Nevertheless, the situation is worsened when the absence of political clarity manifests itself in complex interrelated legal texts that are often poorly understood, and which create a fuzziness that ruling and administrative classes can exploit.

5. Constituting Membership

Clear definition of, or criteria for, membership is commonly proposed as fundamentally important for securing their tenure rights, and for managing land. Membership accords rights and is therefore the basis upon which rights can be asserted and justified. It is also the basis upon which others can be excluded and is therefore the basis for constituting community and group identity. In recognition of this the CPA Act requires membership definition, and the regulations to the Act put it near first on the list. Terms of References for legal entity establishment all ask for “clarity of entry and exit” i.e. how membership is gained and lost.

Yet there is legal incoherence in legislation and also in the use/definition of “member” in many CPI founding documents. Moreover communities have adapted their own use of the term in order to optimize access to grants and to meet bureaucratic requirements. This section shall consider these issues and what this means for the constituting of membership by looking at founding documents and community experience in a number of LEAP case studies.

5.1. The message on membership from constitutions

LEAP spent some time analyzing the constitutions, first to compare them with actual practice observed in the field, and again more recently when undertaking to translate the documents into the communities’ vernacular – and this meant turning them first from legal into ordinary English. The documents reveal some of the problems around “membership”, and how practitioners and officials have thought about and addressed these.

Terminology regarding membership is confusing in the documentation. There are references to beneficiaries where trusts were used, this being the accepted legal term, but “beneficiaries” is also the term commonly used to refer to those who receive land reform grants. The Act refers to members of the Association, and in many of the documents references are made to persons, members, member households, participating members, rightful members, members of member households; and these references are neither consistent nor differentiated. Trust deeds sometimes refer to members and sometimes to beneficiaries, because of the desire to create an accountable membership rather than beneficiary relationship to the trustees.

However what we see in the documents is not simply chance variation in terminology, nor just poor definition and sloppiness on the part of the drafters (although there is plenty of evidence of this). Rather there is some deliberate variation in how membership is dealt with by drafters, but there is reason to doubt that this reflects the real differences between particular communities.

One major problem drafters face is whether membership should be defined as **household** or as **individual**. The concern is how to secure individual rights when land rights are gained through being part of a household, and what are the nature of the rights, responsibilities and internal relationships of the household. This is of particular concern when it comes to the securing of women's tenure rights, as households are sites of "co-operative conflict" in which women are structurally disadvantaged. (Sen in Cousins 1996, 19) Changes to customary arrangements of responsibility and obligation can have the unintended consequence of increasing risk rather than adding to tenure security for women. (Cousins 1996, 35).

There is no constitution that LEAP has seen that manages to reflect community concepts and practices regarding "membership of the community" and the attendant rights and responsibilities. The drafters generally seek to design a set of clauses that define community practices according to the legal and policy principles of equity. Drafters are biased towards a formal legal paradigm as regards, land, ownership, and decision-making. Thus the constitutions usually seek to combine ensuring security for all, equity and democracy AND rights to transfer and to alienate rights AND processes to expel and exclude members AND to define voting rights and quorums in standard received formats. These are fissures that cannot be bridged by current law and practice.

5.2. A closer look at some case studies

To turn to some examples of how this plays out, we draw on examples of constitutions and compare these to community practices as LEAP observed them. In the constitutions of Intuthuko, Vukile/Impala and Nkaseni ²the same pattern of unclear, inconsistent, and therefore contradictory definition of membership can be seen. Extracts from Nkaseni's constitution serve to illustrate:

Preamble: ...establish ...Trust...to hold (land) for and on behalf of the participating member families from the community, and generally facilitate the land use of said land by the participating members. In definitions: "participating members" shall mean the rightful participants ... which are designated in clause 10.1 Families eligible to apply for benefit....of the Trust ...shall comprise of the families ...whose applications for a settlement grant has been approved by the Department of Land Affairs. Membership shall be vested in

² Constitutions and trust deeds, field reports and constitution simplifications and assessments referred to are included in the bibliography, and thus are not referenced here.

these families and the said families shall be registered in a membership register as participating members.

The above seems to say clearly that beneficiaries of the trust are families. Yet in later clauses a member is referred to as an individual:

*(10.3) ...new membership shall only be considered if and when a participating member decides to leave the land and wishes to sell his or her rights in the land...
(10.4) Membership of the Trust shall be terminated upon...the death of the member, at which point the legal successor of the deceased will become a member
10.4.30 membership may be terminated ... participating member has engaged in conduct which would constitute an offense in terms of the Act. It goes on to say if
(10.4.4) a participating member is expelled... the Trustees shall award his or her spouse or ... dependants so as to replace... (him or her) on the membership register. Clause 11.6 refers to The right to bequeath to his or her heirs and In the event that a member dies, the surviving spouse will automatically inherit membership. The clause on voting reflects the participating member as ...representing his or her family.*

We see then that in this example families or households are given as the unit of membership but on issues of termination or transfer, membership refers to household heads. Let us now look at what the fieldwork in the two of the communities reveals about membership in practice.

Nkaseni

In Nkaseni there are 39 beneficiaries, and 25 households. These are labour tenants, who did not move from their existing homes and have a strong clear identity as a community. There are 6 families who live outside the boundary of the piece of land demarcated for sale to the group who decided not to move, because they would have to rebuild. They are considered part of Nkaseni, are part of meetings and decision-making, and the community map included them.

Vukile

In Vukile the picture is different. The previous landowner evicted most of those who lived there, and after 1994 the evictees gathered to seek to reclaim this land. This they did under a redistribution project. The farm valuation meant that they had to find more people to secure sufficient grant money, so they sought out those who had been previously evicted, and found enough to 'contribute their names' to enable the purchase. So the constitution talks of 110 households, when there are only 16 living on this land. This farm adjoins a tribal area, and is effectively governed by the tribal authority. It is also used for extra grazing for the adjoining tribal area, though recent reports suggest that

residents are beginning to raise objections to this.³ The “community identity” and their strategy for future membership is not clear.

The use of households as units of membership is valid in terms of community practice. It is the definition of members as those who are grant beneficiaries that moves the documents away from reality in the first instance, and goes on to create further distortions.

Uzulu Angifuna Ukusuka

To draw on another example, a labour tenant CPA, where there are seven beneficiaries and four households. “Persons” are members, yet “individual membership” is later stated to be vested in households, which would result in four members. In the annexed list of members seven names are found. In either event the “standard” constitution clauses are nonsensical regarding election of a committee and separate meetings and quorums.

The other three constitutions LEAP analysed do not have the same inconsistencies about membership definition. The first two achieve clarity by making no attempt to protect the tenure of household members.

Emsi

In the Emsi constitution the household head is the member, and members are those household heads whose grants are approved by the DLA. All rights of land and its use, rights of voting and decision-making fall to this member. Clause 10.8 states that *dependants of a member.... may reside with him or her*. The notes made at the time of drafting indicate that the drafters did discuss the reality of households as complex institutions containing rights for all its members. Nevertheless this constitution allows the member to bequeath his or her rights away from those household members living on the property. In Emsi there are 52 households, of which 8 are not on any beneficiary list, and which no-one is able (or prepared?) to explain. There are two groups, those who were evicted, scattered, and have returned, and those who stayed. They live on different sides of the river, and have differing experiences and attitudes. People are not working in terms of their constitution at all, and governance comes from the local tribal authority.

Gannahoek

The Gannahoek Trust deed is different again. This was developed prior to official land reform, and, interestingly, was used as a case study by those who drew up the CPA Act. Here “member” is not used as a concept, beneficiaries are founder kraals, which are listed, and which participated in the original purchase of the farm, and (for future) any additional established kraal recognised at Gannahoek in terms of the Agreement. Kraal is

³ Personal communication Hlongwa M: September 2000

defined as *a family unit, comprising of residents, as traditionally accepted amongst the residents of the farm and shall include those persons dependant upon the head or heads of the family according to civil and indigenous law*. However in recognition that this definition gives rights of voting and decision-making to household heads alone, the drafters of the document attempt to broaden management rights by requiring the trustees to establish a separate body of two representatives from each kraal, for decision-making and management.

In Gannahoek there is clarity amongst the residents about who belongs, although there exists some disagreement about who qualify as new entrants. People struggled together to fight eviction, collected money and purchased the farm, only receiving land reform assistance at a later stage. They therefore did not engage with DLA criteria for grants or registration, or have to incorporate these considerations into their document. Those who are members all paid in to purchase the farm. There is no sense that this was paid by the ‘household heads’ as separate from their kraals. The ‘residents committee’ described in the constitution, and intended to ensure broader representation, simply never happened; it seems more because it did not make sense to people than that they resisted the idea.

5.3 Understanding the difficulties of membership: listening for harmony

The three key elements for ensuring tenure security identified earlier are:

- community practices should be adapted rather than replaced
- customary and statutory law should be bridged and if possible harmonised
- effective implementation requires legal, institutional and technical cohesion

Consideration of the above experiences in terms of these areas suggests the following:

Apart from the problems at the formal legal level, the constitutions are not in any way congruent with the daily reality of people’s lives. In order to go the route of adaptation and harmonization we would first need to know what current practices and customary law are regarding ‘membership’. At present there is insufficient understanding of current practice, nor are land reform processes allowing this to be explored. From the LEAP fieldwork we get a partial picture, which mostly reflects that it is not what the documents set out. The picture of people’s realities is more diverse than that revealed by the documents; not surprising as they reflect a particular, dominant cultural and professional paradigm. The LEAP case study communities vary in the degree to which they express clarity and cohesion about their membership. However none of the groups work with membership as set out in their constitution; none of them refer to their document and the documents do not come close to actual practices. The degree of variation between documents and practices is different between communities.

Reflection on legal and technical cohesion highlights where some of the problems in membership definition lie. The CPA Act enables members of groups to hold and own

land. There are, however, a number of other laws and policies that define tenure rights and entitlements. There is also law and policy that determines what government can authorize expenditure for. There are two key issues:

- i) Firstly, land rights legislation creates overlapping land rights and entitlements. For example, a person living on state land can, under some conditions, be both an occupier (ESTA, 1997⁴) and a beneficial occupier (IPIRLA, 1996), while a person living in a labour tenant family can be both an associate and an occupier.
- ii) Secondly, and more importantly in practice, there is little consistency between the rights granted by the three laws and Act 126 (1993), which sets out the criteria for determining who can apply for a grant.

A consequence of this inconsistency is that the implementing officials, who must account for public expenditure in terms of law and policy, draw up lists of grant beneficiaries according to the poverty criteria of the policy and not according to the land rights and entitlements people have. It is then a very small step for officials to use these same lists for determining the membership of the group that will own and hold the land, especially given that the grants are intended for land acquisition (amongst other things).

Thus while the Act leaves the substantive definition of membership open for local definition, the ambiguity in policy and legislation allows the official (or lawyer) to interpret the beneficiary list as defining group membership. This is legally contestable in terms of land rights legislation and may have little to do with people's own identification of membership of their community.

6. Institutional Problems and Perspectives

The present institutional context in which CPIs are established is plagued by a number of problems. Firstly, the DLA does not provide support to CPIs once they have taken transfer of land. This is because it has no legal authority to do so in the case of trusts, and inadequate human resources to undertake its legal obligations in terms of the CPA Act. Secondly, the DLA has not created the institutional support for managing CPI records and/or registration of individual household land holdings and rights, and thus has no basis for intervention in rights disputes. Thirdly, the Act did not provide for traditional authorities and there is "no guidance on how [they] could be accommodated within the CPA". (ANCRA, 1999) Fourthly, many communities have disregarded their constitutions and have adapted or created local institutional support for themselves. As a result of this, there is concern that multiple allocatory and adjudicatory procedures will create overlapping *de facto* rights that elude both official and legal resolution, creating fundamental insecurity of tenure.

⁴ The Acts referred to are included in the bibliography in full

This section will first consider some of these issues from the perspective of communities who have either taken transfer of land or are in the process of doing so. These examples are all drawn from KwaZulu-Natal where the issue of tribal jurisdiction and land control may be more present and politicised than in other provinces. We will then look at elements of institutional incoherence at government level.

6.1. The need for hybrid institutions: through the eyes of communities

Ekuthuleni

Ekuthuleni is a settled community in the process of taking transfer of state owned land that people have lived on for a long time. The area is an isigodi⁵ of the Entembeni Tribal Authority and is currently managed by an induna who has authority over land allocation and dispute resolution. An elected land committee, that the induna chairs, is at the forefront of the initiative to take transfer of the land. A constitution in terms of the Act has been drawn up, but is not yet registered and nor has the committee been officially elected.⁶ The constitution makes a passing reference to the continuing role of the Tribal Authority and yet it does not unpack this role. Furthermore, it transfers all the functions of the tribal authority to the CPA. The constitution also makes provision for members to sell their land parcels.

At a recent workshop delegates role-played institutional issues and procedures. What follows is one of the role-plays.

“Dlamini went to see his cousin, Ntombela, to ask him for some land. Ntombela agreed and pointed to the piece of land along the river that ended as the river turned at his neighbour’s house. Dlamini could have it up to the tree and from there to the road.

Ntombela then took Dlamini to the induna to introduce him and tell him he’d agreed to subdivide his land. The induna asked Dlamini if he had a letter from the Inkosi of the area he was leaving, and Dlamini said yes. The induna told Dlamini to accompany him to the Inkosi⁷ of the area’s house, where Dlamini paid the tribal secretary R400 as a khonza⁸ fee. The Inkosi read the letter Dlamini had, asked him some questions and then agreed to accept him as a member of the tribe.

Back at the isigodi, Ntombela asked his neighbours to come to his house to constitute an ibandla⁹ at the induna’s request. The induna arrived and pointed out

⁵ An isigodi is a tribal ward that falls under the authority of a single induna.

⁶ The community says a committee has been elected, but the DLA official was not present at the election.

⁷ Inkosi is translated as chief.

⁸ Tribal membership fee.

⁹ A group of neighbours who witness demarcation. Can be group of elders in other communities.

the boundaries so that Dlamini, Ntombela and all the members of the ibandla could see them. After the ibandla left, Dlamini gave the induna a bottle of whiskey, paid him R40 for his help and provided meat and drink for a small braai. The following day he came and built his house.

One day, Dlamini came home and saw pegs in the ground on his allocated portion. He was wondering what they were for when Mrs Dladla arrived and said the CPA had allocated her a portion of land and marked the boundaries of her allocation with the pegs. When Dlamini tried to tell Mrs Dladla that the induna had already allocated that land to himself, Mrs Dladla replied that the CPA had the authority to subdivide land, not the induna. Unsure what to do, Dlamini asked Ntombela's advice, and Ntombela suggested they go and report the situation to the induna, which they did. In the meanwhile, Mrs Dladla, also concerned that her allocation was at risk from Dlamini, went and reported the situation to the committee.

Both the induna and the committee were most disconcerted by the reports they received. The induna said the authority to allocate land came from the inkosi who was the born leader of the area and nobody could take this authority away. The committee told Mrs Dladla that since the land had been transferred to the CPA, the elected committee had the authority to allocate land in terms of the constitution that was registered with the DLA.

The two institutions were finally forced to meet in order to resolve the situation. The dispute was intense and conflictual, resulting in an urgent call to the DLA to come and mediate the situation as provided for in the CPA Act.”

The play expresses the confusion the community has about how the new land management system will relate to the practices people are familiar with, and the anxiety that dual systems will result in overlapping rights and dual adjudicatory processes. It also indicates the necessity for outside institutional support to resolve issues of competing local institutions. Sadly, this support is not likely to be forthcoming.

If in this community there is a fear about the future, in other communities the reality of dual, un-integrated institutions is already the source of struggle and, at times, outright conflict.

Amahlubi

The AmaHlubi, for instance, recently took transfer of land they were evicted from last century. All members of the community pay allegiance to Inkosi Hadebe. The community currently lives on two properties, one of which Inkosi Hadebe owns personally and the other that falls under the Ingonyama Trust. The new land links the two previously disparate properties together and is owned by a trust. During the process of setting up the

trust, the community requested that the land be transferred to Inkosi Hadebe. However, the DLA did not have policies in place to enable this and, at first, the NGO assisting them also resisted the idea that an inkosi should own land as his personal property. The community thus strategically decided to conform to DLA's requirements to set up a trust so that they could gain access to the land, with the understanding that Inkosi Hadebe and tribal structures would continue to administer the land once it was transferred to the trust. During legal entity workshops, the community decided that Inkosi Hadebe should be an ex-officio member of the trust since he needed to stand above ordinary elected trustees. A provision in the trust deed thus refers to trustees making decisions "in consultation with" the Inkosi. In addition, a certain number of trustees had to be members of the tribal council.

Despite the community's opportunistic decision to conform to government requirements to set up a trust, and attempts to integrate the tribal authority with the legal entity, there are serious power struggles in the trust. These manifest themselves around definitions of membership, access to grazing and arable land, development visions and management of the new land. According to those trustees and community members who subscribe to tribal practices, all members of the AmaHlubi have access to the new land and its natural resources, the indunas and councillors continue to have allocatory functions and the tribal court resolves disputes. According to the chairman of the trust and those community members who are seeking to transform the area along modern development lines, only those people who are grant beneficiaries have access to the new land and the trust has allocatory and dispute resolution functions. When asked about the role of the tribal authority in the trust, the chairman says the trust is obliged to inform the inkosi about its decisions. This, he says, is what "in consultation with" means.

It is not clear yet how these fissures will be resolved in practice. What is clear though is that failure to resolve them will result either in paralysis of the trust and in members of the community attempting to access resources through opportunistic use of the dual institutions. Although it is too early to predict what this may mean for tenure security, some scenarios can be forecast, namely, that a hybrid institution will develop, or that either the trust or the tribal authority will gain dominance and extinguish the other, or that things will be immobilized. While the legal implications of this are uncertain, what is certain is that this process will occur with little recourse to government support and institutions.

Thembalihle

The AmaHlubi are living with and managing tensions between dual institutions, although the long-term outcomes of this tension are still unknown. The Thembalihle community, however, was caught up in a violent war of tribal jurisdiction that has resulted in deaths and displacement of people. An NGO facilitated the processes of setting up a trust in Thembalihle that involved widespread participation and consultation of community members, with an emphasis on the involvement of the youth and women. Issues of tribal

allegiance or jurisdiction were either not raised at the time or were not seen to be important. It was only once the trust took transfer of the land that two amakosi laid claim to the land and the war over who had jurisdiction ensued. Attempts by various government departments and NGOs to mediate the conflict were unsuccessful. The failure of this land reform project did, however, serve to underline that the amakhosi, their jurisdiction and their control over land could not be disregarded in land reform projects. Despite this, legal and policy frameworks give no guidance on how to work with tribal and traditional authorities, and official practices still tend to ignore them in the setting up of common property institutions.

Nkaseni

At Nkaseni, for instance, the constitution has no references to customary practices and yet the community clearly understand property boundaries in a traditional or customary sense and not as defined by the cadastral system. Thus, relationships with people living on neighbouring privately owned farms are close knit and the neighbours appear to have “insider” status, if not actual rights to the land and resources. Furthermore, community is understood as inclusive of those people living on neighbouring land, and an ibandla¹⁰ makes decisions affecting the community, not the trustees.

It is not clear why the attempts to develop hybrid institutions in some communities appear to be relatively conflict free, at least at a local level. It might be due to a strong district leadership that has spearheaded the engagement with DLA’s land reform programme and that understands and respects the role and involvement of the tribal authorities in the area. What is clear about the hybridisation is that these local CPIs are closely linked to wider institutions in the district which play a central role in their functioning. But it bears repeating that these linkages are not as a result of land reform law, policy or practice.

While the jurisdiction and involvement of tribal authorities is present in many rural people’s lives in KwaZulu-Natal, there are areas where it is absent. Members of the Gannahoek community were labour tenants who took transfer from the farmer of the land they had lived on for generations. Leadership in the community is spread across a number of elderly men, who are also mostly trustees. Although the chairperson of the trust is referred to as an induna, this is more in the sense of responsibility, authority and leadership than an allusion to a tribal link. Nobody in the community knew who the inkosi with jurisdiction over the land was, and there was clear consensus that the tribal authority has no role to play in the affairs of the community.

¹⁰ Unfortunately, the constitution or history of the ibandla is not described in the case study.

6.2 Coherent legal and institutional frameworks: with eyes on government

Government has a constitutional obligation to provide secure tenure to all South Africans. The key legal and technical mechanism it has used to do this is ownership through a title deed. The Act gives rights to members of groups through contractual agreement with the CPA, which owns the property in freehold. Recognising the essential negotiability of rights to land and resources in CPIs and the possibility of abuse opened up by this negotiability, the Act provided for a monitoring and interventionist role for the DLA in CPAs.

This section looks briefly at why DLA doesn't perform this role and some of the implications of its inaction. We then consider some alternatives to contractual rights and some of the institutional and technical issues involved in these alternatives.

The Deeds Office, Surveyor General's Office and the private sector professions of conveyancing and surveying underpin freehold tenure in SA. The legal provision for the institutional support of members of common property arrangements is in the CPA Act and trust legislation that provides for fiduciary monitoring by the Master of the High Court.¹¹ The freehold transfer of property to CPIs ensures theoretically that the group's tenure is secured against arbitrary appropriation by the state and others.¹² Members of CPAs who have been treated arbitrarily by the group have legal recourse to the DLA.

These legal provisions for DLA's institutional support of members of CPIs are not realised in practice because the monitoring functions provided for by the law have simply not been undertaken. Some provincial officials have said that "land reform projects are coming back to us for help"¹³ with land invasions, eviction of members and disputes around land and resource allocations. However they have said that they cannot intervene in CPIs because there is no basis for this intervention. They argue that problems with beneficiary lists and the absence of spatial records of member holdings and rights means that there is no information base from which to make an intervention. (Hornby, 2000) In addition to this, they argue that they do not have the capacity to monitor CPAs.¹⁴

In addition, Regional Councils tasked to provide services with the remainder of the grants have approached DLA to clarify who the rights holders are in order that they know who to consult with.¹⁵ Although there is no official position on how to deal with these issues,

¹¹ The Master of the High Court in Pietermaritzburg has said he doesn't do this for community land trusts. (LEAP: 2000)

¹² We say theoretically because recent stories suggest that CPIs are not able to manage invasions of their property. The key reason for this appears to be the regulation of evictions under the Extension of Security of Tenure Act that entails an expensive court process and the provision of alternative land.

¹³ Informal discussion with Lisa del Grande; Hornby D; 2000.

¹⁴ Informal discussions with officials; Hornby D; 1999 and 2000.

¹⁵ This is particularly the case with large settlements where beneficiaries and others have settled under customary allocation systems and not according to business plans. Information from informal discussion with Lisa del Grande, Hornby D, 2000.

some officials have said in informal discussions that “we have decided not to deal with these cases unless there is a development imperative”.

It is odd indeed that officials can choose to disregard the law. We would suggest that this is because political priorities are to transfer land and to spend budgets, and not the maintenance of tenure security. Broader institutional arrangements for the provision of tenure security have in effect never developed beyond the provision of freehold tenure. This raises serious questions about the contractual underpinning of membership rights in common property institutions because contracts are only as good as the capacity of parties to enforce them. Contractual rights become meaningless where that capacity is eroded because of internal conflict or tribal contestation, if there is no neutral institutional support for individuals and groups to assert their rights.

The judicial system could be viewed as an alternative recourse. However, this makes a strong presumption that legal options would be pursued and that the findings of any court would be upheld locally. Moreover any legal intervention would draw on relevant legislation and community constitutions and the findings are likely to prejudice the rights of many people because of flawed documents that also do not reflect local practice. This leads to the conclusion that formal law remains an unrealistic arbiter of disputes for most rural people because it is not sufficiently embedded in the real institutions and practices that frame their lives.

6.3 A new tune to dance to – the legislative shuffle

The problem of how to grant real rights in land to members of groups, in conformity with constitutional requirements and without damaging the essential negotiability and adaptability of common property arrangements, was a key concern of the drafters of the Land Rights Bill.

The problem was resolved through these provisions:

- Individual users of land would be granted statutory ownership rights while nominal title remained in the name of the state or legal entity;
- Members would choose their institutions for land management;
- The state would provide decentralised institutions to monitor local land management institutions and to mediate and arbitrate on individual versus group disputes.

In addition to these provisions, statutory rights holders would be able to register their rights in terms of the Registration Facilitation Bill. Although this draft Bill does not appear to provide for affordable and accessible registration procedures, it does nevertheless provide a mechanism for people living within group-administered systems to obtain individual records of their land holdings.

Drafters of the Land Rights and Registration Facilitation Bills thus recognised the importance of legal, institutional and technical coherence in provision of tenure security. However, the DLA minister shelved the draft Land Rights Bill last year saying it was inappropriate and too expensive to implement. One can only guess at the political priorities that informed these statements. The publicised alternative proposal to the Land Rights Bill is to transfer land to “traditional communities” using the Upgrading of Land Tenure Act (ULTRA, 1991) despite evidence that the Act results in members of groups losing rights, and that transfer of land to traditional communities is likely to create conflict. Furthermore, the legal nature of individual informal rights to land and resources and institutional support for the assertion, claiming and realising of these rights are not addressed in ULTRA. It is rumoured that a Land Administration Bill is being drafted but it isn’t yet known whether it provides mechanisms and institutions for individuals to secure their rights in common property situations.

7. Closing the Gap

This analysis reflects the disjuncture between the intentions of the law and the daily reality of people living their lives. This disjuncture creates fissures in and between land management institutions and between constitutional provisions and practice on the ground that then generates a dangerous indeterminacy. It has created competing and conflicting local institutions that lay claim to different memberships, with sometimes devastating effect on people’s lives and tenure security. The fractured way in which membership definition is dealt with increases the risks and insecurity for vulnerable household members. Furthermore, the state has not only failed to recognise the existence and effects of this indeterminacy, but continues to express political priorities that undermine the tenure security of individuals living in group systems.

We have argued that the indeterminacy can be minimized through serious attempts to achieve legal, institutional and technical coherence that recognises local practices and builds bridges to formal law and institutions.

Communities constitute their membership in more or less “customary” ways, by means more or less in the control of the group or its authority. At the point of interacting with a land reform programme “membership” comes to have some specific meanings and implications. These may have more, or less (usually less), to do with the previous or existing practices, familiar and legitimate to the people concerned. This suggests that land reform grants should not be regarded as though they confer rights on those whose names are used to access them.

There is a need to unburden the CPIs of unrealistic expectations by focusing on tenure security of the group and its members. Our findings also suggest that as long as there are prescriptions on what the constitution must contain, the mere form of the document will prevail. LEAP’s indicators suggest we should be developing constitutions with

communities that are meaningful and effective for the particular group now, but which enable adaptation towards greater equity for women, transparency etc. Field processes should be designed to start with “how do we do things now” with regard to entry and exit, and land allocation and transfer. This content should be recorded to facilitate community access and use, and be protected from the obfuscations of conventional legal forms. The political choice would need to be one of acceptance of the status quo while instituting processes (such as at constitution drafting) to hold real discussion and move towards constitutional principles. The institutional linkages then become the key to supporting tenure rights as they are, and in gradual adaptation towards greater equity.

Experience demonstrates that where there is a strong tribal presence, it is a mistake to ignore or disregard the impact of customary systems on the functioning of the common property institutions. Government has an imperative to negotiate the role and involvement of the tribal authority in CPIs because failure to do so results in conflicting allocatory and adjudicatory systems. In this, as in all CPI establishment, it is important that the ownership should vest in the members and attention be focused on clarifying and adapting community processes for asserting, justifying and realising rights.

There is clearly no coherent legal and institutional framework that is accessible to people. The Land Rights Bill sought to provide this and it or something like it, is crucial to secure the tenure of individuals living in CPIs. Linked to this there is a need to develop systems for the production, maintenance and updating of land records situated within the institutional framework. Together these should provide concrete support to members of CPIs to assert and justify their rights, and to CPIs to adjudicate and enforce these rights.

While it is recognised that legal, institutional and technical coherence is difficult to achieve, there has been little evidence over the past year or so to suggest that the DLA considers this an important political imperative. Failure to give this issue proper prioritisation is not only unconstitutional, it is also tantamount to denying the poor true citizenship of the country based on secure tenure and access to developmental resources.

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