



Contested institutions? Traditional leaders and land access and control in communal areas of Eastern Cape Province, South Africa

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ABSTRACT

The South African government has endeavoured to strengthen property rights in communal areas and develop civil society institutions for community-led development and natural resource management. However, the effectiveness of this remains unclear as the emergence and operation of civil society institutions in these areas is potentially constrained by the persistence of traditional authorities. Focusing on the former Transkei region of Eastern Cape Province, three case study communities are used to examine the extent to which local institutions overlap in issues of land access and control.

Within these communities, traditional leaders (chiefs and headmen) continue to exercise complete and sole authority over land allocation and use this to entrench their own positions. However, in the absence of effective state support, traditional authorities have only limited power over how land is used and in enforcing land rights, particularly over communal resources such as rangeland. This diminishes their local legitimacy and encourages some groups to contest their authority by cutting fences, ignoring collective grazing decisions and refusing to pay 'fees' levied on them. They are encouraged in such activities by the presence of democratically elected local civil society institutions such as ward councillors and farmers' organisations, which have broad appeal and are increasingly responsible for much of the agrarian development that takes place, despite having no direct mandate over land. Where it occurs at all, interaction between these different institutions is generally restricted to approval being required from traditional leaders for land allocated to development projects. On this basis it is argued that a more radical approach to land reform in communal areas is required, which transfers all powers over land to elected and accountable local institutions and integrates land allocation, land management and agrarian development more effectively.

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Introduction

Theoretical context and key debates

Considerable debate currently surrounds appropriate mechanisms for securing and strengthening land rights in developing countries (Toulmin and Quan, 2000; Sjaastad and Cousins, 2009; Loehr, 2012). Political economists such as De Soto (2000), have espoused the formalisation of property rights through individual titling as the only effective means of securing capital in order to reduce poverty. In contrast, many other observers, as well as land law practitioners, have expressed considerable scepticism about this approach, suggesting that there is much empirical evidence

to suggest previous attempts at titling have not yielded the economic or tenure security benefits intended (Quan, 2000a; Bromley, 2009; Meinzen-Dick and Mwangi, 2009). Not all of these sceptics necessarily protest land titling per se but rather the individualisation of land rights. Indeed, some support titling approaches which recognise existing forms of land rights such as collective rights over communal grazing lands or forests and the retention of localised control over land disposition (e.g. Alden Wily, 2008).

In sub-Saharan Africa, many countries have been actively encouraged, by pervasive neo-liberal theory and in many cases the juridical legacy of their colonial forbears, to eschew a role for customary land rights in developing modern land tenure systems (Sjaastad and Cousins, 2009; Obeng-Odoom, 2012). However, there is now increasing recognition amongst academics, land rights activists and land NGOs of the social and political 'embeddedness' of land rights in Africa, and how this needs to be reflected in contemporary land tenure frameworks (Cousins, 2007, 2008, 2010; Lavigne Delville, 2007; Okoth-Ogendo, 1989, 2008). In particular

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Okoth-Ogendo has argued that social relations ‘...create a set of reciprocal rights and obligations that bind together and vest power in community members over land.’ (Okoth-Ogendo, 2008: 100).

An important part of this is a conceptual distinction between land *access* and *control*. In this line of argument, land access is essentially a function of membership in the family or community and is available to any individual on this basis, although with certain limitations on the rights of women to hold land in their own right (Walker, 2003; Bank and Mabheha, 2011). It is always specific to a resource management or production function or group of functions and is maintained through active participation in the production process at particular levels of social organisation (Peters, 1994). Control over and management of land is vested in and exercised by the political authority of a particular social group to supervise specific functions at different levels of social organisation (Bromley and Cernea, 1989). It acts to guarantee power over access to land for production purposes (Okoth-Ogendo, 1989). These principles provide a basic framework for understanding how land tenure systems have functioned in sub-Saharan Africa and many believe that aspects of this social and political embeddedness of land rights should be formalised in contemporary land tenure frameworks in sub-Saharan Africa (Cousins et al., 2005; Cousins, 2007; Meinzen-Dick and Mwangi, 2009).

There is, however, the potential for such an approach to create a disjuncture in the design of effective national land tenure policies that both embed rights and uphold democratic principles. Of particular focus has been the role and nature of local institutions in the securing of land rights (Toulmin, 2000, 2009; Agrawal, 2001). Nested, local institutions play a key role in a decentralised process of securing land rights for local people and have historically been the crux of land access and control for many communities (Alden Wily, 2003; Toulmin et al., 2004; Toulmin, 2009). However, given the profound socio-economic and political changes that have taken place and the degree of manipulation they have been subject to by colonial and post-independence administrations, the form that current institutions take and the extent to which they are able to uphold and administer a socially and politically embedded view of customary land rights is highly variable (Cotula, 2007). For example, in many parts of rural West Africa, customary institutions of varying form still govern access to land and natural resources (Lavigne Delville, 2007) whereas in Botswana the role of customary authorities (chiefs) in land allocation has, since 1970, been replaced by that of putatively more accountable Land Boards (Alden Wily, 2003; Quan, 2000b).

Where customary authorities still play an active role in land management, the degree of legitimacy and perceived accountability that they have amongst local people is a further pressing concern. Under colonial administrations, traditional leaders in many countries, particularly in Anglophone Africa, became paid appointees of the state with a devolved mandate over local law and administration, a system which Mamdani (1996) has described as ‘decentralised despotism’. Most aspects of judicial, legislative and administrative power, including comprehensive powers over local land allocation and control, became embodied in them, creating a ‘clenched fist’ of local authority (Mamdani, 1996: 23). This unassailable authority encouraged arrogance and corruption such that these traditional leaders often lost the grassroots support of the majority of people they purported to represent (Mamdani, 1996; Ntsebeza, 2011; Cousins, 2008; Delius, 2008). Evidence of this lack of popular support for customary authorities as a result of perceived corruption and a lack of downward accountability continues to accumulate from many parts of sub-Saharan Africa (Peters, 2004; Kinsey, 2005; Thiaw and Ribot, 2005; Cotula, 2007). For these reasons, the continuing power of customary authorities in relation to land administration remains strongly contested, with some commentators suggesting that in democratic states, a

legitimate role for them in matters of such critical importance to local people can no longer be justified (Ntsebeza, 2005). The situation is made more uncertain for local people in some countries in that new local government structures now co-exist with customary authorities at the grassroots level (e.g. see Cotula and Cissé, 2007 for Mali; Spierenburg, 2005 for Zimbabwe; Ntsebeza, 2008 for South Africa). This ‘institutional layering’ has resulted in clashes, sometimes violent, which often have at their core struggles to exercise control over land allocation and management (Peires, 2000; Kinsey, 2005).

The South African situation

South Africa offers a case in point. Here, the social embeddedness of land rights in the pre-colonial era, through membership of a politically autonomous group within a chiefdom, has been well documented (Peires, 1981; Beinart, 1982; Delius, 2008). So too has the increasingly decentralised and authoritarian approach to land access and control by traditional authorities that was imposed during the colonial and apartheid eras (Ntsebeza, 2005; Oomen, 2005; Delius, 2008). In the initial post-apartheid era, the removal of much of the state apparatus supporting traditional governance structures within former homeland areas and the contraction of agricultural extension services, created considerable uncertainty regarding land tenure and land management. The development of democratically elected and locally accountable Transitional Rural Councils (TRCs) initially gave hope to many rural people that these structures would not only play a role in service provision but also take the lead in land allocation and management (Peires, 2000). However following local government elections in 2000, these councils were subsumed under local municipalities that formally merged rural councils and their better organised urban equivalents, thereby effectively leaving contentious land allocation and management issues unresolved (Ntsebeza, 2011). A decentralised approach to land rights in rural areas was also supported by legislation such as the Communal Property Association Act (Republic of South Africa, 1996), which enabled local communities in rural areas to create accountable communal property associations (CPAs) to strengthen property rights and facilitate local resource management (Cousins and Hornby, 2002; Wotshela, 2011). However, given that the apartheid laws governing land allocation had not been repealed, in many areas traditional authorities successfully resisted attempts to devolve their power over land access and control (Lahiff, 2003; Ntsebeza, 2008).

In communal areas, the lack of adequate tenure reform has been highlighted as a key shortcoming in securing land rights, reducing conflict and promoting agrarian development (Lahiff, 2008; Cousins, 2010). The *Communal Land Rights Act* (CLARA), introduced in 2004, was designed to end this uncertainty by transferring title of communal land to nebulous ‘communities’, nominally represented by a land administration committee. In principal, communities could choose whether this committee was to be democratically elected or whether an existing traditional council should assume this role. However, amidst fears by land activists that CLARA afforded too much opportunity for unelected traditional authorities to cement their control over local land rights, the Act was contested in the Constitutional Court, declared unconstitutional in 2010 and must now be fundamentally reconsidered (Bank and Mabheha, 2011).

Although this undoubtedly represents a blow to the ambitions of traditional authorities in South Africa, their position is still strong, being legally underpinned by the *Traditional Leadership and Governance Framework Act* (TLGFA), enacted in 2003. This Act was closely linked to CLARA and created a framework for provincial laws which would define the status and powers of traditional

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