
LAND ISSUES SCOPING STUDY: COMMUNAL LAND TENURE AREAS

KEY ISSUES

Prepared for:
DEPARTMENT FOR INTERNATIONAL DEVELOPMENT (DFID)
SOUTHERN AFRICA

**DFIDSA process towards developing a
programme of support on Land Issues in South Africa**

*Scoping of the important issues among, and affecting, people in the communal tenure, commercial farming,
and urban/peri urban locations in South Africa*

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PREFACE

Purpose of the report

This report is one of three Scoping Studies commissioned by DFID SA on the following topics:

- Communal land tenure areas comprising the former homelands and Coloured reserves where land is used for housing, agriculture and common property resources;
- The current freehold, farming communities, comprising the former white “commercial” farming areas, including the farm owners, the farm workers and labour tenants; and
- Peri-urban and urban land users, including the landless. This category will include the so-called townships, informal settlements and access to municipal commonages.

The objective of the study is to inform DFID-SA's design of a long-term program of support for land issues in South Africa, by highlighting the key land issues in communal tenure areas and potential gaps in policy and practice.

The study constitutes the scoping phase of DFID-SA's land programme, which included a multi-stakeholder workshop (September 2003) and will result in the finalisation of a Programme Memorandum. DFID-SA's own focus of analysis and praxis for building a framework for addressing land issues is poverty alleviation linked to sustainable livelihoods.

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LIST OF ACRONYMS

ADM – Amatole District Municipality

CLRB – Communal Land Rights Bill

CMIP – Consolidated Municipal Infrastructure Programme

CPA – Communal Property Association

CPA Act - Communal Property Associations Act 1996 (Act 28 of 1996)

CPI - Communal Property Institutions

DEAT – Department of Environmental Affairs and Tourism

DLA - Department of Land Affairs

DWAF – Department of Water Affairs and Forestry

IDP – Integrated Development Plan

IPILRA - The Interim Protection of Informal Land Rights Act

ISRDP - Integrated Sustainable Rural Development Program

LEAP - Legal Entity Assessment Project

LEFTEA - Less Formal Townships Establishment Act 1991 (Act 113 of 1991)

LPM – Landless Peoples Movement

SLAG – Settlement and Land Acquisition Grant

TRANCRAA - Transformation of Certain Rural Areas Act

ULTRA - Upgrading of Land Tenure Rights Act 1991 (Act 112 of 1991)

Additional legislation referred to:

Provision of Land and Assistance Act 1993 (Act 126 of 1993)

Land Titles Adjustment Act 1993 (Act 111 of 1993)

1. INTRODUCTION

The limits of tenure definition: communal tenure as a conceptual construct

Applying the concept of “communal tenure land” generically to the former bantustans and Act 9 areas is highly misleading, as these areas display diverse settlement patterns, population distribution, land tenure rules and relationships, structures of governance, land uses and ecological conditions. In some provinces, such as KwaZulu-Natal, Limpopo and parts of the Eastern Cape, communal tenure areas are still wholly or partially subject to institutional arrangements of traditional authorities, while in others, combinations of old and new institutional arrangements linked to civics and government departments have evolved. The majority of land reform projects undertaken to date have made use of Communal Property Associations or Land Trusts, which have created private communal ownership regimes both within and outside the former bantustans. This study refers to all these constructs, however the main focus is on the former homeland or bantustan and the former Act 9 areas¹ created under the Apartheid regime.

Communal areas include urbanizing settlements undergoing various degrees of formalisation. These display many features in common with informal settlements in urban and peri-urban areas. The reverse could also be said to be true. It is becoming increasingly apparent that a *continuum of settlement type under a range of tenures* across former political boundaries may be a more useful paradigm within which to examine land issues. However, the legacies of colonial and apartheid systems created distinctive regulatory frameworks (including policies, laws and practices), which support distinct tenure categories and remain on the statute books pending new laws.

Bantustans as colonial and apartheid constructs

Communal tenure areas are a legacy of South Africa's racially discriminative past. Colonial and bantustan policies defined racial space zones resulting in the most unequal and spatially skewed distribution of land between indigenous peoples and colonial settlers in Africa. Loss of access to land and land rights in the country as a whole, and the associated loss of citizenship, represent one of the most enduring legacies of the colonial and apartheid period.

Residual communal tenure areas under settler and apartheid rule came to embody huge significance in terms of social identities and networks, and access to other resources, including jobs, both inside and outside these areas. As such the land rights in these areas, inadequate as they were and are, fulfill multiple functions, not only of land-related provisioning and shelter, but also of social protection for poor households straddling both the rural and urban terrain. The rural land rights provide the key influence around identity and “anchor” for the poor - and even many better off - family members in the towns and cities, where tenure continues to hold many insecurities.

Rural land rights are thus critically linked to broader sets of rights and relationships outside the communal tenure areas. Land rights were in the past associated with loss of citizenship, and provide a key to extending citizenship in the future. The challenge is to extend the full set of rights and duties embraced by the notion of citizenship, as enshrined in the Constitution, without eroding the present livelihoods of the poor and vulnerable in communal areas. This sets up a conundrum of huge proportions. The tension in present land policies reflects an ambivalence between preservation of ‘African rural communities’ defined in terms of customary tenure and traditional institutions and values on the one hand, and the constitutional injunctions of democratic governance and individual and equal human rights on the other.

Land issues in the “communal tenure areas” thus activate a host of policy and developmental questions. How is policy bifurcation to be overcome? How can these areas shed their association with the past, and integrate into the mainstream of South African development without jettisoning social protection for the poor; and what will be the impact of new institutions of land tenure on progress in extending secure livelihoods and citizenship - thereby building social inclusion – for all citizens of the country?

The ongoing fluidity around new and evolving land tenure laws and the uncertainty around existing laws have complicated the task of scoping land issues in the communal tenure areas. There are political sensitivities in government

¹ These areas are affected by the Transformation of Certain Rural Areas Act 94, 1998, originally defined by the Rural Areas Act 9 (House of Representatives) of 1987, which replaced the 1963 Coloured Rural Areas Act. After 1994, ownership vested with the Department of Land Affairs. These areas are still referred to as “Act 9 areas”, and this term is used throughout this report.

and civil society pending the passage of new laws around land tenure, land use management and traditional leadership, and ongoing uncertainty around resolution of:

- The extent to which, or manner in which, new laws will address questions of land access for the present holders of informal land rights, both in the former bantustans and outside them; and whether a range of rights systems will be made available to those in formalizing or informal settlements;
- The precise nature and content of the forms of land rights envisaged under the Communal Land Rights Bill (CLRБ), still being drafted², and the status of existing off-register rights pending registration or transfer of land rights contemplated in the CLRБ;
- The institutional arrangements around the administration and protection of existing and new rights, and the extent to which the State will provide resources to support them;
- The regulatory framework for spatial planning and land use management in relation to land held by “communities” to overcome the present anomalies between the “formal” and “informal” systems of land use allocation, regulation and management.

2. ORGANISATIONAL CONTEXT OF LAND ISSUES IN THE COMMUNAL AREAS

The main organisations and players involved in land issues in the communal areas are:

- The Rural Poor (individuals, households and communities or group entities)
- Civil Society representatives of the rural poor
- Traditional authorities
- National Government (principally the Departments of Land Affairs and Agriculture and Provincial and Local Government. Also the Departments of Housing, and of Social Development)
- Provincial Government (principally Departments of Agriculture, Housing and Local Government)
- Local Government (District and Local Municipalities)
- Private Professionals involved in land administration
- Agri-business and financial institutions

2.1 The profile of the rural poor

Rural – urban populations

The space-economy, and attendant poverty and demographic profiles, created by the Apartheid State, have proved resistant to change. A comparison between the 1996 and 2001 census indicates that the overall rural – urban split has shifted from 55.1% urbanized and 44.9% rural in 1996, to 57.5% urbanized and 42.5% rural in 2001 (with 1996 data adjusted according to Stats SA 2001 definitions). In real numbers, the rural population has risen from 18 220 668 in 1996, to 19 050 159 in 2001. Although the proportion of rural to urban is changing as urbanization increases, absolute numbers in rural areas are increasing.

Demographers observe that the rate of overall rural out-migration appears to have been slower than expected. This is due to increasing unemployment in urban areas and the attendant decline in migrancy as a result of falling employment opportunities in the economy (particularly in sectors such as mining).

To construct demographic profiles in terms of either rural or urban does not reflect the reality that most families display “double rootedness” (see Bornstein, 2000, 198), i.e. they straddle both rural and urban environments. Where migration is taking place from rural areas, it is not necessarily to large urban centres. Contrary to popular notions, major urbanisation fluxes tend to be towards peri-urban fringes and small towns and not just the metropolises (May and Rogerson 2000, 211 - 212).

² In October 2003, Cabinet approved a previously unseen version of the Bill that vests strong administrative and ownership powers in “traditional councils” where they exist, the latter defined in a new Bill on traditional leadership. These provisions are controversial and will have implications for the future prospects of developing a holistic and unifying Land Administration platform for the country. Indications are that certain civil society organizations intend challenging these provisions.

Population and area estimates for communal areas

The 1996 data indicates that around 15 million people lived in communal areas, approximately 83% of the rural population, compared to approximately 2.9 million - 16% - on commercial farms.

Two trends impact on the current number of households in communal areas. (1) Retrenchments on commercial farms have seen former farm employees returning to the communal areas. (2) There has been an increase in the absolute number of people living in rural areas since 1996. Accordingly, the current population living in communal areas is estimated to be closer to 16 million - 35% of the national population.

The figures in Table One indicate the 1996 census population classified as 'tribal' by Stats SA, and provide an indication of the number of people impacted by communal tenure and the extent of overcrowding in these areas. The total area of land inherited from the former "bantustans" is estimated at 15 813 238 hectares - 13% of the area of South Africa.

Province	Population	Province	Population
Eastern Cape	3 672 874	KwaZulu-Natal	4 110 017
Limpopo	4 108 246	Free State	301 842
North West	1 647 446	Act 9 Areas	70 000
Mpumalanga	1 268 201		
TOTAL		15 178 626	
Source: Stats SA			

The most accurate figures available are for KwaZulu-Natal where the population of 4 110 017 - 48.8% of the provincial population - lives on 2 834 046 ha. This is in comparison with a mere 7% residing in commercial farming areas.

Within the land categorised as communal, there are 23 former "coloured rural areas" found across the Northern Cape, Western Cape, Free State and Eastern Cape. These Act 9 areas account for 1.7 million ha - 1% of the total area of South Africa. (Rohde et al, 2002: 260) and accommodate 70 000 people.

The demographic and spatial distribution of poverty

May (2000,23) observes that the majority of the poor are "African, rural and women". Using 1995 data, May estimates that although 50.4% of the population was classified as rural, 71.6% of the poverty share, based on 'money-metric indices', was in rural areas (ibid). Broader criteria for measuring poverty are, however, more appropriate. These include calorie-based counters, social wage and living conditions (such as access to shelter, water, services etc) and social marginalisation. May finds non-income measures of deprivation indicate that the provinces most affected by poverty are KwaZulu-Natal, Eastern Cape and Limpopo (2000a, 41 & 43).

It is now widely recognized that the future of the rural areas is closely linked to the network of small towns. The small towns are often the first place displaced farm workers seek shelter. These small towns have a poverty share of 24%, which is beyond the 14.1% of the urbanized population that they represent (May and Rogerson, 2000: 209). Small towns are growing at a rate far higher than rural areas, with extensive informal settlements.

Chronic and transient poverty

A distinction between chronic poverty and transient poverty (or the chronic and transient poor) marks much research and social commentary on poverty and the implications for poverty alleviation policies. Initial studies on chronic poverty in South Africa have been undertaken by Aliber (2001) and de Swardt (2003). Aliber (2001, 29) estimates that there are 1 million households living in chronic poverty, with 950 000 of those being African. A longitudinal data set of poverty statistics based on research in KwaZulu-Natal indicates that around 20% of African households are chronically poor (in a poverty trap) (Aliber, 2001, 15). The rural areas are the main sites of chronic poverty, with 87% of all chronically poor

households in KwaZulu-Natal being from rural areas, and 30% of rural households being chronically poor (Aliber, 2001, 14), while de Swardt estimates that half the rural poor are chronically poor (2003, 4).

Gender profile of communal areas

Historically most women remained in rural communal areas and carried the responsibility to secure familial land rights, in spite of lacking legal recognition for holding land in their own right. The 1996 census figures for rural areas of former homelands indicate that nearly 55% of the population was female. Progressively more women are reverting to short and long-term migrancy as a survival strategy (Walker, 2002). Shrinking employment in urban areas and on commercial farms, which has impacted disproportionately on men, and increasing female mobility are likely to see higher proportions of men in the communal areas. Nonetheless black rural women in communal areas are recognised as being particularly vulnerable to poverty as a result of the intersection of race, class, gender and geographic location (Walker, 2002). While it is important to recognise rural women are not a homogeneous group who are all poor, women-headed households in rural areas are among the poorest and most vulnerable in the country (Budlender, n.d.).

2.2 Civil Society representatives of the rural poor

Non-governmental organizations

Historically, the National Land Committee (NLC) and its affiliates have represented the interests of the rural poor regarding land issues. However, the role of NGOs within the land sector has become increasingly contested over the last two years and the position and role of the NLC in relation to the State has changed. With the emergence of a broad social movement in the form of the Landless Peoples' Movement (LPM), the NLC and some affiliates have been lobbying at a national level for a serious evaluation of the fundamentals of the land reform programme. Government has in turn questioned the representivity of NGOs in relation to the rural poor. Consultation on policy matters is no longer as broad as it was previously.

At the same time, some of the affiliates have changed their focus to rural livelihoods, concentrating primarily on rural development and service delivery functions, e.g. liaising with the DLA in respect of applications, and with municipalities in relation to integrated development plans, and providing agricultural extension and marketing. For some of these NGOs, relationships at a local level with the DLA and other departments continue to be constructive, particularly at a project level and in terms of piloting specific approaches. Advocacy tends to focus on programme imperatives rather than being adversarial in relation to State policies as a whole.

Community Based Organisations

For many service delivery and community based organizations (CBOs) working in communal areas, land reform has not yielded the resources necessary to improve rural livelihoods or transform social relations. These tend to focus on broad based development (beyond land issues). It is recognised that other resources are necessary for rural development, particularly to build capacity at local government level to co-ordinate local economic development at municipal scale.

At project level, local organizations and CBOs are generally poorly resourced with limited capacity for lobbying and grasping opportunities beyond the immediate environment. This limits their ability to be intermediaries with the broader society.

There are a multitude of local level organizations and structures established at various times in the past, and these now compete with traditional structures, municipal structures and other civic structures for resources and control of the development agenda. These include traditional councils, civics, project committees, development committees, sectoral committees – such as water committees, and ward representatives.

The LPM developed in response to perceived slow delivery of land and housing by government. The relationship with the State has become increasingly strained, particularly over land invasions and the rate of land reform delivery. Its focus is mainly on rural and peri-urban land access issues, including housing in peri-urban areas and matters arising from labour tenancy and farm tenure in rural areas. Two issues stand out in terms of the discourse of the LPM. The first is that the organization claims to comprise membership of the rural poor and therefore to represent their interests directly - not as an intermediary. The second is its demands to be consulted - as a voice of the poor - on policy development. Recent threats to lead a boycott of the forthcoming elections indicate a shift towards an adversarial approach in future. The momentum of popular pressure for more radical land reform appears to be mounting across a broader range of civil society. One view holds that nothing short of radical redistribution of the country's resources outside of a market-based land redistribution framework, and a breaking down of the bantustan/commercial divide physically and economically, will resolve the problems of poverty and competing local authorities in the communal areas.

NGOs are caught in a bind of having to fulfil some functions of the State and the market due to institutional gaps. One of their principle roles is providing a bridge between land reform beneficiaries and the local and central State. The State does not have the capacity to work with every client community at an intense level, yet the problems being experienced at a community level can be both complex and extensive. NGOs are able to assist communities to work through the multiple challenges of development and provide capacity-building resources. This can bring them into conflict with local government and government departments, as the development visions are not synonymous. In the absence of NGOs, however, this 'bridge' is missing. NGOs, by their very nature, are only able to work in selected case areas, and the impact is therefore localised and limited.

Traditional authorities

Traditional authorities straddle the State and civil society, but make demands on the State for formal recognition given the potential clash of functions with State organisations. For many rural communities, the most immediate institutional structure has been, and continues to be, a traditional authority³. For these people any dismantling of traditional authorities is perceived as threatening an integral component of their society. For others, traditional authorities represent association with colonial and apartheid political and social engineering. The non-elective nature thereof is seen as fundamentally at odds with the constitution and democratic governance. The efficacy, impact and local legitimacy of existing traditional authority structures varies enormously across different regions of the country. In some regions these structures compete with other local structures (CBOs and local government) for control of resources and services, including land administration. Lack of certainty with regard to their legal standing and roles in communal areas creates confusion and impacts negatively on projects in some provinces, while in others like KwaZulu-Natal, there has been more historic continuity of roles with less disruption. Policy implications are discussed in section 3.2.1.

2.3 National government

Department of Land Affairs

The Department of Land Affairs (DLA) is the central Department dealing with land related matters. The structure of the Department is outlined more fully in Appendix One. The departmental structure includes responsibility for land reform, spatial information and the land registration system in the form of the Deeds Registry and Surveyor General. The Deeds and Cadastral system does not at present serve the majority of the people living in the communal areas of the former homelands, over one third of the country's population, and residents of informal settlements.

A continuing weakness in the structure is the inadequate institutional provision for land administration in ex-homeland areas. The DLA took over the trusteeship functions over communal land from the South African Development Trust, and all land administration functions relating to communal land, some which were delegated to provincial government. In some cases provincial government, local government, NGOs and private professional consultants provide some of these services. However, these activities in most provinces take place outside any recognised departmental structures and therefore budget frameworks, given the incomplete delegations of authority to other spheres of government pending the passage of new laws on communal tenure and land use management. The efficacy of the service has therefore been compromised, and activities and services tend to be piecemeal and ad hoc.

A key challenge faced by the DLA is the integration of the land reform programme with integrated development planning located at the local government sphere; post implementation support which requires alliances with the Departments of Agriculture, Water Affairs and Forestry (DWAFF), Housing and others, and the ability to provide the necessary infrastructure to support the implementation of the CLRB and other tenure laws. The DLA has increased its linkages with local government and many land reform projects now feature in municipal Integrated Development Plans (IDPs).

A national precedent in this regard has been an agreement between the Eastern Cape provincial office of the DLA, and the Amatole District Municipality (ADM) for implementation of certain (non-agricultural) components of land reform. This role has subsequently changed to a support role to Local Municipalities, which are now the loci for planning and implementation. The content of the land reform projects has been defined in terms of DLA-funded Land Reform and

³ The White Paper on Traditional Leadership and Governance (10 September 2003) estimates that 14 million people live in areas under a traditional authority.

Settlement Plan, which has been subsumed into one of the sectoral plans of the ADM's Integrated Development Plan. This is the closest attempt at a broad-based strategic and development spatial and economic plan that incorporates land reform and land rights as a central component of integrated rural development.

Department of Provincial and Local Government

The Department has supported the establishment of local government and continues to support the devolution of functions. The Department provides technical and financial support through specific programmes (such as the formulation of Integrated Development Plans). Programmes such as the Consolidated Municipal Infrastructure Programme have been widely used to extend infrastructure development within the communal areas, while the Local Economic Development Programme has been less effective.

Department of Housing

The Rural Housing Programme makes use of the institutional subsidy within the communal areas. The problem of individual title is overcome through group ownership systems. The programme was initially not used very effectively; however there has been a substantial increase recently.

2.4 Provincial government

The role of provincial governments in communal areas relates to the acquisition and holding of land to deliver Schedule 4 and 5 Services. These "services" include functions delegated from the national sphere, (e.g. housing), the delivery of social services (e.g. education, health). All these services require access to land and co-ordination is arranged through the State Land Disposal Committees operating at the provincial sphere and co-ordinated by Provincial Land Reform Offices of the DLA. This process is governed by policy set by the DLA and contained in the guideline document "Interim Procedures Governing Land Development Decisions which require the consent of the Minister of Land Affairs as Nominal Owner of the land". In addition the provinces retain certain responsibilities in respect of provincial spatial planning and land use management processes. These currently derive from various provincial ordinances, old order laws emanating from the former homeland dispensation, 1991 land reform laws like Less Formal Townships Establishment Act 1991 (Act 113 of 1991) (LFTEA) and Upgrading of Land Tenure Rights Act 1991 (Act 112 of 1991) (ULTRA) and new order laws like the Development Facilitation Act. The majority of the existing laws will be rationalised by the Communal Land Rights Bill and the Land Use Management Bill (LUMB). In terms of the LUMB the provincial government will retain provincial planning functions, certain tribunal functions in respect of land use management and support functions to help poorly resourced local government with spatial planning and land use management.

In KwaZulu-Natal the provincial government undertakes land administration somewhat differently from other provinces, and there is reportedly more stability in this regard. Traditional authorities have continued to play the central role in traditional land systems. The Department of Traditional and Local Government Affairs (DTLGA) continues to undertake certain land administration functions under a delegation from the Ingonyama Trust Board, such as the issuing of Permission to Occupy (PTOs) for residential and commercial sites under 5 ha and for developments under R500 000 in value. Where developments exceed these standards, a lease must be applied for from the Ingonyama Board. The DTLGA is building the basic data sets required for a land administration system, based on traditional authority and ward level data. Key spatial data is being captured and shared across various users, including the residents themselves, in order to make land administration in communal areas more accessible.

The Eastern Cape provincial government, through its evolving Growth and Development Plan, is prioritising integrated and pro-poor economic development strategies that specifically target the former bantustan areas, emphasising land use management across the former racial land zones. The Municipal Mentoring Project in the province aims to develop training workshops and procedural manuals on land administration for municipalities in respect of land planning and land development in the communal areas.

2.5 Local government

There is significant variance in capacity at local government level. Municipalities serving the communal areas are generally the worst resourced. The functions of Local and District Municipalities in land administration in the communal areas have not been entirely resolved. Although clearly responsible for the performance of local economic development,

certain transport functions and spatial planning and land use management functions within the framework of integrated development planning, the enabling legal frameworks and the resource base to deal with land development and land administration in the communal areas are not yet in place. There is a need for district and/or local municipalities to develop appropriate land information systems to assist with development applications, apply new national planning and land management norms and support Integrated Development Plans (IDPs) and Spatial Development Frameworks. This would also assist local communities in maintaining and updating records and effecting rights transfers. The ability to access spatial information records at local government level would greatly enhance the ability of local authorities to plan or support land development in communal areas.

Clarifying the powers and functions of local government will also help settle the role of other organisations and stakeholders at local level, particularly those that 'compete' with municipalities, causing confusion.

The role of local government is central to service delivery, and there is an assumption that some aspects of land reform will be decentralized to the local level. In the Eastern Cape the agreement between DLA and the Amatole District Municipality (ADM) has formalised this relationship in land reform cases that involve settlement and services. However, in terms of current powers and functions Local Municipalities are to be the loci for planning and implementation. This means that ADM will play a support role to Local Municipalities in future.

Local government and land use management

Under the Constitution, municipal planning is a function of local government. Land Use Management is rapidly being recognised as an essential function of municipal planning and an important component of Integrated Development Planning. It is necessary, not only to provide certainty regarding land development, but also to bring about the detail absent from broader scale IDPs and Spatial Development Frameworks; and to provide an institutional framework for community co-management of natural resources and residential and agricultural land in communal areas. In terms of the Municipal Structures Act, Category B Municipalities are responsible for municipal planning, except in terms of Section 83 of the Municipal Structures Act, where it becomes a function of Category C Municipalities if a local government lacks the capacity. While it is clear that local-level land planning falls under Category B Municipalities, no legislation lists specific powers and functions in respect of land administration, because there are various layers of functions where authority rests with all three spheres of government. In this context, local government should be provided with the capacity to co-ordinate local land administration services in the interests of decentralisation (see Appendix Two for a discussion of the TRANCRAA experience).

The Municipal Systems Act, 2000 (Act No.32 of 2000), requires each municipality to prepare an IDP, key components of which are a Spatial Development Framework and a Land Use Management System (LUMS) for the whole municipality. The Land Use Management Bill (LUMB) will establish the national enabling framework to guide spatial planning, land use management and land development throughout the Republic, in terms of which all Municipalities are required to prepare a LUMS to regulate the use and development of land.

LUMB brings in the requirement for wall-to-wall zoning (through land use schemes). This implies bringing all township establishments within town planning schemes. Currently communal tenure systems cannot be zoned in the way that surveyed land under freehold tenure is managed. The LUMB and the CLRБ will therefore need to be closely aligned to take into account the different tenure systems. Simply describing communal tenure areas as 'mixed use areas' (as is the case in KwaZulu-Natal) is not the same as zoning under a land use scheme. Adjustments must be made to accommodate communal systems.

In summary, issues of land administration straddle all spheres of government, and while land use management is a clear function of municipal planning (with scope for community participation), there are related issues that are functions of national and/or provincial government. Land tenure in particular is a function of national government at this point. Resolving the roles of local government in respect of rural land administration therefore requires a multi-faceted, inter-governmental and holistic approach.

2.6 Private professionals involved in land administration

Historically the private sector, particularly professional planners, land surveyors and legal conveyancers, have played a major role in specific key components of land administration in respect of the formal Deeds and Cadastral system. These

professions have however, until the last decade, had no involvement in the administration of rural communal land. Land planning, demarcation and transactions were undertaken by line departments, functionaries under the District Commissioners/Magistrates and traditional authorities, co-ordinated at district level by the District Magistrate's offices. The Magistrates issued land rights in the form of rights of occupation (known as Permission to Occupy, or PTO's) to qualifying male heads of household in respect of unsurveyed but spatially demarcated sites, within larger surveyed or unsurveyed administrative boundaries. Although surveyors played a significant role in the earlier colonial period (surveying administrative area and district boundaries, or "locations" as they were first known, as well as individual quitrent and freehold sites in some regions), these activities ground to a halt with the systematic introduction of the PTO system, around the 1920s, when the tilling policy was abandoned. Post-1994, there has been renewed involvement by the private sector in the formal planning, surveying and conveyancing of village settlements undergoing formal planning and tilling, mainly in urban fringe areas.

There is particular interest by professional surveyors in the communal areas, and in many provinces there has been dialogue between the professional body of representatives and the DLA with regard to their future role in surveying communal areas. This is a controversial matter in land policy debates; one which cuts into the heart of one of the central tensions around land policy since the 1920s, namely,

- the political, social and economic trade-offs involved in extending the formal cadastral system into communal areas;
- whether this should be linked to individual land parcelling to create legal evidence of individual or group land rights (based on current western approaches);
- whether these individual or group rights should be in the form of titles registered in the central registry or remain off-register;
- if off-register, whether the State retains dominium;
- or whether boundary identification should be created rather as a Public Good for other purposes such as service delivery;
- whether cadastral coverage can be extended to accommodate a range of accuracies, e.g. systems that lack co-ordinates, based on other forms of boundary evidence;
- critically, what are the costs and sustainability of any one or combination of these options?

Some town planners and surveyors are beginning to rapidly adapt their formal professional approaches to take into account issues of governance, community participation, social tenure, new or evolving institutions and decentralisation. However, there remains a big policy and technical gap between the paradigms that are followed for the formal Deeds, cadastral and land management systems on the one hand, and that of the prevailing less formal or informal systems within the communal areas. This gap is also reflected in the different conceptual paradigms inhabited by the technical/legal professions on the one hand and the social scientists on the other. The former still tend to motivate for technical solutions that are not, or may not, be appropriate.

2.7 Agri-business and financial institutions

South Africa has an extensive network of agribusiness formed during the alliance between "Organised Agriculture" and the apartheid government. This includes the former agricultural marketing boards, the Land Bank and the agricultural co-operatives. During the apartheid era, black farmers and landowners were expressly excluded from the agri-business network. In the bantustans, institutions such as the Ciskei Development Corporation were intended to provide farmers in these regions with exposure to agribusiness. These institutions were, however, flawed by their affiliation to the apartheid regime and their penchant for top-down, agricultural schemes with a propensity for inappropriate technology.

The 1996 Marketing and Agricultural Products Act removed statutory support for the agri-business network and aimed to increase market access to all farmers. Prior to the implementation of the Act, however, many of the marketing boards and co-operatives managed to reposition themselves in the private sector without relinquishing control over assets accrued with support from the fiscus. With a few exceptions – most notably in the wool and sugarcane sector – agribusiness has remained inaccessible to black producers on communal land, who are unable to access the technology or information that would allow them to supply formal markets. This truncation of the agri-business sector is most acute with regards to finance. To date, private financial institutions and the Land and Agricultural Bank have proven ill equipped to extend credit to risk averse farmers who are unable to offer freehold title as collateral. Similarly, the inability of communal land users to provide an effective demand – demand supported by the ability to pay – for services, has seen private sector service providers reluctant to extend their business networks to these areas.

In November 2001 the Department of Agriculture, in conjunction with the major farmers unions, produced the Agricultural Sector Plan, which aims to deracialise South Africa's agribusiness. Whether or not this plan will impact upon remote communal land users remains to be seen. Certainly contract farming arrangements initiated by Tongaat Hulett in KwaZulu-Natal, have revealed the potential to include small-scale producers on communal land in agri-business sectors, particularly where the supply chain involves value adding and processing. Similar successes have been achieved by the National Wool Growers Association in the Eastern Cape, although considerable State investment was required to overcome the innate difficulties of conducting business in poor rural areas.

3. INSTITUTIONAL ENVIRONMENT

Rules of the game

The key players in the land arena interact via formal and informal systems. The formal system is characterised by:

- A title deeds registry and private land market that is augmented by a land redistribution and land restitution programme.
- Transitional and evolving policies, pertaining to communal land, tenure upgrade and poverty alleviation, which attempt to formalise and strengthen existing land rights. These are in a state of transition, and therefore constitute an attempt at formalisation.
- Formal financial institutions, registered under the 1990 "Bank Act".

Informal systems refer to customs and practices that are not fully acknowledged by policy or the legal and technical framework of the country, but nevertheless service a large proportion of the population, particularly the poor. The authority of traditional leaders, and their influence over land allocations, has been regarded as an informal agrarian structure, for example, in the sense that it differed from the core system with its Western, deeds and cadastral foundation.

The informal system is characterized by:

- Existing multiple livelihood strategies, including land rights, land allocation and land use practices.
- Institutions such as traditional authorities, community-based governance and communal tenure, which are in a state of flux in most regions.
- "Stokvels" and informal loan schemes.

New forms of land rights have implications for both the existing formal and informal systems. International and local experience has shown that it is ill advised to simply subsume the informal into the formal. Rather the challenge is to incorporate the desirable elements of the informal and formal system into a credible agrarian structure. This process needs to acknowledge that informal systems provide multiple forms of social protection for the poor. Where these forms of protection are jettisoned, livelihoods are easily undermined. Incremental adaptation that builds on local institutional capacity has, in most instances, proven more effective in providing protection for the poor, than expeditious "formalisation" of tenure systems.⁴ The importance of informal systems was demonstrated in KwaZulu-Natal, where the Traditional Authority system performed many of the functions of government when the State withdrew. Informal systems fulfil a variety of functions that mirror those of the formal system. The challenge in areas such as KwaZulu-Natal, is not to replace the informal systems completely, but to "constitutionalise" them by nesting them within broader policies, so as to underline the continuity of citizenship between those in the formal and informal sectors.

One of the tensions between the formal and informal systems is the difficulty of securing rights within a system of communal tenure. Policy acknowledges the legitimacy of communal tenure arrangements, but in some instances there is a lack of the common resource management institutions required to ensure that this form of tenure does not degenerate into opportunism at the expense of the weak and marginalized. This tension is most acute when it comes to reconciling customary land rights and land use patterns with the imperatives of the Constitution.

⁴ An NGO initiative known as the Legal Entity Appraisal Project (LEAP) has revealed this argument most forcefully in South Africa. It has been found that working with existing institutions towards increased tenure security has a range of benefits.

Underlying this tension are different ideological paradigms sometimes depicted as “African versus western” or “customary versus individual civil rights” frameworks. The tensions manifest themselves in problems around the following issues:

- Gender and wealth dynamics in relation to land use
- Land rights succession, particularly with regard to women
- Governance of land rights and land use
- Notions of commercial agriculture
- Market orientation
- Misdirected capital-intensive projects and resultant wasted infrastructure
- Ecological considerations

A further tension emerges from the fact that the formal system tends to discount all but the productive potential of land. In reality communal land represents a source of multiple provisioning by allowing food production, while at the same time providing eco-system services, water catchments, a variety of natural resources, graves, and space for religious, ceremonial, social and recreational purposes. Policies that adopt a narrow conceptual approach to communal land as an agricultural resource, exclusively, tend to render the other services that this land provides “invisible”.

Privatising the former bantustans in a titling exercise has appeal to a range of actors, including many rural rights holders, but the danger is that a rapid shift towards titling and privatisation will undermine the rights of marginalised and serve to consolidate vested interests. This is particularly likely given the withdrawal of magistrates from the rural land administration arena. Communal land represents a key national resource with which to redress inequalities and provide some of the country’s poorest with access to social protection, entitlement and an agricultural asset. If this land were to be transferred to a formal system of private ownership expeditiously, this potential could be surrendered to the detriment of the poor.

Formal and informal land systems have been resolved innovatively in some instances, for example in attempts to integrate formal and informal systems in integrated development plans, and in partnerships between different departments and spheres of government in implementing land reform. Protection of existing land rights or formalisation in common property institutions has created opportunities for joint ventures between private entrepreneurs and land rights holders. In order to be successful these innovations, like the Traditional Authority systems, need to be “nested” within broader institutional frameworks so as to ensure accountability and consistency across all levels of policy.

3.1 The formal system

3.1.1 Anti-poverty policies

In spite of the recent upturn in certain poverty-alleviation measures in the communal areas (e.g. child support grant, feeding schemes, attempts to improve administration of pension and disability transfers) and improvement in service delivery and infrastructure development, these measures tend to be geared toward social safety net and social security measures. They are seldom linked to redistributive mechanisms such as land reform and local economic development.

3.1.2 Rural development framework

Infrastructure, extension of services and economic development projects have penetrated some villages in communal areas as a result of sectoral engagements such as water delivery programmes under the Department of Water Affairs and Forestry, and infrastructure programmes under the Consolidated Municipal Infrastructure Programme (CMIP). However, in general the rural population remains limited in its ability to raise a political voice while “urban capital, urban labour and the urban unemployed completely overshadow the rural sector in the demands they make on the State around jobs, housing, delivery of services, crime, policing and economic policy more broadly.” (Walker, 2002).

The Integrated Sustainable Rural Development Program (ISRDP) is an attempt to focus attention on the economic development potential of particular nodes and works through existing line functions, but has been criticised – like its predecessors, the National Rural Development Strategy (1995) and Rural Development Framework (1997) - for failing to bring vision, strategic planning or resources to rural development (Aliber 2002, PLAAS 2003) and being thin on content.

Ideally, the ISRDP would co-ordinate existing policies and the activities of departments, but currently the programme lacks the resources with which to do this. Walker (2002) notes: "land reform is not seen as having a potential contribution to make to any broader programme of rural development (beyond the restructuring of agriculture and/or the provision of food safety nets for the poor)."

3.1.3 Tenure policy

Land tenure reform has been seen as the critical pillar of land reform in communal areas. On the one hand, provision of secure and legally recognised land rights is central in creating social inclusion and advancing citizenship. On the other hand, once-off transfer to private legal entities or individuals has been shown to create new sets of insecurities as a result of a) the workings of the market and b) the lack of administrative infrastructure to monitor and support these new entities or titles and c) the lack of sufficient legal definition of the content of individual land rights in relation to each other within common property institutions. In this context titling quickly reverts to informal systems, traditional or otherwise.

The uncertain results over a prolonged period of time to legally define land rights in the communal areas has had a profoundly negative impact on development programmes and led to the collapse of former administrative services to support existing land rights. In some cases this has led to the seeking of alternative solutions, such as the creative use of existing opportunities via the Interim Protection of Land Rights Act No 31 of 1996 (IPILRA, see below); the IDP process through partnership agreements with DLA; and NGO provision of informal land administration services to support off-register land rights.

The White Paper on South African Land Policy aims to confront the legacies of communal tenure. The White paper tries to meet divergent goals in extending democracy, recognizing individual rights, acknowledging African community tenure systems⁵ and bringing communal systems into an affordable land administration system. Like the Constitution, the White Paper recognises that traditional authorities will continue to have a role in South African society. In practice, however, finding a single framework to accommodate the diversity of issues and constituencies involved in communal areas has proven difficult, and responsibility for different aspects are being addressed by a suite of policies that are in various stages of development and implementation.

- The Interim Protection of Informal Land Rights Act, (IPILRA) which aims to protect existing rights.
- Transformation of Certain Rural Areas Act (TRANCRAA) in Act 9 areas: creates opportunities for the transfer of land from the State as nominal owner to the rightful owners and users.
- Upgrading of land rights in terms of the Upgrading of Land Rights Act and the normalisation of old titles under the Titles Adjustment Act.
- The Communal Property Associations Act No 28 of 1996: attempts to address institutional concerns arising on communal land and a central instrument for group transfers outside the ex-bantustans. Recent versions of the CLRB use similar institutional mechanisms to address group tenure within the former bantustans.
- The land redistribution programme, which together with the CLRB seeks to reduce overcrowding.
- The Communal Land Rights Bill (CLRB), which seeks to upgrade rights in these areas and provide "comparable redress", discussed under evolving institutions in section 3.3 below.

The experience of working within the policy environments of IPILRA, TRANCRAA, upgrading and Communal Property Institutions (CPIs) is discussed in some detail in Appendix Three. These frameworks have provided positive scope for engagement with land rights, but negative experience due to lack of broad institutional support for these policies.

Old systems and legislation have been slowly withdrawn from the statute books, although the complexity of the inherited legal framework continues to defy complete unravelling. Systems such as PTOs and quitrent tenure were considered the epitome of the second-class status for people in the ex-bantustans and these "permit based systems" were quickly jettisoned. In retrospect, this compounded the problem of untangling rights. In practice PTOs had reverted to locally recognised familial land rights, albeit under circumscribed land use conditions and without provision for women's rights of succession. Clearly the system lacked key components of constitutionality, but nevertheless provided some measure of

⁵ Expanded by Dr Siphos Sibanda and included in (2001) "The principles underpinning the Communal Land Rights Bill".

security. PTOs overtook earlier colonial attempts at titling - such as quitrent and African freehold tenures, which were widely regarded by the early colonial "native" administrators as failed experiments in land titling⁶.

Quitrent tenure is now legally recognised as freehold tenure where this is legally permissible⁷. PTOs are no longer recognised in policy, legal and organisational frameworks. Where PTO, quitrent and other rights co-exist, adjudication in order to upgrade tenure has been marred by internal conflict, particularly where the outcome is seen by "higher order" land rights holders, such as quitrenters or freeholders, to "flatten" all land rights. The PTO system is fast descending into an informal system. National offices of DLA, provincial government departments and municipalities battle to maintain administrative continuity. The State's response has been to sidestep these problems by transferring, or proposing to transfer at scale, land into communal property institutions or individual title, which, however, brings new challenges and insecurities.

The administrative framework for restructuring intergovernmental relations and tenure relationships is partly resolved through the establishment of local and district municipalities. Many local government constituencies include both former bantustan and white commercial areas and in some ways it is easier to straddle the various policy tensions at the local level where the emphasis is on practical solutions to land allocation problems and not ideological positions. However, no resources have been provided for municipalities to fulfil functions of land administration in the communal areas, and the devolution of power to local government has stopped short of providing municipalities with powers to demarcate land and approve allocations. Land administration has thus collapsed in many ex-bantustan areas and random land allocations are widely reported. In KwaZulu-Natal and the northern regions of the former Transkei, traditional leadership structures enjoy a certain level of local credibility and continue to perform land administration functions.

3.1.4 The land redistribution programme

The legacy of overcrowding associated with poverty within the former bantustans is widely acknowledged.

The redistribution programme (more recently embodied in the Land Reform for Agricultural Development – LRAD - Programme⁸ is the main tool available for redistribution programmes, but this programme is aimed at commercially oriented agriculture and is not designed for poor entrants to land for social protection and direct provisioning and as such plays a very limited role in reducing overcrowding of the communal areas. A recent evaluation by HSRC (2003) confirms this observation. LRAD therefore does not appear to be making significant inroads in the "communal" constituencies, as it does not address the specific circumstances and levels of needs of the poorer and informal spectrum of the land market and it is arguable whether the programme would impact even under highly scaled up delivery. Nevertheless some groups and individuals from these areas are being assisted to access land via LRAD, with uneven results.

The provinces with large communal areas, such as KwaZulu-Natal and the Eastern Cape, have experienced substantial demand for land adjacent to existing communal holdings, whether State or privately owned land. The land is desired for both productive and residential purposes. Groups may purchase, and have purchased, this land through accessing the Settlement and Land Acquisition Grant, and using the CPA Act. In the Eastern Cape, individual households, usually ex-farm workers living on State farms, have acquired residential land and access to commonages in terms of IPILRA and the Settlement and Land Acquisition Grant and in some cases additional productive land using LRAD. In KwaZulu-Natal cases where the newly acquired land is adjacent to an existing tribal authority area, tenure often mirrors the traditional land practices. In other cases there has been tension between the CPA and traditional authority structures with regard to land administration. There is the potential that once the CLR is in place that a grant mechanism will be instituted that will allow African traditional communities to acquire additional land (similar to the Municipal Commonage Grant). This will

Redistribution in KwaZulu-Natal

In KwaZulu Natal, between 1994 and December 2002, some 239,936 hectares of land assisting 16,001 households were transferred through the redistribution program. However, not all of these transactions would involve households from communal areas, and they do include categories such as farm workers.

DLA, 2002, M&E Directorate.

⁶ For example, the Glen Grey titles conceived in terms of the Glen Grey Act of 1894, a form of perpetual leasehold that linked land tenure rights to systems of local governance and land use management.

⁷ The Upgrading of Land Rights Act is not applicable in most of the former Transkei due to legal anomalies.

⁸ The programmes provide grants to individuals, not households. Individuals qualify for R 20,000 provided they contribute their labour, but must contribute additional cash of kind in order to access larger grants – up to a value of R100, 000.

provide a direct mechanism for communities within the ex-bantustans to access additional land and could immediately assist in releasing pressure in areas where overcrowding is particularly severe. This form of grant may not be universally welcomed, particularly by proponents who believe that commercial agricultural interests are best served by individual freehold, and wish to see a deracialisation of land holding, but on an individual freehold basis.

3.2 The informal system

Existing post-bantustan institutions and practices outside of the formal policy and legal environment

History is one of the pervasive influences on current land use patterns and land rights. Understandings of communal land use rights in the past have failed to acknowledge the multiple livelihoods of the informal communal system and the inextricable linkages between rural and urban economies. Structural links between the formal and informal economies have remained a feature of the post-apartheid era: the urban economy still draws on the former bantustans as if they are labour reserves, as occurred under the previous government. However, institutions supporting land rights and land use have undergone fundamental change, characterised by the withdrawal of former State services in land administration, and new roles for local government in land issues.

Land rights administration and land use regulation have become increasingly informal pending new regulatory frameworks. In some cases, such as KwaZulu-Natal, informal systems based on customary practice have proved to be more robust, having had a less interrupted historical passage than in other regions. In others, the collapse of the Permission to Occupy administration has resulted in the emergence of unrepresentative local or traditional structures, the growth of systems of patronage and random land allocations. PTO rights themselves have been “downgraded” and informalised.

3.2.1 The homeland/bantustan system of land administration – incomplete institutional transformation

The PTO system of land rights, first applied in the former Ciskei and Transkei in the early decades of the twentieth century, and then adapted and extended to other regions of the country (consolidated in the authoritarian Proclamation R188 of 1969, a version never extended to the former Transkei) precipitated the emergence of an extensive State machinery for implementing and administering these rights. This land administration was wholly separate from, and parallel to, the core land administration system servicing the registration system in the rest of the country.

PTOs incorporated both tenure and use rights in single spatially identified parcels of land earmarked for a specific land use (residential and arable, also trading sites and other categories of State domestic or public purpose uses such as schools and church sites). In the case of arable and residential rights, these were issued to male heads of household, providing widows with usufruct rights only.

The PTO system was more than just a bureaucratic adaptation of customary tenure – it was a semi-formalised system of land occupancy rights, being a hybrid of western concepts of land ownership and land use, customary practice and administrative convenience. The system fulfilled the multiple needs of a labour-hungry industrial and agrarian economy, racially restricted access to land and adaptability to local conditions. In its original form it necessitated a radical diminution of the powers of traditional leaders whose role in land allocation was restricted to that of recommendation, i.e. validation of the eligibility of an applicant as a member of a particular administrative area or sometimes ethnically defined group. The local magistrate/civil commissioner by contrast held the legal power to issue the evidence of the land right. The formal provisions of the law were widely disregarded in parts of the former Transkei where traditional institutions retained credibility and authority. Reintroduction of the system of traditional and later “Bantu Authorities” strengthened, but did not change their legal functions in land allocation. The customary system of land allocation and land use practices survived more in tact in KwaZulu-Natal, where the authority of traditional structures in respect of land administration was retained historically through “indirect rule”.

The inadequate provision for legal recourse in the PTO system in event of abuse, or gender discrimination meant that it could be manipulated by the State or powerful local interests and was routinely used to extract gifts. The PTO system lost currency in terms of the new land policies of the country, which denoted PTOs as “permit-based”, gender-discriminatory and therefore unconstitutional and inferior. The institutional framework for administering these rights was scrapped, encouraging the growth of patronage.

The PTO system nonetheless has legacies that cannot easily be eradicated. These rights - if not the institutional baggage - continue to hold currency as evidence of familial land rights, albeit at the expense of past female rights of succession. PTO rights, though not legally heritable, have in practice devolved on male household heads through the re-issuing of the PTO. An important point of significance about the PTO system in the Eastern Cape was that it arose around and alongside other forms of individual tenure rights that were linked to surveyed boundaries. Thus, evidence of PTO rights exists in relation to evidence of other rights, such as freehold or quitrent on the one end of the spectrum and less formal rights, such as informal post-1994 allocations on the other. Any new land rights regime would have to take into account these already-existing rights in situations where land rights are locally contested.

The abandonment of support for rights such as PTOs, and in the absence of legal alternatives, the tendency is to favour transfer of land into private individual or group ownership when land development occurs. Both the Development Facilitation Act and the Communal Property Associations Act provide only for this option. Moreover, developments involving delivery of housing favour freehold, as it is most compatible with the household grant system. Evidence, however, suggests that transfer of land in a context of poverty, distorts markets and may increase tenure insecurity.

Traditional authorities

Tension relating to constitutional imperatives and custom abound in land policy and are most acute in the context of traditional authorities. The role, merits and legitimacy that should be granted to traditional authorities are highly disputed. Traditional authority structures neither belong to the State nor are they wholly outside of the State, with their history of political involvement (including overlap and interference) well documented. The framework for traditional authorities (the formal legislative recognition of their powers and functions, and parameters) has been managed and administered through legislation and political manipulation since colonization.

Since 1994, democratically elected structures have been put in place at local and district levels to represent citizens' interests. In this sense full citizenship is extended through the State and through democratic process. Central to this is the assumption that the social fabric (including identity, social relations, citizenship) will be reconfigured through State intervention (see for example Munro, 1996).

Critics of the State's attempts to maintain the notion of "African communities" through the partial or tacit recognition of tribal authorities' land rights, maintain that the continued existence of traditional authorities inhibits the development of citizenship and perpetuates a paradigm described as the two nation status. It is suggested that a complete extension of the State is necessary to establish full citizenship. Failure to over-ride traditional authorities retains the fusion of powers in unelected traditional leaders, which is characterised as "the clenched fist" that characterised colonial and apartheid rule. It is reasoned that this has led to a 'bifurcated state' that combine elements of indirect and direct rule, a form of 'decentralised despotism'. The analysis goes further, maintaining that this problem lies at the root of non-delivery in these areas (Ntsebeza, 1999).

Traditional authorities confront the State

"The plans which are now finally being implemented to take away from the institution of leadership not only local government powers, but also the powers to allocate and administer land, will weaken the institution of traditional leadership as well as our monarchy ... The present juncture is so critical that one can say that the institution of traditional leadership has not been in such jeopardy since the time of King Dingane ... There are people who wish to divide that which has been united by history, by blood, and the way of our nation."

Inkosi and Home Affairs Minister MG Buthelezi
(Sowetan, 28 July 2003)

The place of traditional authorities in post apartheid South Africa?

"The main problem with post-apartheid South Africa's attempts to reform land tenure and local government, however, is that while efforts are made to dismantle the rule of traditional authorities, the same Constitution that has a fundamental principle the idea of democracy based on elected representatives recognises an unelected 'institution of traditional leadership' without providing any clarity as to its role, functions and powers. [These critics strenuously argue] that to simultaneously dismantle and retain the 'clenched fist' is a fundamental contradiction. It is this contradiction, and a reluctance on the part of the government to resolve it, that, in the final analysis, is at the heart of the lack of delivery in the rural areas of the former Bantustans."

Lungjisele Ntsebeza, PLAAS, 1999

While the principle of democratic representation is not up for grabs, the State is seeking some form of compromise. This position is clearly outlined in the White Paper on Traditional Leadership and Governance, which attempts to recognise and respect cultural practices and rights. The White Paper recognizes some of the roles undertaken by traditional authority structures at the local level – particularly with regard to social cohesion, the function of representation, the

relatively low costs of maintaining the system, and the fact that customary systems are well known and understood at a local level. The White Paper refers to traditional authorities as “custodians of culture and protectors of custom ... [undertaking] judicial functions ... [to] define and interpret customary law, and settle disputes.” (10 September 2003, 20).

The development of the White Paper – and particularly the sections dealing with the future role of traditional authorities – has been highly contested, with allegations by traditional leaders that they have been betrayed and that government has been slow in attending to unresolved issues. The current version of the White Paper differs from the previous versions in two critical ways. The need for partnerships between the various State organs and traditional authority structures is emphasized repeatedly throughout the document. The second is that land administration is for the first time directly referred to as a role and function that traditional authorities will undertake (section 3.3.3: C: ii). Part of the problem is that there is great variation in the legitimacy and efficacy of traditional authorities across the country, a situation that has undoubtedly made the development of a clear framework by the State a complex process. The ambivalent attitude of the State towards traditional authorities, in particular at the local government level, has led to confusion of roles and functions and in some cases competition between the two institutions.

The DLA's position on the role and future of traditional authorities has clouded land policy since 1994. Initially the Department steered away from traditional authorities in relation to functions of land administration. Later, there was engagement with the notion of “African traditional communities” and structures in relation to land holding and management. However, this approach was complicated by the lack of legal clarity over the status of African traditional communities, and definitions such as “tribes”, in relation to property ownership, leading to a more cautious approach.

There have also been arguments about the practicalities of implementation. The DLA grant structure generally focuses on individual beneficiary households. When individual household grants are pooled in a community application, the Department has to ensure fair access to the resources by each household (for example in the democratic and gender requirements stipulated within the Communal Property Association Act). Where the application was group based through a traditional authority or African traditional community, there were concerns that the Department could not “ensure that the benefits derived by the community members from any such land transfers and purchases would be distributed according to democratic principles, values and practices” (DLA, 2, 2001). The Departmental officials therefore often insisted that a Communal Property Association be established, even if this resulted in a parallel structure.

Dr Siphso Sibanda, who has written extensively on the legalities, status and terminology used with regard to traditional authorities and communal tenure systems, has headed the debate around traditional authorities within the Department. For example, the term ‘African traditional communities’ rather than ‘tribes’ (seen as derogatory and pejorative) became part of Departmental discourse. Sibanda has argued extensively that African traditional communal tenure systems should be given full legal recognition, with existing traditional authority land rights given the same legal status as private holdings or CPAs. According to Sibanda customary land holding practices have, “hitherto ... been left off the menu of legal entities available to communities to choose from” (Sibanda, 2001: 9). This recognition is seen as being important if African traditional communal tenure systems are to be seen as equal to Western models of social development and tenure, and in order to show that traditional authority structures are not necessarily unrepresentative and corrupt.

The Minister of Land Affairs in her policy statement of February 2000 encouraged the development of further grant mechanisms relating to the acquisition of African traditional commonage. A draft policy document circulated within the Department identified the role that traditional institutions could play in this regard; “traditional leaders and institutions will administer the land so acquired on behalf of the members on the basis of the community's customary laws or shared rules [which must comply with the Bill of Rights, the Constitution etc]” (DLA, 2001, 6).

The revised versions of the Communal Land Rights Bill (CLRB) and the White Paper on Traditional Leadership and Governance now form complementary instruments, and provide the legal mechanism which will give legal status to African traditional communities, particularly the CLRB which clearly provides for African traditional communities to access and own land. The conditions for this are not spelt out in detail, particularly those relating to community rules (presumably the CLRB regulations will do this). It is not clear how the new policies will overcome the dangers inherent in policy bifurcation, which may exacerbate the negative tensions between customary and statutory land rights systems.

Communal tenure as an institution

Communal tenure is conceptualized here as an institution in its own right. Traditional land tenure systems are a type of communal system. Although partly regulated through legislation, particularly in KwaZulu-Natal, communal tenure is based on local arrangements and it is this aspect that is considered private.

Communal tenure provides the poor with a crucial livelihood asset that cannot be alienated through sale or failure to repay mortgage. It is not simply a cheap, under-developed freehold option. It has its own rules, institutions, norms and values. In certain circumstances it has been shown to have advantages over freehold tenure. As a group-based system with exclusion rights, it provides a base for the accumulation of social capital, which creates conditions for social stability during times of change and economic instability.

There is growing recognition that tenure interventions should seek to adapt and extend existing communal tenure practices rather than replace them. Communal tenure in South Africa has been inherently fluid in the face of social change, though in some regions remains intransigent to the power of traditional authorities. Modern application of communal tenure, for example, is exposed in its weakness in providing land rights to women. Anecdotal evidence from KwaZulu-Natal indicates that social changes in family structure in some traditional authority areas has impacted positively on tenure, particularly the rights of women. This flexibility is one of the strengths of communal systems, but at the same time the lack of a formal legislative framework makes access to services, recourse to justice, representivity and tackling of authority difficult.

Generally, communal systems promote strong rights to personal residential property. Communal systems in some regions display a high propensity to absorb new land applicants (particularly relatives) and as such act as a buffer against destitution. In most cases newcomers are absorbed within an accepted hierarchy of rights. In most communal systems, membership of a village community provides the framework for rights of access to commonage and collection of natural resources, even if the person is not in permanent residence. In some parts of the Eastern Cape, however, both formal and informal rules controlling new allocations of land have broken down, with widespread reports of random and opportunistic allocations. A market in land is constrained by a central tenet of communal systems, namely, that land rights are contingent on membership of a community. On the one hand, this principle protects the integrity of the system, on the other, it constrains mobility and choice.

Although use rights (residential, arable and grazing) within communal systems are attached to individuals, land uses can be changed. However land use changes tend to be determined by hegemonic interests, and women find it harder to press for change outside of a formal regulatory framework.

Over-legislating customary communal systems, which are deeply embedded within the social system, presents the threat of undermining local action and functional authority structures, thereby promoting an environment in which opportunism and unforeseen consequences are commonplace. At the same time, it is clear that greater linkages between traditional systems and government institutions are needed to drive constitutional principles into the system, and to promote people's access to the benefits of local economic development, justice, land use regulation, grants and services.

3.2.2 Land use practices in communal areas

Land use practices in communal areas are more varied than tends to be acknowledged. The commonly recognised uses are homesteads, cultivation and grazing. This obscures the multiple land uses and livelihoods of the poor, which tend not to be visible to the formal sectors. It also conceals the gendered nature of land use practices, and the weakness in policy around women's land rights. Land use practice is discussed under "Cross-cutting issues" in section 4 below.

3.2.3 Role of the markets

Typically analyses of the bantustans emphasized the lack of market access but in reality market transactions have shaped relationships since colonisation. One of the reasons for this is the fact that communal areas only manage to produce in the region of 30% of their food requirements, thereby necessitating a reliance on the external food market. In addition there has long been a vibrant internal market –particularly for cattle – within the communal areas.

What is true, however, is that communal land users have not – with a few notable exceptions in the wool and sugarcane sectors - been able to access formal agricultural markets with their produce. Equally, transfers of land and land rights in these areas have remained distinct from influences in trends in the broader land market.

Past development interventions on communal land have focused on promoting market access. Typically the benefits of these initiatives have been limited, as they have tended to focus on a narrow production value of communal land and agricultural commodities. Such interventions – particularly where they have encouraged specialisation - ignore the role of agriculture and land in the pursuit of diverse livelihood strategies. The role of land access, stock and agriculture is often that of a contingency that is both extremely valuable in preventing destitution and not the sole source income.

In the past agricultural schemes have encouraged communal land users into a western-style commercial agriculture, encouraging specialisation and exposure to market forces beyond the control of communal users. For many risk averse poor farmers on communal land this – and particularly the forfeiting of tradition livelihood strategies - is unattractive.

More recent efforts have concentrated on substituting the reliance on external markets. The Eastern Cape Department of Agriculture's, Massive Food Production Programme, for example, aims to promote the production of maize for local markets, thereby reducing reliance on maize imported from the Free State and increasing the regional income multiplier.

Market value of land

The concept of internal "renting" of land is not well developed in communal areas. Market based land values do not generally translate into monetary values or even "return in kind". They retain instead social values related to land as a livelihood asset, which includes socially regulated access to land and how it is used. Social regulation is generally applied through closed access to members of the community only, which in turn constrains movement and the development of a land market. There is evidence of change. Forces of change include the penetration of more individualized tenure regimes, the political privileging of equitable, individual rights to property, agricultural economic development and socio-economic pressures on the household, which are magnified in the context of HIV and AIDS. These changes adapt and transform communal concepts of land loans, which are not financial transactions between legally equal partners based on land values but social transactions involving duties to support relatives' livelihoods or to assist families in need and "paid" for through unequal relations of patronage.

There are tensions between the articulation of sales or rentals of land and communal conceptions of land that are embedded in past, present and future relationships, mediated by communication between male heads and their ancestors. A landholder, whose family graves are located at the homestead, is unlikely to transact in what constitutes family identity. Where sales of 'structures' have taken place under these conditions, people have stripped the structure and rebuilt elsewhere. However, where graveyards have been centralized (often through missionary influence), and land is less critically bound into this relationship, it is more possible to transact in it. Where landholdings are more individually defined (again through missionary influence), a new household may begin to gain dominance over a holding (e.g. by borrowing or being asked to 'look after' land through an authorised procedure). Here the original 'owner's' rights are not extinguished, which can create grounds for a dual claim to the land that may last generations. This land is then closed off from both formal and informal land markets and will remain so until clear adjudication processes are available (see Appendix Four. These examples indicate how communal systems respond to change through practical adaptations on the ground.

Despite the tensions in the values underlying these different notions of land, the development of a land rental market in communal areas appears to be a favoured option by external agents, who are struck by the contrast between unutilised land on the one hand and people without access to land on the other. Proponents of a rental market argue that the redistributive impact of a land market would result in a more efficient allocation of land, although it is not clear that this notion of efficiency embodies the full set of land values contained in communal land.

In some localities land rental markets do nevertheless exist and are developing. In KwaZulu-Natal, areas penetrated by contract farming have begun to see a land rental market developing as a result of demand for land from community members with some status, notwithstanding the tensions between the market and the social land ethic. Likewise, in the Eastern Cape, where individual tenures predominated historically, forms of internal exchanges that give land a value, such as sharecropping, have been practiced in communal areas, which assisted in redistributing resources where land pressure is high. Research suggests that the emergence of a rental market as AIDS affected households or other highly

vulnerable households lose the capacity to use fields, which could then be loaned for cash or a share of the crop to other members of the community, would be advantageous and there is some evidence to suggest this occurs.

The push to create a land market in communal areas does appear to be increasing. Some legal entities created for communal land reform projects provide for the sale of membership rights on request, for use of land holdings as collateral. It appears that member-occupiers interpret these provisions as the right to sell land, suggesting that an informal land market similar to that in urban housing for the poor may begin to emerge. This push is also present in some traditional areas where the youth and gender activists argue for individualised land holdings so that they “can do as we please with our land” (AFRA research, AmaHlubi). The demand for individualised rather than socially mediated control over land is a necessary precursor to a land market, though the issue of individualised rights has wider significance than that of the land market.

There is scope for the extension of a land market in the communal regions. For this to be in the interests of the poor, however, it is essential that judicious “sequencing” be observed. More specifically certain prerequisites should be in place prior to the exposure of communal land to the market. These include:

- land rights need to be distributed broadly in accordance with transparent gender inclusive principles enshrined in the Constitution,
- the full set of values associated with land need to be acknowledged so as to ensure that invisible rights (such as the extension of citizenship) are not transacted unwittingly, and without due remuneration,
- legitimate and accountable systems of transaction and mediation need to be created,
- structures that protect the rights of the poor and the marginalized need to be created,
- a legitimate system of succession needs to be established. Against the backdrop of HIV/AIDS the system of succession should protect the rights of orphaned minors and widows,
- environmental assets need to be identified and enforceable environmental protection measures need to be in place.

Where these rights and values are not enshrined prior to market exposure, the market mechanisms could exacerbate the plight of the poor. Where the poor are given secure rights to communal resources – not necessarily private tenure – these rights can be used to leverage resources in the market.

3.2.4 Informal credit and banking institutions

South Africa has a sophisticated financial sector, but historically it has not serviced remote farmers on communal areas. In 2000 an estimated 26 million South Africans, many of them in communal areas, had no access to formal financial institutions (KPMG, 2003). Instead commonage users have had to rely on local savings schemes – most classically “stokvels” – and informal loan agents who frequently charge a premium.

Since the exchange of land in communal areas seldom involves financial transactions, the lack of access to credit has had little direct impact on the distribution of land in these areas. However, the inability of communal land users to access loan finance has contributed to a self-fulfilling cycle of underdevelopment: low returns to agriculture have made it difficult to generate the sort of revenue that would permit access to finance, and without access to finance, investment in the items that might increase returns is difficult.

3.3 Evolving institutions

3.3.1 The Communal Land Rights Bill

The Communal Land Rights Bill (CLRb) seeks to provide a framework for securing tenure and a platform for development in communal areas. Communal land is defined as areas classified as African communal areas under Apartheid, as well as any other land “acquired by, or for a community whether registered in its name or not” (CLRb, 08.10.03). This includes land acquired through the land reform programme, and would imply that land currently held by a CPA would also be included.

The main aims of the Bill are:

- To provide for legally secure tenure in communal areas.
- To enable registration and transfer of communal land to communities.

- For the award of comparable redress where rights are lost or compromised.
- To provide for the conducting of land rights enquiries.
- To provide for the democratic administration of communal land.
- To enable registration of community rules.
- To establish community-level land administration.
- To establish provincial level land rights boards.
- To ensure that municipalities have the legal authority to provide services on communal land.

The CLRB has a central function of transferring communal land to a community. Land tenure rights are recognized as being an informal or formal right established through customary law, established practices or beneficial occupation (described as 'old order rights'). Once these rights are "confirmed, converted, conferred or validated by the Minister", they are recognized as 'new order rights'. New order rights are to be recorded in a communal land register in terms of the Deeds Registries Act. Any subsequent land allocations or changes to rights are to be recorded. These rights will be formally recognized through the creation of a 'Deed of Communal Land Right', and may be upgraded to freehold (this requires community approval). The conflicting, overlapping and unrecognised underlying rights will be dealt with through a land rights enquiry or through the alternative dispute resolution system that the Department of Land Affairs is currently establishing.

Local level land administration is to be undertaken by Land Administration Committees. These structures can be a traditional council, although the composition must comply with the requirements set out in the CLRB. The existing local institutions and social systems are therefore relied upon to reduce the costs involved. Sibanda (11, 2001) states that "[t]he use of existing local institutions would have the effect of reducing the cost to the State of relying on a huge bureaucracy that was initially proposed in the June 3 1999 draft Land Rights Bill. These local institutions have some capacity that already exists notwithstanding the fact that the development of this local level capacity has been adversely affected by the colonial and apartheid development practice and experience."

Previous versions of the CLRB emphasised the restoration of respect and legal recognition to traditional tenure systems and African traditional communities (Sibanda, 2001). The current version of the CLRB (08.10.03) does not make direct mention of this, and has been widened in scope to include all communal tenure situations. However, the extent to which the State is willing to intervene, and transform, social relations at a community, household and individual level is circumscribed in this legislation. This sets up a tension between individual rights as enshrined in the Constitution and the Bill of Rights, and the right of the community to determine rules which impact on the rights of individuals. The CLRB attempts to provide recognition and respect for indigenous social systems, while at the same time recognising individual rights and the need to transform society in terms of gender, democratic and power relations (see for example sections 19 and 20). The recent versions of the CLRB have been criticized for not dealing with power relations directly and specifically, and versions of the Bill have variously inserted and removed references to gender equality. A further tension relates to the limited extent to which the new dispensation will provide State-backed administrative support, at the level provided to tenure systems in the "core" or "formal" sector, and even measured against that afforded to former PTO and quitrent systems.

<p>Timeframes for transfer There are an estimated 20,000 rural communities in South Africa. At a rate of 100 transfers per year - which is ambitious given current rates - it would take 200 years to assist all rural communities to get to the final stages of the transfer process.</p>
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Perhaps the most pressing concern raised by commentators in the sector has been the strong emphasis on centralised registration processes, and on transfer into ownership, divesting the State of all its ownership responsibilities. Decisions around these processes depend on centralised discretionary powers of the Minister of Land Affairs. There appears to be no blanket extension of statutory rights, therefore interim rights will continue, pending an application-driven process to trigger a process of upgrade. The Bill thus falls short of a systematic approach to bringing currently informal land rights into a unitary land administration framework. Critics intend challenging the Bill on constitutional grounds, as well as its overt attempt to link land administration to the envisaged Traditional Leadership Bill and its failure to convincingly provide prospects for improved land tenure rights for the majority.

3.3.2 Community priorities around tenure reform

Rights holders who have been consulted confirm their desire for (a) protection and legal recognition of informal tenure rights and (b) provisions to allow local people the opportunity to play a key role in governance of land rights, including decisions around land allocation and use of the land. Rights holders welcome the fact that local institutions will be accorded some status in making decisions around the spatial and tenure relationships within their localities, and that community-oriented governance in one form or another is to be recognized and afforded status in the law. However, responses to government plans are qualified in numerous (and different) ways, with great fear that government support and resources for administering rights is to be jettisoned with the intended legislation:

- Concern that roll-out would take a long time, and about what happens in the interim.
- Desire for clarity on the nature of existing informal rights prior to registration/transfer. What measures, such as the present Interim Protection of Land Rights Act (IPLRA) will provide for the legal protection of existing land rights prior to registration and transfer?
- Fear that a case-by-case transfer and registration process will delay development opportunities during the interim.
- Want the tension about the respective roles of traditional authorities and local government addressed so that development in communal areas is not hampered.
- Want clarity on the how the processes to define and register rights, and processes of land use planning and development will interface with each other, and clarity on the respective roles of traditional authorities and councillors with regard to this.
- Do not want transfer of title or creation of strong irrevocable rights to pre-empt development opportunities.
- Strong desire for economic development, underpinned by a solid land administration system to inform trajectory of tenure reform, and for these elements to be balanced.
- The disintegration of the old land administration systems was frequently identified as the *most* pressing problem in communal areas.
- All people/groups consulted indicated that they want State-supported, sustainable land administration systems.

Tenure and development

On the ground, there is both support for, and opposition to, the idea of the state transferring land, as there is ambiguity around the concept of land transfer to groups. Most favour a balance between the individual rights and group systems. People assert that tenure reform must take place hand-in-hand with development, and tie rural people closer to government support, not sever their links with it.

Source: PLAAS community consultation on the CLRB 2003

The Namaqualanders – after a long process to choose between two legal options for vesting communal rights – maintain that they have come full circle and say that neither will work unless the government subsidizes and supports adequate internal land administration systems. Many are asking why the land cannot stay “state owned” until sustainable land administration systems are guaranteed.

In summary, rural people say they desperately need a balance between land rights and development. They want assurance from government that provision of services will be provided if the land is privatized. They do not want to have to choose between secure rights and development; that their land rights must secure for them a central place in planning and development decisions. They seek integration between land administration functions, particularly linkages with local government planning and development functions, bearing in mind the complicated interactions and intersections of processes involved at all stages. As co-ordinator of integrated rural development, local government will require extensive resourcing to provide the capacity to fulfil these requirements, raising concerns about present budgetary provisions therefore.

3.3.3 The challenge of land administration

New approaches and understandings of land administration (including land rights and their allocation, spatial demarcation, land use management, land information systems, and enforcement) provide the opportunity to link the formal and informal land rights and land use systems, taking into account issues of different levels of need, cost and sustainability. The design of a national land administration framework must address these issues directly and explicitly. Current policies do not do this. There remain contradictions between pending laws on land use management and communal land rights administration and management. The former imposes a formal, normative planning system across

the country, regardless of tenure distinction, while the latter maintains distinct and parallel systems of rights administration for communal areas, both prior to and after the transfer of land into private individual or common property regimes. The proposed system for communal land rights administration falls clear of a comprehensive State service, leaving the bulk of responsibility on the land rights holders themselves.

Given the complexities of the South African tenure legacies, the challenges facing land administration need to be worked out robustly and in consultation with legal and technical experts as well as social researchers and civil society. Evidence suggests the pioneering of new tools and a new regulatory framework is needed if a system that will be capable of bridging the formal and informal systems is to be achieved. Debates thus far have tended to be polarised between “pro-titling” and “anti-titling” positions, which obscure the real challenges. An adapted system will have to be designed to take into account the existing formal land titling system, because 1) it is a national core system used by investors and elites, who will continue to use it; 2) forms of titling and cadastral coverage in the communal areas already exist; and 3) many poor rural households in communal areas are demanding some form of title and/or registration. At the same time there is overwhelming evidence that a systematic land titling programme for rural communal areas is neither appropriate nor sustainable, and is not within the capacity of the State at present. It is not appropriate in so far as social tenure continues to provide multiple services in relation to existing livelihoods of the poor, as outlined in this report.

It seems clear that any innovation must match the de facto social land tenure systems and build incrementally thereon. Accommodation between Eurocentric notions of title and customary rights systems should be made to overcome present dichotomies. This requires adjustments to the conventional definition of land administration. The latter does not take into account governance and institutional aspects of tenure in communal areas and is overly prejudiced against non-cadastral spatial units. This has the effect of excluding those areas outside the present cadastre, i.e. most of the land surface areas of the ex-homelands (Fourie in MXA 2002).

A key question is whether boundary or spatial information is an infrastructure for the Public Good or whether its primary purpose is legal evidence of rights (ibid 2002), whether these be group or individual rights. It is a common misconception that land administration systems service land rights only, whereas in reality a great number of other systems “ride on the back” of land tenure and land administration, and hence the term land administration “infrastructure” is appropriate. In the past, the cadastre was regarded as the infrastructure, whereas currently the whole land administration system has been included, in order to accommodate areas such as the vast tracts of land in Africa that are not covered by the cadastre. Spatial planning and land use management (including natural resource management), service delivery, cost recovery on service delivery, valuations, rates and taxes, raising financial capital, etc, all rely on the cadastre in the formal land administration system. The implication is that these functions will not take place in the absence of a cadastre (ibid 2002). This calls for a radical re-think of how land administration can be re-engineered to serve the poor, and how alternative systems of spatial information, e.g. data based on a range of other forms of evidence but which lack co-ordinates (i.e. goes beyond cadastral parcels) and land rights and records (e.g. possessory rights) can be brought into an integrated land information system, but which at the same time extend the current constraints of informal systems.

Fourie (2002) argues that conventional approaches to land registration are seen as having no place in poverty alleviation because of cost and affordability factors. However she points out that an adapted form of land registration, linked to spatial information, can be critical for poverty alleviation, as spatial information can be used to plan the delivery of social and economic services. She proposes the creation of a Spatial Data Infrastructure as a Public Good for a range of purposes, and which includes non-cadastral information.

This approach would move the debate beyond the over-simplified emphasis on the pro's and con's of titling as a means only to increase tenure security, and rather broaden the focus to take into account the use of spatial information to plan the delivery of economic and social services. It has been suggested that new technology could well be developed to take into account “positional uncertainty” enabling the integration of a range of land management and administration organisations (Fourie 2002), and which would play a unifying and integrating role between different land tenure systems and the associated social structures.

Decentralisation is the key institutional issue in the design of new land administration models that take into account the need for broad based land administration that is not “run out of the capital city by land professionals working for the commercial sector and elites” (Fourie 2002) alone. According to Fourie, working models of decentralised land registries exist in Africa, and demonstrate the potential for decentralised land titling or registration. She concludes “land titling per se cannot yet be ruled out when land policies are developed [but] should be investigated in terms of ... other issues

...such as the decentralisation of land services and capacity to deliver at these levels, and the cost of their provision to the State and the citizen". Hence the role of local government should be factored in to debates about land rights governance, as it is the closest sphere of government to the people and is best placed to co-ordinate the multi-sectoral approach to land issues that is critical in land use management (i.e. including forestry, human settlement planning, agricultural reform, water management, taxation, etc).

Research on the potential for a new regulatory framework should assess what impact various models would have on the livelihoods of the poor, taking into account land rights security, access to natural resources within a framework for land use planning and natural resource management, the role of land in social protection and land rights for women, accountable institutions and enforcement mechanisms and making the land information systems, and the legal and technical procedures and principles underlying land rights and land use, accessible to the poor. The problem with present policies and policy proposals is that they do not sufficiently take into account the responsibilities of the State in the provision of land services, the role of local government in land administration and the failure to date by private communal entities to deliver robust land administration (see Appendix Three). This may lead to over-emphasis on formal planning (township establishment), or over-hasty once-off transfer from the State to private legal entities as a first step.

4. CROSS-CUTTING ISSUES

4.1 Land use and livelihoods

Multiple livelihoods, land and poverty

Rural economies are not just about farming, as Elizabeth Francis observed in her seminal work on livelihoods in rural Africa (Francis, 2000).

The concept of "multiple livelihoods" arose in response to attempts to analyse the impact of interventions to induce "commercial farming" in developing economies. Multiple livelihoods were conceived as the non-farm contribution to farming in order to generate the capital to re-invest in agriculture. However, the term is now widely applied to the relatively un-commercial conditions in the former bantustan communal tenure areas. This has brought a corresponding shift in the understanding of the function of multiple strategies, namely that in less commercialized areas, the poor engage in multiple livelihoods primarily as a coping mechanism against poverty, and are not generally able to reinvest scarce cash resources in agriculture. The implications of the importance of non-farm livelihoods in the communal areas, are, however, consistently underrated in policy recommendations, which continue to overstate the role of farming only.

There is great diversity in how livelihood strategies combine and lead either to enhanced social and economic circumstance, or simply remain as survival mechanisms. Responses are always shaped by larger forces, which interact in particular ways with local conditions and values (Francis: 2000,182). State-driven attempts to create a commercial farming class on communal land show few successes, as testified in a range of under-performing high-cost irrigation schemes, farming schemes designed around "economic farming units" and leaseholds on State land.

Land as a physical resource plays a critical role in multiple livelihood strategies - but not only for agriculture. Whilst food production is critically important to the rural poor, the role of land in supporting livelihoods goes beyond the narrow conception of "agricultural land use" and "food production". Non-agricultural land based livelihoods, such as natural resource harvesting and hunting, remain critically important to livelihoods in rural areas. The complex manner in which multiple livelihood strategies combine tend to be overlooked by development actors who attempt to replace them with commercial agriculture in isolation of existing strategies and internal markets.

Access to a familial land rights is also a powerful lever for social and political inclusion in the body politic and is seen as foundation for gaining access to other State and private resources, both within the communal areas and without. In this sense land rights impart identity and social protection and as such constitute a central

Role of agricultural production

- Security against poverty for vulnerable households.
- Provides food security - up to a quarter of requirements in unemployed households.
- Insurance against irregular income and unemployment for vulnerable households.
- Seen as important/reliable source of income for very vulnerable households.
- Facilitates accumulation for wealthier classes.
- Seen as a "fall back" in times of need.

Adapted from May, 2000

component of livelihoods, particularly because this land cannot be attached. The ability of land to impart social protection and broaden citizenship makes land policy critical to government efforts to assist the poor and advance social inclusion.

Access to land and livestock

May (2000: 23) indicates that some "70% of the rural population have access to land, although in the case of more than 50% of this group, the land size is less than 1 ha". May also cites a study indicating that 26% of African rural households have access to a plot for cultivation, with an average size of 2.2 ha and 24% of African households own livestock (2000: 24). When converted to real terms the estimates are that 900 000 African households do not have access to arable land, and 1.2 million have no livestock (Aliber, 2001, 29). Results from a study in KwaZulu-Natal indicate that chronically poor households have access to less arable land than other groups (ibid).

Sources of income

Some 36% undertake some form of agriculture production, although it is the third most important livelihood source, after remittances and wages (see Table Two); and the principle source of income for only 18% of households (May, 2000, 24). Agricultural production is important for the very poor and for the better off. For the poorest category of households (classified as "marginalised" by May) subsistence agriculture is the dominant survival tactic, and this provides 81% of the household income (ibid). Where households are able to access remittances, wages and welfare incomes (some 70% of households) these tend to displace agricultural activities almost entirely (May, 2000, 27). Agriculture is therefore not a dominant source of income for most households in rural areas, except for the marginalised, and the wealthiest group, for whom agriculture provides 32% of their income. May concludes that on the whole "agriculture thus seems to play a dual role, as a safety net and as a way of deriving an entrepreneurial income." (2000 26-27).

Activity	% H'holds engaging in activity
Claiming against household.	39 %
Wage labour in the secondary labour market.	37.4%
Agricultural production (sold & consumed).	36.4%
Claims against the State.	32.4%
Source: May, 2000, 25	

The decline in commercial agricultural employment and the increasing casualisation of employment in the agricultural sector has impacted negatively on residents in communal areas due to their high levels of dependence on wages from the commercial sector.

Broad determinants of land use

There are competing and overlapping demands for different land uses across national, regional, local or household spheres. The way these uses are mediated is a function of the respective priorities of these potentially competing interests, and the outcome depends on macro and micro economic policies, land policies, historical land use patterns of ownership and access to political power.

The potential competition between the formal agricultural sector (corporate, commercial, private and public interests), and the poor who use the land in communal and informal settlements is an example of competing priorities; another is between conservation lobbies and developers, with local communities occupying an uneasy space between them. Less visible is the competition between different users within or across rural communities and households, often differentiated by wealth, age, gender or occupation.

The regulation of these different priorities, shaped as they are by broader social, economic and political interests, differs between the "formal" and "informal" land sectors. In the formal sector, contestation over land use (or development aimed at changing land use), is mediated via a host of regulatory laws, proclamations, by-laws and administrative practice, which work their way through "planning consent" procedures and compliance with a range of conditions, e.g. environmental impact or traffic assessments, which are authorised mainly at local government level, and in some cases, at provincial or national level.

Informal systems, by contrast, follow local practice and have little by way of formal mechanisms to arbitrate internal and external competition. Customary systems have been vulnerable to State-centric interventions underpinned by colonial and apartheid political engineering. Examples include the Land Acts, which delineated highly unequal distribution of land according to race; betterment planning in black rural areas; agricultural plans based on "economic farming units"; and conservation planning within settlements, such as soil reclamation works, fencing and camps. Other interventions, which changed land relationships include land rights systems such as Permission To Occupy rights (PTOs), and stock reduction schemes. Some interventions were met with violent reaction. Local users have not been accorded the status of users in the way that owners in a registered property system have recourse to formal engagement with authorities and civil society around proposals to change land use. As the pressure to convert land to new uses increases, mechanisms are needed to regulate and mediate between competing land uses to provide the poor, and women, with mechanisms to influence land use decisions in communal areas.

Betterment planning in the bantustan areas, and the introduction of the concept of "economic units" in these and the former coloured reserves, resulted in considerable reduction in the size of land available and accessible to rights holders for grazing, cultivation and expansion. The Border Rural Committee has assisted some local communities in the former Ciskei to quantify such losses. They have successfully instituted claims in terms of the restitution process, resulting in household financial settlements as well as considerable resources for land use planning and local economic development.

Betterment schemes were also applied to Act 9 areas to promote 'commercial' agriculture. Probationary leases were issued to 'bona fide farmers' with the intention to sell the land to them. Very little land was actually alienated through this process, but it did lead to a concentration of rights to arable land in the hands of a few farmers. Through a parastatal scheme, expensive agricultural infrastructure was invested, but failed to produce the envisaged increased levels of productivity. The changed spatial arrangements also resulted in the loss of grazing rights for many, in favour of rights for a few farmers. It reduced the scope for subsistence agriculture by poorer inhabitants, and substantially reduced their livelihoods.

These examples show how subordinate rights can be lost or marginalised in the interests of "development".

The question arises as to how to extend the benefits of external protection and mediation of land use to systems that currently fall outside of the formal land use planning systems. Currently the land use regulation paradigms for the freehold property market and "communal" situations have different rules and levels of institutional support. External agents tend to prioritise issues (e.g. notions of the "environment") differently to local land users. There is clearly a need for systems that allow communal land users to engage with land use and environmental issues and enter the governance framework. It would appear that these issues get debated, and decided, at multiple levels of civil society and government, often pulling in opposite directions, with local users drawn into the agenda of development agencies (private or public sectors, NGOs or all three) without independent access to mediation. Examples are the unfolding conflicts of interest over building a highway through Pondoland (exceptionally rich in plant diversity); or development involving casinos, hotel or eco-tourism in communal areas.

Current regulation of land use rights leads to further problems. Rights to access natural resources on afforested land, for example. In such cases it is extremely hard to decentralise natural resource management decisions to local users, as corporate and public interests are reluctant to relinquish control over resources where there have been high investments.

Without legal recourse or formal enforcement mechanisms, land rights holders are subject to the vagaries or conservatism of local practice which tend to favour the rights of men over women and the more influential over the more marginal and commercial activities over subsistence. Without recourse to institutions of governance, linked to government, local land users continue to be vulnerable to manipulation by powerful outside interests, or by elites within their communities.

The birth of a wall-to-wall municipal system of government has created the potential to reconcile the informal systems and formal systems, to spread the benefits of regulation and enforcement across all land tenure systems. However, extreme care needs to be exercised in the process to prevent the undermining of fragile relationships that have survived without such external mediation, or which have been created through internal mechanisms or PTO systems of regulation. However, local government in these rural contexts are the most under-resourced to rise to these challenges and therefore provincial and national governments need to develop their capacity as required under the Constitution.

Land use practices in rural communal areas

Land use practices in communal areas differ widely from one region to another according to historical circumstances and ecological conditions. Time has shown these systems to be responsive to changing circumstances. However, certain basic principles seem to hold in most communal areas.

The main *recognised* (i.e. "seen" by the State and local institutions) land uses are residential, arable and grazing. Residential rights are personal rights that cannot be alienated under local custom. Even under the State-imposed PTO system, the State rarely cancelled residential rights though it had the power to do so, and did so primarily to implement conservation and betterment schemes at scale. Rights to arable land differ from area to area. Evidence in KwaZulu-Natal suggests that fields may be redistributed, while in the Eastern Cape fields are held by stronger individual rights (quitrent or PTO) and would not be redistributed. Grazing land (commonage) is accessible to all residents regardless of their tenure status. Quitrent tenure in the Eastern Cape first granted exclusive rights to title holders only, but later these rights were diluted to accommodate access to later arrivals or new households, thus bringing this system in line with the PTO system – which is still contentious in some areas. In the Act 9 areas, State intervention resulted in the concentration of use rights in a handful of land users categorized as "farmers".

Commonages are used for a great diversity of activities beyond agriculture. For many of the poorest rural people commonages represent a public meeting venue, a source of water, a place for rituals and a place from which natural resources may be harvested – particularly firewood. In addition commonage environments include water-catchments, wetlands, diverse habitats (and associated bio-diversity). Commonages also contain vegetation responsible for preventing soil erosion and the bio-sequestration of greenhouse gases and heavy metals. In this sense commonage forms an integral part of the regional ecosystems, and contributes to environmental stability. Although this environmental value is difficult to quantify, it should not be ignored. This is particularly the case given that environmental instability tends to impose disproportionate costs on the poor, who are less able to insulate themselves against environmental disasters.

Many of these commonage attributes remain invisible to the State and external agents in spite of their importance to local users, particularly the poor. The introduction of betterment planning was typical of State interventions that disregarded the diversity of spatial land use in communal areas, and the accepted local rules regulating their access. This intervention attempted to redefine communal areas spatially, and in some cases disrupted internal relationships and shrunk accessible homestead resource bases.

Land for cultivation

Contrary to popular belief, not all land in communal areas is marginal. The Act 9 areas in the Northern Cape generally present less arable potential, but some regions along the eastern seaboard (former Transkei and KwaZulu-Natal) receive high rainfall, though soils in the former Transkei are not consistently favourable for cultivation. Without exception, however, overcrowding and adverse socio-economic conditions have undermined arable potential in these areas, the combination of which are associated with accelerated land degradation.

The majority of households in rural areas cultivate small plots of arable land (Andrew et al, 2003).⁹ There are, however, significant

Forces of change – case of Okhahlamba community in KZN

High levels of cattle theft means few households have cattle for ploughing, resulting in a transition from reciprocal production relations between households - "sharing" cattle for ploughing and then "sharing" the produce - to relying on tractors for ploughing purposes. As the tractor demands petrol, only those with cash can hire one and reciprocity relations underpinning subsistence economies seem to be dying out.

There are further reasons why cash is needed for production. Because the land is no longer as productive as before, cattle manure is not sufficient and people now buy lime and commercial fertilisers. Poor crop yields mean households eat all the produce rather than store some as seed, which they must now buy.

A major reason for not cultivating is the lack of fencing for household vegetable gardens and arable fields. Since cattle are stolen when they're taken to grazing areas, they're now left around homesteads where they destroy the crops. It seems that the theft of cattle has broken down the production relations which previously supported the economy by forcing a transition to cash from reciprocity and breaking down relations managing land use.

Source: Christine McDonald – personal communication

⁹ Andrew qualifies her conclusions on the grounds of great socio-economic and physical diversity, methodological constraints of secondary research not geared to investigate land use change *over time*, and insufficient attention to "biophysical or socio-economic and political factors operating at various spatial scales" impacting on local land use practices.

inter- and intra-household inequalities in the size of, and access to, arable land. Population growth and in-migration have created pressures on the land available to households and to individuals within households. New arrivals have often struggled to secure access to meaningful portions of land. In some cases the concentration of resources is modified through internal arrangements, e.g. sub-dividing arable holdings, sharing arrangements or cutting up grazing land. In rare cases rural households have increased access to arable land through sharecropping or lease arrangements, but this tends to be limited to particular sets of circumstances; for example where traditional land administration institutions are weak; severe land shortages prevail or forms of commercialised agriculture have emerged.

Cultivation is primarily geared towards food production for home consumption. There is some debate about the relative extent to which agricultural production contributes to the livelihoods of rural households in communal areas. More recent studies suggest it may be more significant than originally supposed and Andrews (2003) cautions against oversimplifying the complex relationship between farm and off-farm incomes and how the two are related via economic and social forces. What is clear however is that all communal areas remain net food importers.

Custom in most areas dictates that fields get opened up during winter to allow grazing of weeds and stubble. This is a source of contention in areas where there is irrigation and people wish to plant in winter, or where poor people cannot afford fences to fend off animals during the growing and harvesting season. In response to this and increasing stock theft, some people in the Eastern Cape have abandoned betterment fields and consolidated and fenced home gardens around homesteads. This enables these plots to be more easily reached, tended and policed. Consolidation and fencing of adjacent fields also enables collective capacity, motivation and ability to enforce, all of which can give rise to labour savings provided sufficient support for co-operation is available.

Commercial production

The consistent failure of market-based interventions to regenerate commercial agriculture in the communal areas despite numerous State and parastatal interventions, suggests a failure to understand the dynamics of rural poverty and how local economic strategies and multiple livelihoods of the poor are in turn shaped and constrained by the macro-economic environment.

In certain areas, particularly those close to marketing infrastructure, transport and towns, it is not a lack of access to markets that inhibits production of surpluses so much as an inability to generate surpluses. In part this can be attributed to the pervasive poverty and the risk avoidance strategies of the rural poor who perceive investments in agriculture as being insecure relative to the purchase of food or education, and accordingly only invest in agriculture as a last resort.

Research in some regions shows renewed production of surpluses where particular favourable conditions combine, e.g. Willowvale in the former Transkei, where settlements escaped the ravages of betterment planning and the influx of newcomers. Here, given remoteness and poor transport networks, other constraints limit economic expansion, such as access to markets or processing operations; appropriately designed community-based storage facilities to allow surpluses to be exchanged or sold when there is local demand; and supported access to more or suitable land. South Africa has a sophisticated financial sector, but historically it has not serviced remote farmers on communal areas. In 2000 an estimated 26 million South Africans, many of them in communal areas, had no access to formal financial institutions (KPMG, 2003). Instead commonage users have had to rely on local savings schemes – most classically “stokvels” – and informal loan agents who frequently charge a premium.

Expansion of agricultural production

Group of farmers in Ditsobotla (former Bophutatswana)

Expanded by accessing increased amounts of land, equipment, labour and finances under sharecropping.

Contract farmers in KwaZulu-Natal

Over the past 20 years, arable fields in communal areas have been used to cultivate commercial crops (sugar cane, timber, cotton, coffee, pepadew) grown under contract to commercial companies (e.g. Tongaat, Mondi). The companies provide farmers with physical inputs, credit, extension services, machinery, technical advice and a guaranteed market, who avoid the risks and expense of purchasing land and paying labour to grow the crop. There is concern that unequal power relations between the farmer and company results in terms that favour the companies.

In 1973, 4500 registered black sugar cane growers were producing a million tonnes on 15 000 hectares. In 2002, 50 000 growers using 80 000 hectares produced 13% of all cane produced. In 2000, there were 13 000 small-scale timber growers producing 100 000 tonnes on 31 000 hectares.

Source: Andrews et al, 2003

Since the exchange of land in communal areas seldom involves financial transactions, the lack of access to credit has had little direct impact on the distribution of land in these areas. However, the inability of communal land users to access loan finance has contributed to a self-fulfilling cycle of underdevelopment: low returns to agriculture have made it difficult to generate the sort of revenue that would permit access to finance, and without access to finance, investment in the items that might increase returns is difficult.

There are some isolated examples of access to product markets, in conjunction with inputs from other markets (credit, information, technology and support services) and sufficiently large land parcels, being the catalyst for cash cropping and produce marketing on communal land. Typically farmers in these areas are able to bring formerly abandoned fields back into production and maintain garden cultivation for domestic food production. Some of the modalities for this phenomenon have been in Ditsobotla and contract farming in KwaZulu-Natal.

In KwaZulu-Natal, application of contract farming relationships has enabled farmers in communal areas to access commercial markets and attain a measure of commercialisation. There is some risk that expansion of cash crops may impact on livestock farming as fields used for winter grazing are converted to long-term commercial production (e.g. timber). Some contract farmers are demanding registered ownership of increasingly large portions of land, thereby threatening the communal natural resource base. In the main, however, contract farming has had a negligible influence on tenure arrangements, predominantly making use of land that has been left fallow when food production has been consolidated in gardens around homesteads.

These case studies indicate that acquiring sufficient land for cash crop production within communal land tenure systems is possible, and problems may be overstated. They show that farmers with small plots can and do respond to market opportunities, despite low incomes. Andrews (2003) has highlighted the spatial dimension to commercial opportunities, showing that proximity to existing commercial agricultural regions and networks is a key determinant of the degree to which the rural poor can access markets. The evidence does reveal that access to markets stimulates processes of agglomeration in communal areas. The need to reform the tenure system to promote commercial production is thus not a pre-requisite for production, as the system has shown its ability to adapt with new rules and requirements.

Livestock ownership

There is widespread evidence of the continued vibrancy of livestock ownership in communal areas, and increasingly, town commonages. Ainslie (2002) asserts "in spite of the relentless subjugation" of Africans, "the sustained intervention of the colonial and apartheid State in rural production systems ...and the considerable economic changes that have transformed the livelihoods of rural people ... investment in livestock continues to be a surprisingly vibrant and often preferred livelihood option for many rural people". He concludes that policy makers should start by "officially recognising that cattle ownership ... remains a culturally resonant, economically rational and socially acceptable option for strategies of production and accumulation" and support and enhance these investments without interfering with the production system itself.

Research suggests "the *total* returns from livestock (especially cattle) can be higher in communal areas production systems than in corresponding commercial farming systems under freehold or other forms of tenure" (Andrews et al, 2003). This concurs with the work of Adriansen (1999) and Obu et al, (2000) who have show that communal grazing regimes that permit high density grazing and high levels of mobility might be ecologically more appropriate in semi-arid regions than traditional, sedentary ranching practices.

Livestock statistics show that there are now considered to be more cattle in the communal reserves than in the freehold farming sector (Ainslie in Andrews et al, 2003:24). The former Transkei is said to hold 65% of all the cattle in the Eastern Cape as a whole (Ainslie, 2002: 2). There is, however, strong internal differentiation in livestock holdings.

Ainslie's research shows that livestock ownership, animal husbandry and marketing practices differ (sometimes markedly) across regions, pointing yet again to the great diversity of the communal areas and making it difficult to generalize. He found that people keep livestock for a range of, or combination of different purposes, the forms of which can change according to a great number of circumstances or variables, e.g. cultural values linked to generational characteristics (e.g. lobola - which in some areas is changing to "proxy cattle" or cash), domestic developmental cycle priorities, distress-sales at the beginning of the year for children's education expenses, etc.

The value of livestock has been assessed in very limited ways. In keeping with the commercial agriculture orientation of the land reform programme, land reform projects have tended to focus on the meat value, and ignore the host of other inputs livestock provide to rural households (ploughing, milk, dung for floors and fuel, manure, savings), which when considered in monetary terms, exceed the meat value. This, it is argued, needs to be factored in to interventions that affect land use patterns and livestock holdings (Shackleton, 2003).

Livestock ownership has implications for gender relations. While there is evidence that women are acquiring livestock, suggesting that the taboos preventing this are breaking down, emphasis on livestock as an accumulative livelihood strategy will reinforce the material holdings of men.

There is a volume of - diverse - material on livestock production in communal tenure situations. A central theme to this material involves the fact that livestock ownership is both a key economic strategy of accumulation for the more affluent and a key safety net strategy for the poor, including people in towns. Economic and political changes (e.g. increased tenure security in rural and urban contexts, decreasing employment security for the poor, increasing cash resources for the better off) are fuelling a desire to own livestock for multiple economic and social purposes. This has massive implications for land redistribution, particularly when this starts to translate into absolute growth of livestock holdings in rural and urban areas.

Commonages and the economic value of non-agricultural natural resources

The economic value of land-based activities in communal areas for self-provisioning or informal market activities has caught the attention of researchers. There is ongoing detailed research documenting the economic value of land-based products as a vital livelihood support, and as an alternative land use to those traditionally thought to be most important by policy makers. This research is premised on the problematic that land reform, planning and use have focused on cropping and livestock. Both research and implementation around land issues have neglected the fact that rural people make extensive use of wild resources (see box below). Land reform projects that ignore this, and move people to areas where such resources are not available, or in lower abundance, result in poorer livelihoods for the recipients. The value of wild resources to poor rural households is sometimes greater than that for cropping and livestock and is typically more important the poorer the household, given that it is the poor households who are unable to access agricultural incomes (Shackleton, 2003).

Land-based livelihoods bases and regulation

One of the livelihood bases that provide back up to poor households in the communal areas is the range of available natural resources. Commonages, which are used for multiple purposes, provide both grazing for livestock, and a host of non-agricultural sources of direct livelihood provisioning. These raw materials are increasingly used for informal and formal exchanges and trade as well. Access to commonages is through membership of the group, which entitles all users unlimited access to resources that are not scarce and equitable access to those that are scarce, at no, or minimal financial cost. The collapse of land administration systems in communal areas has resulted in open access in some places and a rapid denudation of these resources.

Using commonage resources

Who are the users?
100% of rural households use some natural resources. The poorer and more isolated use a greater diversity and more of each resource than more 'well off' or less isolated households. Women and children are the primary harvesters while men are primary users of grazing. Households that have less income, labour and other assets due to morbidity and mortality losses from HIV/AIDS use less land for crop production and are more dependent on commonages for natural resources.

<p>What do they use?</p> <ul style="list-style-type: none"> • Fuel wood, fencing, building materials 70-100% households • Wild edible fruit 72-100% households • Wild herbs 93-100% households • Medicinal plants 50-100% households • Grazing 30% households • Craft/SMMEs no data 	<p>How do they use it?</p> <p>Some households are totally dependent on these resources for survival, especially in times of need (e.g. retrenchment, AIDS). Trading in raw (e.g. thatch) or processed (e.g. mats) resources can be quite profitable compared to other income-generating activities.</p>
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(Additional information: Shackleton et al, 2000)

These arguments suggest that debates about land rights and use should focus not only on land as a physical object but also on the rights to resources on the land and how the resources and land are used. In heavily populated rural areas resource abundance is often depleted from a variety of causes. People then seek key resources elsewhere, such as State or private land. While many of the State agencies (Department of Water Affairs and Forestry, Department of Environmental Affairs and Tourism, provincial Conservation Boards) and large corporate landowners have policies that supposedly favour neighbourly relations, this rarely happens on the ground at specific sites, for a range of reasons, including fire hazard, hunting and anxiety about losing control (Shackleton, 2003).

Gender and wealth dynamics in relation to land use

As unemployment increases, household resources get diminished by HIV/AIDS, men return to rural areas and women begin to generate cash in the informal economy, the intra-household dynamics relating to land are being affected.

These combined pressures push the very poor, and many households affected by HIV and AIDS, out of agricultural production, which competes with the demands on labour, time and financial assets. The rising cash costs of subsistence production raises the stakes attached to risk of crop loss or damage, with the potential loss of substantial household investment in cash and labour. Women producers must find cash resources to fund the next year's input costs either from profit or from a partner or family (Cross and Hornby, 2002).

Realising rights within communal systems depends on having the resources to use the land. Evidence suggests that informal systems favour male-dominated land uses, managed in terms of gendered cultural norms and rules. For example, privileging commonage for livestock grazing or hunting, which may clash with garden projects, small enterprises, eco-tourism or gathering, e.g. thatching grass. These rights also confer disproportional benefits to large stockowners or those with access to packs of hunting dogs. Thus access to grazing may be formally accessible to all members of the group but only a realized right for those who can afford livestock.

Even where access rights to residential and arable land are granted to individuals (such as in the PTO system), in practice rights accrue to households - represented by the "household head" (typically a man). Unlike the freehold system (in which rights are contingent upon financial means), the ability to access communal land and the extent, location and quality of the land, hinges on implicit criteria around status, determined by authority, age, marital status, and wealth and also social networks and need. Historically women have seldom accessed land for long periods. There is however evidence of change, suggesting some acceptance that women with children who are divorced, widowed or single have independent land needs, particularly if they have male sons. This access is usually mediated through a male family member, such as husband, father or brother; and it is more frequently to residential land. Hunting, grazing and arable land tends to remain the domain of men reflecting increasing scarcity of grazing (e.g. Limpopo Province) and the assumption that men have preferential rights to pastures. These dynamics perpetuate the secondary status of women within these social contexts in terms of their exclusion from public and domestic decision-making, which is particularly visible at crisis points in women's lives, such as separation, divorce and death of spouse and which is compounded in situations of polygamy where one marriage is traditional and the other civil.

Research suggests that poor rural women have specific land needs, with land for settlement and residential tenure security high priorities based on their functions as primary caregivers, which requires secure places for raising children. Linked to this, women favour arable gardens located near to the home for household food production, limiting the pressures relating to time, security and crop irrigation. This relates to the gendered nature of the risks associated with agricultural production; also the trade-offs women make around investments. In studies done by the Development Bank of SA (cited in Cross & Hornby 2000), women farmers were disinclined to risk cash investment in what they saw as an uncertain return. Many women cultivators preferred to grow food to reduce household food budgets, allowing them to use their scarce cash for other household priorities. Women increasingly favour non-farm opportunities to use land for activities such as craft, tourism, catering and other income-generating projects.

4.2 Gender and Land rights

In South Africa, there is high level of constitutional and policy commitment to gender equality¹⁰. The DLA included considerations of gender equity in its policy documents from the outset (e.g. the 1994 Core Business Plan for the Land Reform Pilot Programme). However international and South African experience suggests that gender equity is difficult to implement unless detailed content, direction and guidance is given to gender commitments (Walker 2003).

The principle of gender equality is premised on individualised rights, which counter patriarchal power relations and are often at odds with key precepts of customary law. In contrast customary law in South Africa is based on patrilineal forms of social organisation and the elevation of group rights and responsibilities over those of individuals. These different ideological standpoints can translate into significant differences, requiring the law to make choices between 'equality' and 'tradition' or 'custom' at certain junctions. The Constitution recognises citizens' rights to enjoy their culture and practise their religion, but is subordinated to other provisions of the Bill of Rights and the fundamental right to equality.

Legislative legacies provide additional obstacles to women's access to, and use of land. The Black Administration Act deemed wives in customary marriages to be minors, subject to their husband's guardianship, which prevents women from owning property or contracting in their own right. This was repealed by the Recognition of the Customary Marriages Act, but its legacy remains. While all customary marriages entered into after 20 November 2002 will be in community of property (property is shared between the surviving spouse and children – girls and boys - on the death of a parent), all customary marriages secured before that date must follow "black law and custom", interpreted by the Courts as male inheritance. In KwaZulu-Natal customary marriages were not governed by the Black Administration Act, but the Code of Zulu Law remains in force: they are legal minors, subject to their husbands' guardianship.

Gendered nature of land use priorities

Research by Thembele Kepe (2002) shows that men in the Mkhambathi area along the former Transkei Wild Coast burn grass to encourage the sprouting of young palatable shoots in order to bait hunted animals. Women in the same area, however, need mature grass for thatching purposes. Kepe concludes that in such cases, the interests of those without access to mechanisms to mediate land use decisions become secondary.

The Midnet Newsletter reports that women on a land reform project in Weenen, KwaZulu-Natal, were aggrieved when men, as is custom, sent livestock to graze the irrigated fields at the start of winter although the women wished to use the fields to plant winter crops for household food and sale.

Broad socio-economic changes are bringing opportunities and stresses for women living in rural, communal areas. Policies and programmes – including land reform - that attempt to promote women's participation are creating new opportunities. Research by LEAP provides evidence of some unravelling of the patriarchal land system. More women are satisfying their need for land by asserting constitutional provisions of gender equity. In KwaZulu-Natal, some tribal authorities and Communal Property Institutions are recognizing the legitimacy of the assertion of rights to own or hold and inherit land, but results remain tentative and inconsistent.

By 2000, the DLA records showed that 47% of all recorded beneficiaries of redistribution grants were women (Cross and Hornby, 2002). However, there is no indication of how many of these were joint husband/wife registrations nor to what extent the women beneficiaries used or accessed the land. The 1998 Quality of Life (QoL) study¹¹ found that 31% of beneficiaries were women headed households, but female-headed households had fewer and smaller plots than male-headed households and were also less likely to use this land for agricultural production and more likely to use it for residential purposes than male-headed households. Other research confirms that women's primary land needs are for residential security for their families, followed closely by access to a secure garden plot located within accessible distance of the homestead (Cross & Hornby, 2002).

The LRAD programme emphasizes accessing land for commercially oriented agricultural purposes. Initial impressions are that while some women are accessing the programme, it is not geared towards meeting the land needs of the poor in the communal areas, particularly those of poor women.

¹⁰ See for instance, OSW 2000.

¹¹ Researchers have found it difficult to extrapolate from the QoL studies on the grounds of lack of methodological rigour.

One of the main problems with land reform gender policy has been the tendency to conceptualise "women" as an homogenous group, without distinguishing between the very real differences and needs among women. Equally, while women form part of the groups receiving settlement of land claims, there has been no disaggregated data-gathering from which to draw any figures for assessment.

Exacerbating the problems of land access and land rights, are the unrealistic assumptions in the land reform programme that people have information, literacy and experience in making applications. There is the very real potential for new policies to inadvertently perpetuate gender asymmetries that emerged under earlier programmes and governments. Walker (2002) points out, in addition, that there are limits as to what can be expected in the restitution programme vis-à-vis women's equality and land rights, given that restitution provides redress for rights that were lost in "an already heavily circumscribed and fundamentally patriarchal land dispensation".

There is debate as to the best way of securing tenure for women. Some commentators recommend rights or ownership to residential sites and fields be registered jointly in the name of husband and wife to protect women from losing homes and land in event of divorce or on the death of the husband; and individual women's rights in single-parent families. Walker (2002: 53) warns, however, against over-simplification: "insistence on individual rights for women under all circumstances may, in the absence of social institutions that support such rights, work to women's disadvantage, by further weakening the principle of reciprocity within and between households and putting joint income strategies at risk". It has been suggested that resistance to women getting access to land may partly be fear of instability resulting from disturbing families' long relationships with particular pieces of land via the introduction of 'illegitimate' sons. A big demand for title appears to be connected with women in this situation (Hornby, 2003). Sometimes men who are threatened by women's growing economic independence actively resist women accessing and working land. Resistance to change is to be anticipated and supporting women's involvement in civil society organisations to defend gains and advocate for greater changes is therefore vital. Addressing women's participation through ensuring representation on community structures for land projects is thought to be critical, but research suggests that sustaining representation and participation is difficult - and not sufficient - to address gender inequity (Walker, 2003; Cross and Hornby, 2002). Representation of women according to quotas on all common property institutions is nevertheless seen as a reasonable point of departure for all new land policies and legislation.

Although practices show signs of change, strengthening policies that promote women's rights in marriage and inheritance, as well as securing women's rights to common property are seen as essential in ensuring that Constitutional principles enshrining equal rights for women are reflected in land practices. In this regard there remains scope for improvement in existing land policy. Various versions of the Communal Land Rights Bill omitted a commitment to gender equity. Women and NGOs expressed great concern about the omission. They are not confident that regulations (yet to be drafted) and administrative decisions will ensure that women are allocated land on the same basis as men - and point out that this should not be left to variable rules and "custom".

4.3 HIV-AIDS: Compounding the vulnerability of the poor

In general HIV/AIDS can be seen to be exacerbating existing problems and undermining the capacity of both the State (local and national) and civil society to respond to crises. Research has shown that the presence of HIV/AIDS compounds the vulnerabilities of the poor in particular. In the land sector, failure to formally integrate HIV/AIDS into policy exposes key weaknesses in rural tenure to a much greater extent. This has implications for local level institutions in monitoring the distribution of resources, e.g. to ensure land can be transferred to women. However it is the responsibility of national government to marshal resources in the specific interests of marginalised groups within the poor, such as sufferers of HIV/AIDS (and other chronic illnesses) who would otherwise fall through the net. HIV/AIDS has been a significant factor in raising awareness of the weaknesses in State linkages with the informal institutions of the rural poor.

Studies on the impact of HIV/AIDS on land tenure and land administration are few but suggest that it increases the vulnerability of groups whose tenure rights are already insecure and/or mediated through others, such as women (widows in particular), and children (orphans in particular), who may find their rights to own, occupy and use land threatened by other family members. The disease also impacts on land's productivity, the existing economic assets of the household and dispute resolution practices. The impacts are also social - in as much as the pandemic has a psycho-social dynamic and its morbidity and mortality impacts undermine social cohesion and fragment family, household and other social networks.

This emphasises the importance of effective rights allocation and administration systems, including local dispute resolution mechanisms that are accessible, affordable and accountable, including to standards of gender equity. Women's insecure tenure rights may also encourage the spread of HIV/AIDS as landless women may be driven into prostitution to feed themselves and their families.

HIV/AIDS affects rural families through serious reductions in their capacities to labour in their own fields, do craft work or work outside of the community; it also negatively impacts their cash incomes that are spent on medicines, cleansing and other ritual ceremonies, and on, food. It also makes inroads on available time – spent on being sick or recuperating, or nursing and tending the sick person. Erosion of time and capacity to perform physical labour in rural contexts holds real threats to the livelihoods of the rural poor.

According to the 2002 Nelson Mandela/HSRC study of HIV/AIDS, the HIV prevalence rate in South Africa is estimated at 11.4% of the total population (Shisana & Simbayi, 2002).¹² For the adult population aged between 15 and 49 the rate is 15.6%. While lower than previous estimates based on ante-natal clinic data, the figure is nevertheless extremely high. Averages, however, tend to obscure the important differences in the rate of infection across sectors of the population, and these need to be factored into the analysis of the impact of the pandemic on land issues in the communal areas.

The HSRC study further indicates that:

- HIV prevalence in the so-called “tribal areas” (i.e. communal areas) is estimated at 12.4% of the 15-49 age group, which is lower than in the urban areas but higher than on “farms”. (Urban informal areas are the worst hit in the country, with an adult prevalence rate of 28.4%). This points to the urgency of policy interventions that ensure that the infection rates do not increase in these areas.
- Levels of infection are highest in the 25-29 and 30-34 age cohorts.
- Women are more at risk of infection than men.¹³
- 2.8% of households surveyed in “tribal” areas were found to be child-headed (compared to 4.2% in urban informal areas, 3.1% in urban formal areas and 1.9% on farms).
- Overall, the Free State is the worst hit province, attributed to very high proportions of people living in informal settlements. Eastern Cape is the least badly affected province.¹⁴
- “Perceived” access to Voluntary Counselling and Testing (VCT) services is lowest in “tribal” areas, compared to urban and farm areas, while rural areas generally are least well-resourced in terms of access to HIV/AIDS information.

It is known that variation around these averages is significant, with some communities containing much higher rates of infection. Studies in East Africa suggest that the spread of infection in the rural areas works outwards from trading centres along main roads, through ‘intermediate trading villages’, to small agricultural settlements (Shisana and Simbayi, 2002, 61). Rural communities along trucking routes are known to be particularly vulnerable to high rates of infection.

HIV/AIDS can be distinguished from other chronic illnesses and epidemics (which also bear heavily on rural areas, e.g. malaria, cholera) in several key respects:

- It infects the productive members of society, who are also in their prime reproductive years and most likely to have young children to care for disproportionately. In rural areas these age groups tend to be regarded as junior members of adult society socially and politically.
- The full impact of high mortality rates due to AIDS – demographically, socially and economically - is still to come as the progression from infection to full-blown AIDS and death is generally protracted. There is a real concern that as

¹² The study excludes children under the age of 2, as well as people living in institutions, thus it may be an under-estimate.

¹³ 17,7% of women aged between 15-49 were found to be infected as opposed to 12,8% of men.

¹⁴ The ranking (highest to lowest) is Free State (14,9%), Gauteng (14,7%), Mpumalanga (14,1%), KwaZulu-Natal (11,7%), Western Cape (10,7%), North West (10,3%), Limpopo (9,8%), Northern Cape (8,4%), Eastern Cape (6,6%).

the pandemic deepens, the spiralling of pressures on rural communities and rural households could systematically undermine their ability to function.

- High levels of stigma and denial attach to the disease, enormously complicating intervention strategies as well as community and individual responses to the pandemic.
- For physiological reasons, women are more likely to contract HIV. This predisposition is severely aggravated by the weak status of women, which is deeply implicated in the transmission and the consequences of HIV/AIDS.

Anecdotal evidence within DLA suggests that projects are already feeling the consequences of HIV/AIDS, including the death of targeted beneficiaries before land transfers take place, and the loss of local leadership in land reform projects as a result of illness and/or death.

Much work remains in analysing the impact of the pandemic on land issues and developing appropriate policy responses. Distinctions must be made between community-level (local economies and institutions) and household-level impacts. Wealthier households are in a stronger position to absorb costs associated with protracted illness, loss of income and labour, medical treatment and funerals than poorer households. Within households, the impact on livelihoods and household composition varies depending on who is infected in the household and what his/her contribution to household livelihoods and well-being has been.

It is difficult to project how the pandemic will impact on the demographics of communal areas over time, as this depends on the effectiveness of government prevention and treatment strategies, behavioural change, future poverty and migration trends and the trajectory of the pandemic itself. However, it is critical that AIDS be factored into analyses of population trends that should inform land policies, planning frameworks and targeting State interventions. The impact of HIV/AIDS on rural-urban population distribution, rural population densities, migration patterns and gender and generational dynamics require sustained attention.

DLA has established a national AIDS desk and adopted an HIV/AIDS policy. Although progress has been made in addressing internal, staffing and employment issues relating to HIV/AIDS, the Department has found it difficult to mainstream HIV/AIDS strategies into policies and programmes. A number of internal training workshops have been held at national and provincial level to discuss possible responses, and a redistribution project at Tshongweni, outside Durban, has been identified as a 'pilot' project.

4.4 Urban-rural linkages and livelihoods

Rural communal areas have been constructed around households' links with the towns and cities, and provide a social anchor. Conversely, South African cities and the urban economy have been structured by the migrant labour system. The structured links between rural and urban families continue and appear to be strengthening despite job losses and shrinking job opportunities for unskilled labour in the formal economy. Rural people now go to small towns for opportunities in the informal economy. Lack of economic diversification in the communal areas drives multi-spatial migration strategies. Lack of long-term security - pervasively fuelled by private tenure in some instances - and access to "social tenure" in urban areas incentivises continued links with rural homesteads, and the maintenance of the rural right through residence by key family members, usually women, as a form of social assurance.

There is a dynamic relationship between acquisition of cash, and choices people make for its reinvestment in the rural economy. A reason for lower agricultural productivity appears to be the need for inputs that require cash in a context where increased unemployment and retrenchments have resulted in decreased remittances and monetised assets. The dependency of the rural economy on the formal cash economy makes strong rural-urban linkages essential for successful subsistence agriculture, a linkage not explicit in land and agricultural policy.

Rural land rights and attendant social values continue to have currency for most of the urban poor, who remain dependent on reciprocal networks that stretch back to rural areas. Failure of urban livelihood strategies and appropriate land rights, results in a migration of people back to rural areas where social networks, livelihoods based on natural resource use and access to land provide social protection and a material safety net in which survival with a limited cash income is possible. The kind of urbanisation where links between rural and urban areas are severed, is not on the cards in South Africa for the foreseeable future. Anecdotal evidence suggests that permanent rural-urban migration occurs,

but only in specific circumstances where urban livelihoods meet total, alternative household livelihood and social needs, e.g. secure jobs, market based land access with title, private pensions and medical aids, etc.

5. GAPS AND OPPORTUNITIES

Land as social protection

Loss of land rights outside of the borders of the highly confined communal areas in the past also defined loss of rights of citizenship to the country as a whole. This magnified the importance of “local citizenship” of a “homeland” village. The value of these land rights is more than the production values of the land, investments and outputs, and also more than social safety nets as a fallback in terms of need. Familial land rights within these areas, limited and constrained as they were by imposed systems of tenure designed to a large extent to fulfil the requirements of the colonial economy, played and continue to play a key role in access to other resources, including jobs, and urban services. The reach of multiple livelihoods beyond the communal areas (e.g. to commercial, urban and peri-urban areas) is influenced by social identities and networks within the communal areas. Land rights therefore fulfil multiple functions, not only of land-related provisioning and shelter, but also social protection for poor households straddling the rural and urban terrain. Land access and associated rights in communal areas should be accorded a value and integrity in keeping with the role these play in the multiple livelihoods of the poor and the economy at large. Public sector support for land reform, land administration and other programmes such as education, health and pensions should be commensurate with this value, to alleviate policy and provide a base from which an agrarian economy can grow.

Economic environment

Communal land represents a key national resource with which to redress inequalities and provide some of the country's poorest with access to social protection, entitlement and an agricultural asset. Current macro-economic policies drive a formal market based political economy that does not recognise the multiple livelihood roles of the informal economy in the communal areas, and hence fails to advance strategies that recognise these systems in their own right, and attempt to build on them. Instead, the communal areas are hidden from the formal system and strategies tend to focus on ways of replacing them, rather than supporting them. Social welfare support is critical, but struggles to transcend the barriers of poverty to focus on developmental functions, while rural development and infrastructure programmes are displaying sustainability problems. The structural links between the rural or informal and urban or formal economies need to be acknowledged in economic policies as a starting point towards more focused development strategies.

Market environment

Market transactions have shaped relations in communal areas since colonisation, and there has long been a vibrant internal market – particularly for cattle – within the communal areas. However, the terms of the market are unfavourable allowing for considerable leakages to the urban economy. The benefits of development interventions on communal land focusing on market access have been limited, as they tend to focus on a narrow production value of communal land and agricultural commodities. Such interventions – particularly where they have encouraged specialisation - ignore the full value of the land to communal land rights holders and the role of agriculture and land in the pursuit of diverse livelihood strategies. Interventions based on support for existing production systems, such as livestock farming, should be considered in preference to attempts to replace them. Poor farmers in communal areas are risk averse, and unwilling to forfeit traditional livelihood strategies. Support for formal livestock markets (without interference in the production system) in the former Ciskei have proved beneficial. Recent efforts are focusing on substituting reliance on external markets.

Pioneering new conceptual and technical tools for land administration

Neither the formal Deeds and Cadastral system, nor the expeditious privatisation of communal land rights provides the poor with a land administration system capable of being sustained (by local people and the state) and capable of providing an infrastructure for the provision of social and economic services to the rural communal areas. Experience suggests that “formalising” the informal system on its own frequently increases insecurity by exposing the poor to the formal land market without the prerequisites for a private market in land. Incrementally building from the existing system outwards towards the formal system via bridging institutions would allow for more appropriate adaptation. With modern

technology it would be possible to develop a spatial information framework to include non-cadastral evidence of land parcels. The formal economy depends on the cadastre for the delivery of a range of public and private services. The recognition of spatial information as an infrastructure for the Public Good, rather than only providing legal evidence of rights is the first step to seeking innovation to extend the country's spatial information database to include communal areas and informal settlements in such a way that the system can perform a similar role to that of the cadastre in the formal system. The concept of land administration itself needs to be extended to incorporate institutional aspects, such as community and local governance, not normally associated with land administration. This will require adjustments in the conceptual tools used by land professionals.

Land Administration services in relation to rights administration

Policy acknowledges the legitimacy of communal tenure arrangements, but in most instances there is a lack of the common resource management institutions as well as institutions to administer individual rights within communal property regimes to ensure that this form of tenure does not degenerate into opportunism at the expense of the weak and marginalized. There are renewed and forceful arguments that land registration has no place in poverty alleviation because of cost and affordability factors, as well as ideological factors. However an adapted form of land registration linked to spatial information and decentralised registries can be critical for poverty alleviation, as spatial information can be used to plan the delivery of social and economic services. Registration also has a role to play in combating gender discrimination. Municipal support (requiring requisite capacity) for land rights administration is considered a priority.

The role of Local Government

To date the emphasis on land reform has tended to focus on the national sphere of government, and local communities. However, the role of local government in land reform and land administration is potentially far reaching. The imperative of linkage with local government is gathering steam with regard to integrated development plans, but there are few examples showing effective engagement between the formal and informal or communal land systems, or progress beyond once-off projects. The challenges presented by spatial planning and land use management in communal systems are enormous, and present constraints to the traditional planning and management roles used and understood by municipalities. The partnership between DLA and the Amatole District Municipality has yielded innovative attempts to integrate communal areas into the planning and implementation domain of local government. However, without NGO support for implementation and post-implementation, many of these plans remain at the level of rhetoric. In order to be successful these innovations need to be "nested" within broader institutional frameworks so as to ensure accountability and consistency across all levels of policy. A re-evaluation of the roles of local institutions, including their powers and functions, with regard to decentralisation of certain land functions is needed to clarify and overcome current competition between multiple local level organisations, including traditional authorities. Decentralisation is likely, however, to be a long-term iterative process due to the often conflicting and competing interests around control and use of land and natural resources in communal areas.

Spatial planning

The critical importance of home gardens, situated close to homesteads, has come to light as a key issue in spatial design of settlements in rural areas and informal settlements. Home gardens fulfill multiple functions: they are easy to access, police, irrigate, and harvest and therefore labour saving and sensitive to women's needs. Home gardens play a vital function in food security. Betterment policies laid out arable plots in composite blocks often far from homes and research has shown steady abandonment of these arable lands over time, with growth of home gardens (where plots are large enough to accommodate them). Spatial planning dimensions of communal land (also peri-urban land and informal settlements) should accommodate these trends.

Development of a national adjudication policy and law¹⁵

South Africa does not have a national adjudication policy or law, in spite of its critical importance in delivery of land rights, land access, housing and services. Adjudication in relation to land tenure is "the process whereby all existing rights in a particular parcel of land are authoritatively ascertained" (not to be confused with creation of new or altered rights). In the Deeds and Cadastral system, adjudication refers to the painstaking checks performed by land surveyors

¹⁵ See Appendix 4 for a more detailed discussion of potential to develop this function in South Africa

and conveyances of all information relating to the property and owner before ownership is transferred. In communal situations it can be conceptualised as the “front end” process that systematically interrogates existing rights (such as in a “land rights enquiry”), facilitates resolution of compensation in the event of land development or resolves disputes between existing rights holders. Both rights enquiries and dispute resolution processes form an integral part of the adjudication function in countries where off-register or uncertain rights are being brought into the unitary system. Land adjudication aims to arrive at highly defined, predictable process that applies standard norms, rules and procedures, developed from practice. Since the function rests between the public and private interest it is best served by an impartial and independent third party situated between the administration and the citizens. As a first step towards developing rules and uniform procedures there should be a process of assembling, examining and evaluating current completed projects (as “pilots”) to ascertain lessons learnt, best practises, formulating objectives, assessing delivery at scale, the standards for procurement, cost implications, record keeping, etc. Currently procurement for adjudication is project-based and is outsourced on tender to the private sector, leading to lack of uniform procurement standards, procedures and quality. The need for adjudication services will escalate after the passage of the CLRB.

Existing tenure options

The strength of the Interim Protection of Land Rights Act lies in its implicit recognition of the full value of rural communal land to the land rights holders, and to society more broadly. The value is not determined by the market, but by the compensatory value of the land, since land rights cannot be deprived without the consent of the land rights holder. Calculation of the value of the rights for compensation purposes (or by extension, for purposes of assessing the worth of rural communal land rights) must be based on the multiple uses and benefits derived from the land by the user. This provides the scope to build in the full range of benefits of the land, beyond shelter and agriculture, such as natural resources, social purposes and social protection. Protection of existing land rights has, in addition, created opportunities for joint ventures, e.g. in tourism or forestry, between private entrepreneurs (internal or external) and the collective land rights holders. There is scope for developing capacity in local government to provide institutional support for both off-register rights, and registered rights, and to sensitise local communities and potential investors to the opportunities in local economic development based on protection of existing rights. However, more explicit attention needs to be given to the protection and strengthening of women’s land rights in property and inheritance, and explore principles of co-ownership within families. Communal Property Associations and other CPIs have also provided opportunities for legal recognition of land rights for the poor. However, these have been shown to suffer from institutional deficit.¹⁶

Gender policies

In spite of constitutional and policy commitments to gender equity in land holding and access, and evidence of changing practices on the ground, women’s land rights in customary systems continue for the most part to be mediated via patriarchal relations. Explicit, committed, long term and multi-faceted approaches to gender discrimination are needed. Regulation around land uses, laws of inheritance, rights of ownership and local representivity are necessary, though not sufficient. Interventions should be layered and sequenced to build broad-based institutional support for constitutionally derived principles whilst ensuring that existing social support networks are not undermined during the transition.

HIV/AIDS

In general HIV/AIDS exacerbates existing problems and undermines the capacity of both the State and civil society. Its presence compounds the vulnerabilities of the poor in particular. In the land sector, failure to formally integrate HIV/AIDS into policy exposes key weaknesses in rural tenure to a much greater extent. Possibilities for policy and intervention are:

- **Securing rights of vulnerable groups**, especially women & children – law, policy, CLRB
- Beneficiary selection in land reform projects – **policy on succession** around rights in the event of the death of the beneficiary
- **Legal entities** of land reform projects – explicit accommodation of, and policies towards, HIV/AIDS sufferers in constitutions, elimination of discrimination in the passage of property in land, appropriate institutional constructs and accessible constitutions, increased institutional support from the State, stronger definition of the content of individual rights within the group, training and conscientisation.

¹⁶ For an assessment of the performance of CPIs in the South African context see Appendix 2.

- **Agriculture** - cropping & technology shifts to cope with pressures on labour and time and earning capacity of HIV-AIDS-affected households.
- **Spatial planning** – layout of settlements to incorporate home gardens and space for small enterprise.
- **Land uses beyond agriculture** – e.g. to provide homes for orphans or for income-generating projects (e.g. markets, craft centres)
- **Dispute resolution mechanisms** that are local, cheap, accountable, gender-sensitive
- Promotion of **rental markets** - so that sufferers unable to provide physical labour are able to derive an income from their land
- **Strong local support & resource networks** for affected households, individuals
- **Institutional development** – programmes to treat and raise awareness of staff
- **De-stigmatising** – training, conscientisation of officials for community work.

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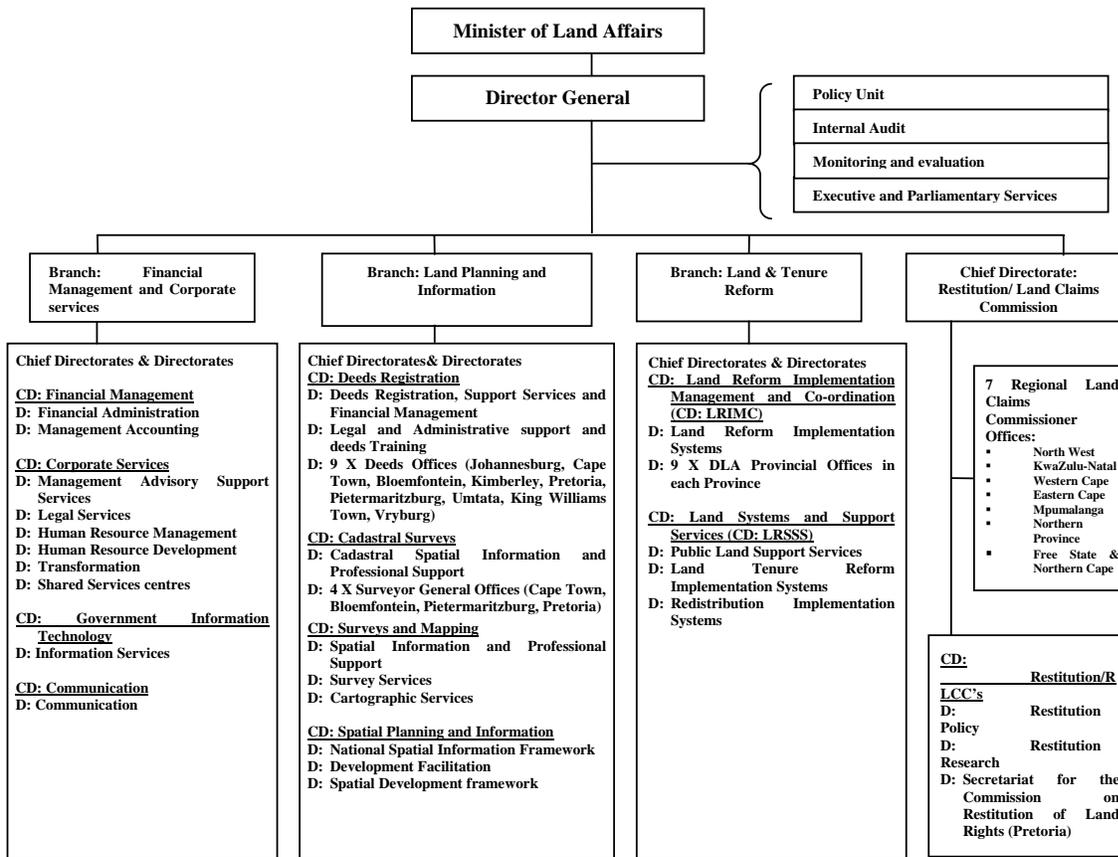
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Appendix One: Legislation and structure of the Department of Land Affairs

The Department has primary responsibility for the administration of the following laws: -

Core laws administered by the Department of Land Affairs	
Communal Property Associations Act	28 of 1996
Deeds Registries Act	47 of 1937
Development Facilitation Act	67 of 1995
Distribution and Transfer of Certain State Land Act	119 of 1993
Expropriation of Mineral Rights (Townships) Act	96 of 1969
Extension of Security of Tenure Act	62 of 1997
Interim Protection of Informal Land Rights Act	31 of 1996
Kimberley Leasehold Conversion to Freehold Act	40 of 1961
Land Administration Act	2 of 1995
Land Reform (Labour Tenants) Act	3 of 1996
Land Survey Act	8 of 1997
Land Titles Adjustment Act	111 of 1993
National Archives of South Africa Act	43 of 1996
Physical Planning Act	125 of 1991
Physical Planning Act	88 of 1967
Planning Profession Act	36 of 2002
Professional and Technical surveyors	40 of 1984
Promotion of Access to Information Act	2 of 2000
Provision of Land and Assistance Act	126 of 1993
Restitution of Land Rights Act	22 of 1994
Sectional Titles Act	95 of 1986
State Land Disposal Act	48 of 1961
Town and Regional Planners Act	19 of 1984
Transformation of Certain Rural Areas Act	94 of 1998
Upgrading of Land Tenure Rights Act	112 of 1991

The current organogram of the Department is as follows: -



The DLA delivers its services through the following decentralised network of offices: -

- 9 x Deeds Offices (Johannesburg, Cape Town, Bloemfontein, Kimberley, Pietermaritzburg, Pretoria, Umtata, King Williams Town, Vryburg)
- 4 X Surveyor Generals Offices (Cape Town, Bloemfontein, Pietermaritzburg, Pretoria)
- 9 X Provincial Land Reform Offices (with district offices)
- 7 X Regional Land Claims Commissioners Offices (North West KwaZulu-Natal, Western Cape, Eastern Cape, Mpumalanga, Northern Province, Free State & Northern Cape) plus a Pretoria based secretariat servicing the office of the Chief Land Claims Commissioner

The Head Office of the Department in Pretoria delivers a range of policy, information and corporate services to these offices.

Appendix Two: Challenges of linking new ownership with municipal functions: the TRANCRAA experience¹⁷

Act 9 and the TRANCRAA process: Land ownership

Unlike the rest of the Trust land areas nationally, the Local Municipalities were obliged to step into the shoes of the former Department of Coloured Affairs (then House of Representatives)' and to take over its land management and land rights administrative obligations concerning 23 "coloured reserves" in terms of the (coloured) Rural Areas Act 9 of 1987 and preceding legislation and regulations, dating back to the Communal Land and Mission Stations Act No 29 of 1909.

The land in these 23 areas currently vests in trust in the Minister of Land Affairs. The larger six of the 23 areas are situated in the Namaqualand District, Northern Cape Province. The trust land (1 188 670ha), state land (372 888ha) and land reform (municipal commonage) land (245 550 ha) area comprises 1 807 108 ha and 30 000 inhabitants. These areas have now been subjected to a tenure reform process in terms of the Transformation of Certain Rural Areas Act 94 of 1998 (TRANCRAA).

In terms of the TRANCRAA process, the Minister needs to decide whether the trust land should be transferred to a municipality or to a CPA. Decisions concerning the state land and municipal commonage land earmarked for these six communities will the trust land transfers. If the land is transferred to a local Municipality, the land will be administered in terms of grazing and allotment regulations that have been recently prepared by inhabitants and promulgated by the four local municipalities in whose area of jurisdiction the communal land is situated. If, transferred to 6 CPAs, the municipality will exit from the scene and the CPA will have to adopt the regulations as rules. The fear is that if the latter route is taken, the CPA will not have the resources to maintain registers, collect grazing land maintenance fees and enforce rules where voluntary participation fails.

The problem is that the four local Municipalities also do not have a good track record of infrastructure maintenance, record keeping and rule enforcement. However, there is greater chance of legal protection if the land is held by a Municipality, rather than under a private legal entity. If the land is to be transferred to a Municipality it will be done subject to title deed conditions imposed in terms of TRANCRAA, which ensures that no disposal or encumbrance of land may take place without the majority consent of members at a general meeting. In other words, the members retain a veto right on how land may be allocated and dealt with. This provision is the same as the provisions of the CPA Act at section 12. So if the land is transferred to a Municipality it will boil down to an arrangement where the land is managed and rights are administered by the municipality as owner subject to CPA Act principles.

TRANCRAA process: Municipal support in land rights administration

Municipalities are the democratically elected spheres of government closest to the people as the arms and legs of reconstruction and development in fulfillment of its Constitutional section 153 Constitutional (developmental) obligations. In terms of section 154 of the Constitution municipalities must support national programmes. The Municipal Systems Act pertinently obliges municipalities to contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.

Hence, municipalities may, in the absence of DLA providing for land rights administrative support or, possibly as the preferred entity (but supported by the DLA) provide land rights administrative support to bolster the security of tenure of communities and members using land.

Prior to, and during the tenure restructuring process in terms of TRANCRAA, a series of innovative steps have been taken in the Namaqualand district to redraft and amend the older Act 9 grazing and allotment regulations and to replace them with sets of regulations and institutions crafted over a five-year period by communities. The communities have been supported by the SPP and LRC who has worked in close collaboration with the Department of Land Affairs and Department of Agriculture. Grazing regulations have been adopted and promulgated by four municipalities and draft new arable allotment and irrigation regulations have been prepared and are scheduled for promulgation. In addition, draft regulations have been prepared in terms of which user group management entities will be established as municipal

¹⁷ This summary was prepared on the basis of personal communication with Kobus Pienaar, Legal Resources Centre, 21 August 2003

entities in terms of the Municipal Systems Act. These entities will then take on delegated grazing management powers in terms of service delivery agreements.

One of the guiding principles in this process has been that different types of land uses (grazing, allotment, irrigation, tourism) give rise to different types of rights. The content of a grazing right to keep a permitted number of stock within a communal area is different from the content of an arable allotment right to demarcated portion of land. The allocation and recordal of grazing rights require a different system of administration to the more static and easier registration of allotment registers.

The Municipal Systems Act (as currently applicable) makes provision for the establishment of municipal entities by municipal regulation which are under the "ownership control" of the municipality to deliver services in terms of a "service delivery agreement" on land within the area of jurisdiction of the Municipality (whether privately owned by a CPA, or Trust land, or Municipal Land (for instance municipal commonage).

The definition of "ownership control" is wide and merely requires that the Municipality must be entitled to hire and fire the CEO of the entity. The rest of the members of the entity could therefore be community members. The advantages of this arrangement are that the entity need not be established as a private body corporate (which is complicated and onerous in rural areas). The scheme now makes it possible for municipal functions to be delegated to lower tier entities closer to land users. This was previously not possible. However, due to pending amendments to the Municipal Systems Act, it may not be possible to structure these "community governance" municipal entities, as envisaged. At the time of preparing this report, however, amendments to the Systems Act have been published that intends deleting the definition of "ownership control" and replacing it with "sole control" so that the Systems Act could be brought in line with the new proposals to be finalised and promulgated as the Municipal Finance Management Act. The result of the amendments, if accepted, is that rural communities will have to run the route of establishing private legal entities. Such entities will then be obliged to participate in competitive bidding and will have to jump a series of hoops, which may in the end result in the private entity not securing the contract.

While municipalities are prepared to apply a whole series of land regulatory provisions related to planning and zoning on privately owned land, the question is whether municipalities would be prepared to provide land rights administration support to community and their members by maintaining records, vetting application to see if criteria are met and approving of decisions to allocate rights to use land that is not owned by a municipality? The answer is in all probability no, unless the Department of Land Affairs who in terms of the constitution is obliged to fulfill the promise of section 25(6) concerning the provision of legally secure tenure, "take appropriate steps to ensure sufficient funding, and capacity building initiatives as may be needed, is made available for the performance of the assigned function or power by the municipalities concerned" in accordance with the provisions of the Municipal Systems Act.

The type of support that is required for land rights administration is different to residential service delivery support. Concerning service delivery municipalities are prepared to take services up to the outer boundary of privately owned land, they are not prepared to internally reticulate services to settlements on privately owned land that has not been subdivided into individual residential erven. The reason for refusing to do this is twofold: in township development, public places and sites on which community facilities and municipal infrastructure is built and streets must vest in ownership in the municipality otherwise the municipality will not build on the sites and maintain it; secondly, if occupants of serviced sites do not pay rates and service charges, the municipality will need to keep the owner of the erf or farm liable for debt collection purposes. The same principles that apply to liability for debt is the entitlement to equitable share / indigent policy free basic services. Municipalities will therefore refuse fix fences and maintain infrastructure on private land on land owned by a CPA.

The challenge is whether agreements could be reached between the Minister of Land Affairs and local municipalities to secure municipalities' commitment to provide services similar to those envisaged in Namaqualand.

Section 4(2) of the Systems Act states that: The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to- (j) contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.

Appendix Three: Tenure instruments

The Interim Protection of Land Rights Act (IPILRA)

IPILRA extends protection to people with certain defined informal land rights on State land in former bantustan and SADT areas. The Act provides that the holders of these rights cannot be deprived of their rights without their consent, and that such deprivation would have to take place under conditions of expropriation. Some would argue that these rights constitute most of the "sticks" in the "bundle" of full land rights. However the Act falls short of recognition of a new tenure right. As such it is seen as a "holding mechanism" pending legal definition of land rights.

In the Eastern Cape, IPILRA, together with the "Interim Procedures"¹⁸; have proved a robust mechanism for rights protection as well as providing a mechanism for redistribution of State farm land to the poor, and for land development. It is being widely used to effect development with equity in joint ventures along the former Transkei Wild Coast. In these situations, community consent is reached for the release of the land via the Interim Procedures. Joint ventures between the developer and the rights holders are entered into for the distribution of profits, and rentals are paid over to the rights holders for the use of the land. The DLA is involved in these processes as the "landowner and nominal trustee of the land" and not as land administrator, i.e. to ensure that land rights are not infringed, and that rights holders benefit from the development. Although the Act does not facilitate a change in tenure, it has the germs of a strong redistributive element and has the further advantage of flexibility and cover for a range of tenure forms.

Local government is involved for purposes of broad planning consent (linkage to IDPs and spatial development frameworks) and provision of services. It is thus a key partner in development processes. However, local government does not readily relate to communal land rights systems. Land developments for public, State domestic, parastatal and private investment purposes (e.g. roads, hospitals, community projects) are frequently proposed and planned as if the land is State or municipally owned, without consultation with, and approval by, occupiers who hold enforceable rights, and who are entitled to compensation if land is alienated for development purposes. Local government requires considerable support in order to work with IPILRA and informal or formal common property institutions.

Transformation of Certain Rural Areas Act 94 of 1998 (TRANCRAA)

TRANCRAA applies to land that is held by the Minister of Land Affairs in trust for 23 "coloured rural reserve" areas in terms of the Rural Areas Act 9 of 1987. The land comprises almost 2 million ha and is occupied by 70 000 people. TRANCRAA provides a framework in terms of which the Minister may transfer the *non-residential* trust land to individuals, private land holding entities (such as CPAs) or municipalities.

Jurisdiction over residential land that has not yet been transferred to occupants as township erven, and all roads and public places, is vested with the local municipality under TRANCRAA.

TRANCRAA specifies that the land may only be transferred to a legal entity or Municipality if the Minister is satisfied that the rules (in the case of an entity) or by-laws (in the case of a Municipality) *make suitable provision for a balance of security of tenure rights and protection of rights of use of—*

- (i) the residents mutually;*
- (ii) individual members of such a communal property association or other body;*
- (iii) present and future users or occupiers & land, and the public interest of access to land on the remainder and the continued existence or termination of any existing right or interest of a person in such land.*¹⁹

The content of rights is important

It is through the regulations that the *content of rights* gets defined – in whatever form the "real" rights are registered (the owner may be a CPA (private) or a local authority (public)), *The personal or contractual rights* can be accorded to users of the land by the "owner". The content of rights may be determined by the different type of land use, as was the case in Namaqualand where lifetime rights are given to a specific arable plot but grazing rights are allocated to an individual to keep a certain number of livestock units.

Source: LRC, 2003

¹⁸ The full title is "The Interim Procedures governing land development decisions which require the consent of the Minister of Land Affairs as Nominal Owner of the Land". DLA.

¹⁹ TRANCRAA, section 3, "Transfer of land in the remainder"

The TRANCRAA process has not yet been completed in any of the 23 areas, but several are near the end of a transitional process of 18 months. A critical task in the process involves determining and confirming rights and adapting and reformulating rules or by-laws that will give legal definition to land rights and to provide rights administrative systems.

Although local government was obliged to take over the land management and land rights administrative functions of the former Department of Coloured Affairs, the formal administration of land rights for agricultural purposes in these areas have collapsed. Land users however continue to respect historical rights despite the fact that in some areas grazing and allotment registers had fallen into disuse. Grazing fees were either very minimally enforced or not at all. Unsurprisingly, it was difficult to establish who had grazing rights, as stockowners had little incentive to publicly claim use rights fearing incurring user costs.

Those working closely with the process have reflected on issues broadly.²⁰ They note that a key strength of the legislation is the flexibility that allows choice over legal forms of land ownership (municipality, CPA or individual freehold). Despite the break down of formal land rights administration, they report surprisingly few irresolvable conflicts. People have continued to adhere informally to old communal systems.

In areas where rights enquiries and rule or by-law formulation processes have been completed, efforts were made to build in protections for residents in the rules / by-laws whether the land is transferred to a municipality or to a legal entity. Fears are expressed with regard to both options. If the land is transferred to a CPA, residents may become vulnerable as a result of corrupt deals or foreclosure on mortgage. If to a municipality, the municipality may disregard community interest. Land held by a local authority may reduce the risk of financial corruption because municipalities as organs of State can be held publicly accountable.

In the "coloured rural areas" of Namaqualand, municipalities have promulgated new by-laws for communal grazing and arable plots after extensive NGO-assisted processes of consultation with users. These new municipal laws have built in protections of the rights of vulnerable groups - for example, new applications for grazing rights will favour women stockowners. While these by-laws were devised for municipalities, a CPA can also adopt them as rules, should the Minister decide to transfer the land to such a legal entity.

In an attempt to set up institutional infrastructure, four municipalities in Namaqualand have initiated steps to establish co-governance entities in terms of the Municipal Systems Act (32, 2000), constituted in terms of a by-law. Community members will serve on the executive committees of these entities on condition that the municipality retains sole control of the entity. The utility will then conclude a 'service delivery agreement' with the municipality in terms of which it will take on management functions in terms of municipal grazing by-laws. The extent of devolution of power to these (hybrid) public 'entities' depends on relative capacity of structures and can be negotiated in each case.

Some of these rural areas are favouring transfer of land to a CPA²¹. One of the concerns about this route is the perception that once under "private ownership" there is no obligation on the part of local authorities to provide development assistance to that area that is essentially being used for agricultural purposes since residential settlements, as noted, have been placed under municipal control. This would place even greater demands on the mostly poor resident population to fund communal land infrastructural development and maintenance. There is also a danger of the land being accessed by private developers through deals by unscrupulous leaders.

The importance of municipalities as both key implementer and interested party cannot be underestimated.

Concerns arising from the implementation of TRANCRAA

Whether people select ownership by a local authority or ownership vested in a CPA, questions about the content of individual rights as well as sustainable regulation and enforcement of land use remain overriding concerns. Provision of administrative capacity and capacitation, infrastructure, budget, and institutional support to administer individual and group rights within the system in the Namaqualand area have been raised as key issues for DLA and municipalities.

²⁰ We are grateful to the following people for their insights into TRANCRAA processes: Kobus Pienaar, LRC; Sue Power, David Mayson & Harry May, SPP; Johann Hamman, facilitator for Mamre and Ebenhaezer and Eric Goodwin, W. Cape PLRO.

²¹ The referenda conducted in 4 out of 5 Namaqualand areas resulted in a narrow majority in favour of transfer of land to a CPA.

After the demarcation of new local authority boundaries and the wall-to-wall coverage of municipalities, the Act 9 areas found they had fewer direct representatives and their interests were thrown into a highly competitive environment for scarce resources. Formalisation of rights also has cost implications - all the models being considered build in cost recovery from users and may favour better-off farmers. Researchers²² argue that TRANCRAA should also address the constitutional right to "comparable redress" for those who fail to gain, or lose out, from the process.

Upgrading of Land Rights Act

More contentious have been the attempts to upgrade or update land rights using pre-1994 legislation such as the Upgrading of Land Rights Act, No 112 of 1991, which leapfrogs off-register rights such as quitrent and certain PTOs directly into freehold; and the Land Titles Adjustment Act No 113 of 1993 which updates out-of-date quitrent and freehold titles in the Deeds Office. There is widespread evidence of the neglect by holders of these titles to update registers on the death or departure of registered owners. Formal systems of succession and registration tend to be disregarded as the land is often treated as a familial land holding, passing to next-of-kin informally²³. Informal sales also took place. These transactions are expensive. Upgrading to freehold is mostly occurring in urban fringe areas and involves formal township layout planning. Adjustment of titles has proved to be a prolonged and administration-intensive process, with minimal results so far. These processes involve forwards-backwards-forwards linkages that require a great deal of facilitation and professional resources, but which have not been adequately provided for.

Communal Property Institutions

Communal Property Institutions (CPIs) are broadly defined as institutions that manage the collective use of all resources held in common including commonage, water servitudes, forests, agribusiness and equity in agribusinesses. CPIs include legal entities such as Communal Property Associations (CPAs) and Trusts.

Post 1994, the ability of land reform beneficiaries to act collectively was seen as the logical extension of the rights based, collective activism that birthed the new government and which informed early land reform discourse. CPIs were attractive to those who retained a belief in the innate ability of collective action, and harboured a mistrust of the public benefits associated with capitalism's unbridled pursuit of individual self-interest. Further, support for CPIs was based on the notion that such institutions would somehow reconcile African systems of land tenure (based on socially regulated access to resources and the principle that everyone within the community of origin has rights to land) with South Africa's adopted Western-style of land tenure based on titling and restricted access.

More recent land policy formation, with its emphasis on the disposal of all State land, including trust land, to the recognised land rights holders has embraced the CPI model as an alternative to the transfer of individual rights into freehold or the retention of State dominium. CPAs are the dominant form of CPI. There are some 567 CPAs registered with the DLA, with far less Land Trusts and even less companies.

The Communal Property Association Act, 28 of 1996 was promulgated to enable land reform beneficiaries to form CPAs for the purpose of acquiring, holding and managing land and related resources on the basis of a written constitution consensually agreed to by all members. CPAs are intended to provide institutional rigour but avoid lengthy and costly registration processes and minimise the administrative burden. The functioning of CPAs aims to ensure democratic decision-making and representivity, both of which are intended outcomes of the land reform process.

To a much lesser degree the land reform programme has made use of trusts (community and trading), propriety limited, close corporations and farming co-operatives. The performance, both within and across different types of legal entities, has been varied. CPAs have been criticised for neglecting existing communal tenure systems, promoting inadequate management, playing into the hands of powerful elites and fostering gender inequalities.

The experience of working with CPIs has led to the DLA and other organizations questioning some of the assumptions and methodologies that have been used in establishing and working with communal land management systems and structures. The Department of Land Affairs currently has a working group looking into CPIs and the Legal Entity

²² Poul Wisbourn & Rick Rohde, working document, "Communal Land Tenure Reform in Namaqualand, South Africa", 2003.

²³ Also based on primogeniture, which in a recent court judgement has been declared unconstitutional.

Assessment Project (LEAP²⁴) is a multi-stakeholder initiative working with the Department and other stakeholders to assess these communal systems and structures.

The main concern arising from experience is that new communal land holding structures may not have the authority or resources required to replace the role of the State once the State land administration functions are withdrawn, particularly with respect to internal or personal rights within common property regimes.

Yet CPIs are founded on *both* (a) the importance of creating robust, legitimate, inclusive and democratic institutions at the local level *and* (b) the importance of ensuring institutions are “nested within” regional, national and international institutions and policy directives. The “nesting of institutions” describes the functional integration and alignment of institutions (including markets and policy) across spheres of government and between institutions within the same sphere of government.

Experiences elsewhere on the African continent provide some insights for South Africa's CPI initiatives. One of the components of the Kenyan land reform programme, which began in the 1950's involved the transfer of group titles to pastoralists. In many instances this resulted in boundary disputes over seasonal grazing, fragmentation of communities, and growing inequality following manipulation of titling processes by local elites. A commission has recently been appointed to review the land policy and the costs associated with the titling model.

The approaches in Mozambique and Tanzania are often cited as viable alternatives to systematic titling. In these countries, land is nationalized and rights are vested in the people who occupy the land as opposed to registered title. The law enables the beneficiaries to define and record these rights at the local level, but there is no formal legal titling of land. The system accommodates both group and individual rights at different levels of social organization and is facilitated through extensive local support for processes of defining, negotiating and administering rights and obligations. Officials have to be available to assist local bodies and group members to define and record their rights, and to resolve disputes. It is claimed that the cost of this support is less than that of registering legal entities and titling the land and that the ensuing arrangements are more resilient. Definition and recordal of rights is nevertheless critical to protect rural land from land seizures by investors, as occurred in Mozambique until relatively recently.

In spite of this tendency on the part of the social scientist lobby to highlight the failures of titling in Africa, there is nevertheless a growing body of opinion outside South Africa that land registration can and should be adapted to accommodate the poor, within a poverty alleviation framework. This requires a modern analysis of land administration, which moves beyond a narrow focus on tenure security towards delivery of economic and social services.

There are suggestions that inadequate diligence and effort has been put into the creation and strengthening of common property institutions within the context of South African land reform. The capacity of communities to define, establish and protect individual and household rights without a clear State supported administrative institutional framework is currently being questioned. Some of the issues that have been identified by the investigations into communal property institutions are:

- The institutions are on the whole under-resourced, have limited capacity, lack internal coherence and operate within a broader institutional vacuum where assistance is uneven and inconsistent.
- The establishment of new rules that differ from familiar informal rules can lead to competitive and contradictory systems operating at the same time, and being championed by different groups within a community. In some cases, as noted above, the collapse of the private CPI has led to reversion, where traditional systems have taken over the land administration system completely.
- It is difficult to adapt principles of communal tenure with which people are familiar (where State holds dominium) to a private property regime, which functions differently, and fundamentally alters relations.
- Private communal systems are difficult to administer and maintain, and require far more internal capacity and resources than most other forms of tenure.
- The establishment of the CPI is only the first step; it has been found that these institutions require a great deal of back-up support, often misinterpreted by government to mean “skills training” in secretarial tasks, whereas the root of the problems lie much deeper, in social relations.
- There is a tendency for private communal systems to fuel conflict within heterogeneous communities.

²⁴ See www.leap.org.za/

- Legal recourse following infringements is difficult. The system is not supported by a land administration system to regulate or enforce individual rights and behaviour. Systems must therefore either i) be created from scratch and mechanisms found to link these properties to government institutions, particularly local government – such as the Northern Cape, or ii) adapt new rules to mirror well understood informal rules from the prior regimes – this requires building local capacity, which is simply not provided for in the funding mechanisms. NGOs are attempting to do this, but the impact tends to be localized, and cannot be applied at scale.
- The weak administration leads to open access, where resources are exploited and include instances of raiding by outsiders.
- Building capacity within local communities to become actors in managing land rights and land use takes considerable time, money and energy. The real problems do not necessarily arise when transfer takes place, rather the structured interface between the formal and informal systems will only really surface on transfer, and thereafter, internal problems that arise may not have the necessary institutional support for sustainability.
- Legal documents dealing with the establishment of the new tenure system are not accessible or useful for the community.

The lack of clear land administration mechanisms supported by the State inhibits the ability of local village level institutions of governance to link or bridge with local government. A related fear is that local government functions and linkages will only become fully operative post-transfer, further qualified by capacity and will to do so; and the fact that transfer is a very lengthy process. The lack of clarity around rights prior to transfer is an ongoing concern. This has led some commentators to observe that the emphasis on transfer in the first instance might, perversely, reinforce the inherited dualism within land tenure and land administration. The period of time required for each investigation, adjudication and mediation per community would be considerable and resource intensive. This places enormous pressure on the DLA, without transitional procedures or administration. The task itself is enormous.

Experience with CPAs suggests that CPIs struggle to achieve self-sustainability and require ongoing mentoring and support. In KwaZulu-Natal there are cases where the CPIs have been set up as parallel structures to traditional authorities. This has led to conflict and competition between the two structures with traditional authorities taking over responsibility for land functions from CPAs in some regions.

It is questionable whether people in deep poverty are able to resolve the land administration-related problems simply by registering CPAs. NGO experience has shown that securing tenure and developing land administration systems cannot be seen as a project. Rather the process involves the iterative building and strengthening of institutions. There is growing support – including some from rights holders – for a gradual strengthening of existing systems, so as to create a common land administration platform, with systematic links to local government, across a range of tenure types. Advocates of this approach envisage that the State would retain authority over, and responsibility for, communal land for as long as is necessary to ensure an appropriate and accountable management of the land.

LESSONS FROM PRACTICE

Seek to bridge customary and statutory law and practice. Colonial and apartheid heritage has created a legal dualism that underpins the tenure systems in the country. Adaptive intervention means acknowledging this dualism and finding legal and other mechanisms to connect the systems. What is required is a 'continuum' of tenure options and land administration systems – with state owned communally managed systems focusing on land as a basis for accumulating social capital on the one end to individually owned and titled land that provides a base for financial capital accumulation on the other. In between should be a range of adaptations, with increasing technical and administrative complexity and costs with allocations of these across state, private sector and rights holder – but all should have clear linkages into public systems. What the state has offered in terms of continuum is CPAs – a clear boundary and registered owner, which is publicly institutionalised, but an absence of state regulation, administration and support to the internal relationships within the boundary.

LEAP

Appendix Four: Development of national land adjudication policy, law and capacity

South Africa does not have a national adjudication policy or law. This is critical, and internationally it is viewed as a priority. Adjudication in relation to land tenure is widely accepted as “the process whereby all existing rights in a particular parcel of land are authoritatively ascertained”. In the Deeds and Cadastral system, adjudication refers to the painstaking checks performed by land surveyors and conveyances of all information relating to the property and the owner before the owner is allowed to transfer the property to a new buyer or a subdivision/consolidation is undertaken. The process is not to be confused with the process in terms of which existing rights are altered or new rights created. In communal situations it can be conceptualised as the “front end” process that systematically interrogates existing rights (such as in a “land rights enquiry”) or resolves disputes between existing rights holders. Sometimes the rights enquiry itself may uncover or lead to disputes if different people claim rights to the same land, or where boundary disagreements emerge, in which case the dispute resolution kicks in. Alternatively the adjudication is prompted by a dispute. Both rights enquiries and dispute resolution processes form an integral part of the adjudication function in countries or regions where off-register or uncertain rights are being brought into the unitary system.

Another important aspect of the adjudication function is related to public planning. During public planning (which in South Africa goes hand in hand with land reform) property boundaries may have to be shifted to accommodate a “new situation” such as placement of services. This requires negotiation with land owners or land rights holders with regard to reaching agreement on the new boundaries and for the payment of compensation for loss of land. The process links to land tenure in so far as boundaries as well as occupiers and owners of land within these boundaries must be ascertained in order to identify which properties are involved and who are the claimants to compensation.

Thus, the ordinary course of land adjudication does not necessarily imply a legal process, but rather a highly defined, predictable process that should apply standard norms, rules and procedures and which should be performed by specialists. Indeed, it is a particular strength of land adjudication that it attempts to lessen land rights uncertainty and resolve dispute outside the ordinary courts, which should be seen as a last resort. Since the function rests between the public and private interest it is best served by an impartial and independent third party situated between the administration and the citizens.

The argument for adjudication lies in the need to promote tenure security, which has both social and economic consequences, and to promote stability during the public planning and land reform process. The social consequences are the protection of rights holders from arbitrary deprivation of their property by the state or the rich and powerful; while the economic consequences are that rights holders will be more inclined to invest in land and the local economy if they are certain about their land rights, and financial institutions will be more inclined to accept land as collateral where the owner has been clearly and officially linked to the land parcel.

From the state’s point of view, adjudication can play a critical role in increasing the capacity of the official system to deliver land and housing and servicing.

The first step in developing a uniform adjudication system is the development of a framework within which the various “pilots” or projects already undertaken can be evaluated for extracting lessons learnt, developing best practices, formulating objectives, assessing delivery at scale, etc. In other words, as a first step towards developing pre-existing rules, uniform procedures, standards for procurement, cost implications, record keeping, etc, current completed projects (which can be regarded as “pilots”) should be assembled, examined and evaluated.

It is important that the function of adjudication is assigned to a body of trained, specialist and independent adjudicators who will provide an impartial interface between the public administration on the one hand, and the citizenry on the other. The need for impartiality is crucial, since the context in which adjudication occurs usually implies an intervention by the state with implications for the citizens (a public interest claim or a public interest programme on state land with rights on top of it) or it may be a claim by a citizen against the administration. Therefore there is a need for an impartial third party situated between the administration and the citizenry.

Currently procurement for adjudication is project-based and the work is outsourced on tender to the private sector. This has created problems of:

- A lack of procurement standards with regard to expertise and to specific components of the work;
- A lack of standard procedures for the various components of the work;

- A lack of application of uniform research and adjudication methods, such as pre-existing rules to create predictability and certainty;
- An uneven quality and type of product, as the competitive tender process requires that 50% of the evaluation is based on cost, which, outside of a “standards framework”, can result in compromised standards. Land adjudication, in its infancy at present, is, however, ill-equipped to be left to the vagaries of the market;

In particular, the work is usually not viewed as an “adjudication function”, but rather as a means to extract ministerial approval to release state land or as a means for identifying beneficiaries so that grants and subsidies can be audited and used for the development process. While these are important products, they do not create sufficient drive for the application of standard procedures and rules, derived from practice, and hence the attainment of predictability and certainty.

Issues to be investigated in relation to the development of rules regulating the function are:

- The role of the private sector;
- The role of the public sector;
- What kind of skills should adjudicators have – i.e. where should the emphasis lie, for example survey, legal, agricultural/land use planning, mediation etc. skills?;
- What rules of evidence will be created;
- What rules governing record-keeping are needed;
- What will the procurement policies be?;
- How will standards be developed, evaluated and enforced?;
- How will fees be set and according to which criteria (e.g. time, technical procedure, etc);
- Does a statutory body of adjudicators need to be created for registration, discipline purposes and for evaluating training;
- How will the public-private partnership be regulated – like the Sectional Titles Act?;