The realties of tenure diversity in South Africa

La réalité de la diversité des systèmes fonciers en Afrique du sud

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Abstract

A common view of South Africa’s land tenure context is that the system is characterised by duality: on the one side is a tenure system regulated through a legal framework derived from the colonial era and servicing modern needs and globalising economy, and on the other a tenure system founded on customary values, servicing a livelihood system dependent on agriculture, natural resource use and social relations of patronage and reciprocity. An alternative view is that South Africa has multiple and diverse tenure arrangements that flow into one another, which are dynamic rather than identifiably separate tenures. This conceptualization is better characterized as a continuum than a duality.

While this approach is conceptually and practically more complex, it has the potential to reveal alternative tenure systems and forms and the practical adaptations that take place between the two extremes of the “dual systems” concept. A categorisation of the multiple arrangements can facilitate an enhanced understanding of the diversity that exists on the ground and therefore provides a framework within which more appropriate policy approaches to pro-poor land management systems can be recommended. The paper will argue that it is important to apply an inter-systems approach that assesses how the various tenure arrangements relate to each other. This entails recognition that the degree to which the state, local government, local structures and traditional governance institutions regulate these diverse tenure arrangements varies greatly and that authorities may well overlap in the regulation of any particular set of tenure arrangements.

The paper concludes with initial insights emerging from the application of this approach by a group of tenure practitioners seeking practically to explore and recommend appropriate policy approaches to tenure arrangements in urban and rural contexts.
Keywords: Multiple systems, tenure arrangements, continuum

Résumé

Le système foncier Sud Africain est généralement perçu comme étant partagé en deux: d’une part un système foncier ancré dans un cadre juridique, issu du colonialisme et adapté aux exigences contemporaines et à la globalisation; de l’autre, un système foncier basé sur des valeurs et pratiques coutumières, liées à l’agriculture, l’exploitation des ressources naturelles ainsi qu’aux relations de patronage et de réciprocité sociale. Cet article présente une perspective alternative, qui met l’accent sur l’existence de multiples et fluides cadres fonciers qui cohabitent et se meuvent l’un dans l’autre, au long d’un continuum compris entre deux extrémités: le system formel, d’un coté et le system coutumier, de l’autre. Cette approche est conceptuellement et pratiquement plus complexe, que celle de la dualité. Elle permet, cependant, l’identification de différents systèmes fonciers, tels qu’ils se pratiquent, se chevauchent et s’influencent. Cette approche reconnait la diversité et la pluralité des rôles que jouent tour à tour, l'état, les municipalités, ainsi que les structures locales et coutumières dans la gestion de ces pratiques foncières. L’article plaide la nécessité de classifier et de l’analyser ces diverses pratiques qui permettent ainsi le development de systèmes de gestion foncière, plus adaptés aux besoins des populations défavorisées, parce que plus proches de la réalité. Des leçons préliminaires issues de la mise en pratique de cette approche par un groupe de chercheurs et praticiens seront présentées en conclusion.
1. INTRODUCTION

Debates about tenure in South Africa are frequently characterised by the mobilisation of polarities. Key to this discourse is the use of particular terminology, most significantly the terms “formal” and “informal” tenure. However, this language and the polarities it expresses are misleading. Firstly, the terminology tends to privilege “formal” over “informal” as though formalisation is the ultimate solution. Secondly, “informal” is suggestive of a disorganized, even chaotic or anarchic “other”, which is at odds with what is often a complex, well organized and regulated set of rules and procedures characterized more appropriately in the plural – heterogenous systems which vary from place to place, context to context. Thirdly, the dichotomy is itself problematic as it indicates a false polarisation, more appropriately represented as a continuum along which specific situations may be placed in relation to, for example, an assessment of whether it is moving towards more informality or more formality.

The terms “legal” and “extra-legal” are sometimes offered as a more constructive alternative to “formal” and “informal”. While useful, there is the continued problem in the language that the implied solution lies in “legalisation” of the extra-legal in the sense that Hernando de Soto employs the term. From the point of view of the social reformer, however, social legitimacy at a local level may be regarded as being as important as the formalities of the law with regard to property ownership.1

In other words, the polarities mask and distort reality and create conceptual dualisms that do not exist in people’s lived experience, which tends to be more fluid, diverse and complex. However, ways of understanding a problem has a direct bearing on solutions proposed to those problems and many policy responses are embedded in this dualism. It is therefore important that South African policy makers and implementers recognise that, like the rest of sub-Saharan Africa, “property matters are determined by a combination of residual colonial law, current constitutional law and ongoing customary law” with “complex interaction between local traditions, customary law, statutory law, and enforcement systems” (Strickland 2004), if we are to develop more appropriate and pragmatic policy approaches to securing tenure in South Africa.

While land reform and housing policy in South Africa aims explicitly to address the needs of the urban and rural poor, the inability of policy makers to grasp the complexity of existing tenure arrangements in the country often render these policies ineffective in terms of their own aims. A more useful approach to understanding tenure in the country is the notion of a continuum in which tenure security or insecurity is viewed as the outcome of social processes that are not static and that are deeply

1 We do note, however, that the state displays institutional bifurcation to the extent to which it channels resources towards the legally recognised as opposed to the legally unrecognised.
affected by government interventions. Tenure cannot be described as secure simply because it takes a particular form, such as a title, but must instead be measured against the degree to which the social processes that result in security command legitimacy.

This paper does not focus on the importance of securing tenure. However, our understanding is that tenure security is both a public good in and of itself and it is also the basis upon which people organise their livelihoods, access many of the services of the state (and private sector) and which the state uses as a base for exercising its relationships with its citizenry. Tenure and tenure security are therefore fundamental to understanding relationships, power dynamics and resource flows between people and between people and the state.

2. POLICY CONTEXTS AND CRITIQUES

In land reform, there are concerns about the tenure security of members of groups who have acquired land through state programmes, and even where tenure is functionally secure, concerns that this provides an inadequate base for securing development. In the housing sector, there are concerns that backlogs of state provisioning for the poor keep growing, housing is not viewed as an asset despite the wide-spread provision of individual ownership, the property market is functioning poorly at the lower end and informal settlement upgrading may create new conditions for exclusion.

In addition, across the rural-urban sectors there are concerns that the land administration system, underpinned by the cadastre, does not have the mechanisms to “recognise” the land tenure of individuals or groups who have unregistered rights and that a large percentage of South Africans continue to occupy and hold land outside of the registry system in spite of the state’s attempts to extend a regulatory tenure framework over all land in the country. These South Africans, who are the poorest of citizens, are rendered invisible by planning and administrative paradigms dependent on the cadastre.

2.1. Land policy context and critique

The post-1994 period saw a rapid and intensive process by the State to fulfill constitutional requirements to provide land tenure security to all South Africans. A spate of law was promulgated to provide wall-to-wall tenure security across the different spatial and land use zones. The new rights framework for land reform laws strengthens possessory rights in certain contexts but without
extending real rights. There has thus been a strong political commitment to recognizing a wide range of informal land rights which were previously unrecognised in law or which were recognized only under old-order racially based legislation.

A new national was subsequently enacted in 2004, which will have a major impact on people living in communal areas. The Communal Land Rights Act (ClaRA) will potentially impact on how the rural poor in South Africa hold land rights and how those rights are administered. The intention of government is to secure property rights to facilitate development and to extend democracy into rural areas under traditional administration. However, ClaRA does not address some of the fundamental problems relating to tenure in the country. Instead, it transfers land into group ownership with an option for further individualization into individual or household ownership, thus replicating rather than resolving the problems of registered rights in these contexts. The Act also fails to address fundamental issues of incompatible systems for recognizing the evidence of property rights. There is, instead, an assumption that the types of rights produced in customary and communal systems can, unproblematically, be converted into rights capable of registration within a cadastral model.

The biggest challenges for South African land policy therefore continue to be how the state reconciles individual rights with group rights and the common law that regulates ownership with customary law. The new laws in South Africa do not replace the common law governing property in South Africa. The primacy of the common law has had the effect of privileging “ownership” evidenced in deeds registration. Although tenure reform legislation enabling the movement of customary tenures to registerable real rights through group or individual registration has provided some relief to certain groups, it has also missed some important principles of customary law, particularly regarding the negotiability around layers of different use rights for different users which tend to evade codification and exact spatial definition. This movement into a registered domain threatens rather strengthens tenures that are currently off register and sets up extreme vulnerability of certain groups within the larger community.

2.2. Housing policy and critique

Tenure is often concealed within the housing issue in South Africa. One of the cornerstones of the state’s housing policy and implementation framework is the housing subsidy system, in terms of which beneficiaries are entitled to a once off capital subsidy that has generally translated into a fairly standard one-house-per-plot physical product, with individual title. In recognition of some of the flaws associated with the first ten years of delivery as well as the changed context over the ten-year period,  

2 These include the Land Reform (Labour Tenants) Act, the Extension of Security of Tenure Act and the Interim Protection of Informal Land Rights Act.
“Breaking New Ground” (BNG) was approved as new government policy in September 2004. BNG is the government’s “comprehensive plan for the development of sustainable human settlements” over the next five years. It identifies that, despite delivery at scale, the size of the backlog has increased and aims to shift housing delivery from product uniformity to demand responsiveness in recognition of the multi-dimensional needs of sustainable human settlements. Tenure preference is one of several dimensions of diversity that the strategy identifies, although it does not unpack the nature of those preferences.

The repetition of the terms tenure “options”, “choice”, “preferences”, in several places in the document is significant. Certainly tenure choice is one response to the inflexible and standard nature of the programme to date. However, the strategy’s overall engagement with tenure is limited in several ways. Firstly, the content of options, preferences or choices beyond individual title is limited to the rental and co-operative ownership types in the social /medium density housing programme which is directed toward the achievement of urban restructuring. Secondly, the strategy’s engagement with tenure is limited to tenure form or option, in isolation from the tenure arrangements within which tenure is embedded is limiting. Thirdly, no policy attention is given to the ability to enforce a socially meaningfully and socially legitimate tenure system. Fourthly, the strategy’s engagement with local and off-register tenure arrangements is limited to a reference to “backyard rental accommodation”, which includes backyard shacks, student accommodation and granny flats. The strategy’s engagement with other off-register tenure arrangements is almost non-existent. This may be intentional given that “informal settlement eradication” is an objective. However, a strategy that aims to be positive about and supportive of informal settlements needs to begin with what exists and what exists is a range of diverse, local, off-register and unofficial tenure arrangements.

2.3 Conclusion to policy directions

Both land and housing policy make fundamental assumptions about tenure security, the key being that tenure is secured through legally backed systems that the state defines and can impose. While land policy has attempted to recognise de facto or possessory rights, this legal recognition has translated into implementation systems that funnel all rights into registration without any attempts to review the principles of registration and the cadastral system that underpins it. Housing policy, on the other hand, has so far resisted the recognition even of possessory rights and the importance of anti-eviction legislation for stabilizing the lives of the poor, offering instead tenure options that fail to reflect how poor people organize their lives and the spaces in which their livelihoods are secured.
3. MULTIPLE TENURE ARRANGEMENTS

Underlying the policy approaches of both the housing and land sectors in South Africa is the assumption that there are people living in “informality” who need to be brought into “formality”. It may, however, be more useful to consider that there are multiple tenure arrangements (processes, rules and procedures) operating in South Africa that serve particular needs and purposes. This approach is captured through the notion of a continuum, which can be depicted as follows:

**THE TENURE CONTINUUM**

**Tenure is secured through**

**Types of evidence**

- Individ title/group title/sectional..leases........official records...witnesses..community authority

**Procedures/processes**

- Public record and the courts
  - Survey and professional adjudication
  - Registration
  - Professional technical inputs

- Membership, effective local institutions
  - Negotiation
  - Local adjudication
  - Dispute resolution

*Land is economic asset for wealth accumulation*  *Land is safety net for vulnerable livelihoods*

The diagram shows tenure arrangements on a continuum in which the extreme ends are most appropriate for particular types of purposes. Registered ownership, for instance, is highly technical and expensive but is most appropriate for property that is to be used as a base for capital accumulation. Locally administered tenures, on the other hand, require greater negotiation and dispute resolution but are more appropriate for land that is to be used as a livelihood base in a set of relationships that constitute social capital. There are a range of tenure arrangements in between these that express various adaptations of these extreme ends. For instance, elected municipal councillors are often used in shack settlements to witness an allocation of an urban residential rental site. This tenure draws from
the customary tenure system the requirement of an authoritative local figure who oversees the witnessing process as the key form of evidence. Unlike the customary system and drawing on principles underlying legal tenures, the tenure form is often rental and not customary ownership.

The nature of the authority that underpin the extreme ends are derived from different sources whereas the tenures in between draw on different authorities for different purposes. For example, individual title is embedded in an authority system that is highly institutionalised and embedded in both the state (repository of property information, courts) and private sector (legal, surveying and planning professionals, credit institutions). On the other end, the customary system, as an example of a highly routinised communal system, has authority embedded in tradition and cultural norms as well as localised practice. (Alcock and Hornby 2004)

3.1. The Registration of Deeds System (ROD)

The South African formal property system is organised around a conventional cadastral model, namely, a land information system that has two key components or subsystems: a spatial component, the geometric description of the land parcels, linked to the textual component, the records or registers, describing the nature of interests and ownership of the land parcels. The Surveyor General’s office (SGO) houses the spatial component and the Deeds Registry is the custodian of the Deeds information. The SGO and Deeds Registry are both centralised. The South African cadastre demands stringent technical sophistication such as high-accuracy surveying based on a geodetic network of co-ordinates and legal conveyancing. While this constitutes high protection for those who can afford to use the system (it is regarded as among the most accurate in the world), the system has failed to make an impact on the property rights of the poor.

The legal property system in South Africa creates hierarchies of property rights. Land rights under the ‘ownership’ legal paradigm (the ROD system) are the strongest rights. These rights are defined by the common law of ownership as developed through the Roman-Dutch law on property. Rights of ownership are real rights, and are maintained by state administrative systems, whereas rights to “use” land owned by others are classed ‘personal rights’ of a lesser and “private” status, without proprietary content and thus lacking the same legal protection and administrative support as ‘real rights’. (Pienaar, 2005).

Viewed from the perspective of the broader land management framework, this hierarchy of rights is reflected in the technical processes that define and register the rights and capture the information. Because a juridical (legal) cadastre underpins secure land rights in South Africa, land has to be “cadastred” if it is to be recognized by the land management system. The cadastre is thus a form of
land tenure literacy - where there are no land parcels, officialdom system cannot “read” the system. However, cadastres don’t easily adapt to systems that allow a layering of rights, such as multiple, differentially entitled owners with different rights to different uses that are socially determined. This system also has difficulties with user rights that are linked to people and not to parcels.

3.2 Customary tenure arrangements

The importance of customary tenure systems in South Africa lies in its widespread use and application. The majority of rural South Africans live on land under a customary tenure system. The 1996 census data indicates that around 15 million people lived in customary areas, approximately 83% of the rural population.

South African officials and professionals commonly depict customary tenure as the chaotic Other of the duality, as undemocratic and “backward” systems that cannot secure tenure, elude bureaucratic control and regulation and prevent investment and development. However, systems that have known and used procedures for land allocation, boundary demarcation, adjudication and dispute resolution, provide a high degree of functional tenure security although they do not deliver registered tenure. Thus many rural South Africans have a relatively high functional tenure security that is outside of legally secure tenure.

Those who are making and implementing policy and programmes lack a precise understanding of how customary institutions organize property rights. A gap in understanding also relates to how customary property systems articulate with property systems derived from Roman-Dutch law. While it is possible to assert that ownership in customary systems is socially embedded in ways that are very different from the Roman-Dutch derived tenure system, the precise problems of articulation require a deeper understanding. Leap (2005) has argued that customary ownership is firstly inter-generational in the sense that the family, past, present and future, has an active stake in the land and secondly, is linked to a notion of belonging to a particular piece of land that is ritualized through highly gendered practices of ancestral worship. These different practices of ownership need to be subjected to more rigorous analysis in order to define more clearly problems of integration within the post-apartheid political economy. Legal reform, such as ClaRA, will fail to translate into effective tenure security unless work is undertaken to create congruence between the conceptions of property, ownership and evidence in the various tenure systems.

The problems of legal and political dualism are therefore likely to continue despite legal reform unless the tensions and incongruities are more precisely identified and solutions to integration found.
3.3. The tenures in between

Many, if not most, rural and urban settlements in South Africa are characterized by semi-official land tenure arrangements. These settlements range from dense rural settlements to informal or semi-formal urban settlements. The land tenure rights might include “old order” rights such as Permission to Occupy (PTO) rights, quitrent tenure, and lapsed or semi-lapsed “freehold” titles. They may also include a range of other informal rights or extra-legal arrangements that have over time become quite formal and individualized. They also include more recently formalized tenure systems that evade full integration into the formal land management system, e.g. rural and urban housing projects or tenure upgrading projects. These hybrid tenure systems affect a large percentage of rural settlements and most newly formalizing urban settlements.

The importance of local and off-register tenure arrangements is thus twofold. Firstly, they are widespread and on the increase. For example, the number of households living in shacks in informal settlements and backyards increased from 1.45 million in 1996 to 1.84 million in 2001, an increase of 26%, which is far greater than the 11% increase in population over the same period (Breaking New Ground). Secondly, although not enough is known about them, they clearly impact on housing and rural land settlements interventions in unexpected ways.

Although we do not have enough systematic knowledge and understanding of local off-register tenure arrangements, there is a wealth of case study material that provides insight into aspects of how such arrangements operate, in all their variety. What emerges from this is that:

- Local, off-register arrangements exhibit more variety than the term “informal settlement” is able to convey.
- An emphasis on place (“informal settlement”), as opposed to arrangements, means that not enough is understood about local rules and procedures. As a systematic body of evidence is not yet available, policy and programme interventions offer standardized and inflexible options.
- There is a link between local and customary systems, partially captured in recent research by the notion “neo-customary”.

Durand-Lasserve and Royston (2002) offer descriptions of types of tenure arrangements in urban and peri-urban shack settlements. These settlements mostly take place through unauthorized land development or local processes of subdivision and allocation of land. Unauthorized land developments are a widespread phenomenon on the fringes of most developing cities. This is not well recognised in South Africa although it certainly exists. There is no data available that quantifies the extent of this phenomenon in South Africa.
Squatter settlements are found on the urban fringes or in centrally located areas, mostly on public land but also – less frequently – on privately owned land, especially when disputed. These can be the result of an organized ‘invasion’ or a gradual occupation. Contrary to common belief, access to squatter settlements is rarely free. An entry fee must generally be paid to an intermediary, or to the person or group who exerts control over the settlement and sometimes also rent. Tenure security can range widely, from settlements on public land that have a degree of recognition from local politicians and officials to settlements on private land faced with eviction.

Rental is the most common form of tenure in these settlements as elsewhere. Rented housing covers a wide range of situations and levels of precariousness. Tenants and subtenants form a heterogeneous group. They can be found in unauthorized land developments, in squatter settlements or in dilapidated buildings in city centres. Backyard shacks, prevalent in some of South Africa’s cities, are an example of this kind of rental housing. Tenure security can vary greatly.

In the rural situation, land reform has created conditions for new off-register tenure arrangements to emerge. Although group owned land is legally regulated by trust deeds or communal property association constitutions in terms of the available legislation, in reality regulation is shaped and determined by conditions on the ground, including history, local practice and power dynamics. In some communities, failures of legally constituted committees have resulted in traditional governance structures taking over land allocation and dispute resolution functions. In others, a “help yourself” dynamic has resulted in the richer and more powerful members of the group grabbing land and resources for themselves. What has become evident through analysis of these situations is that there is a wide gap between legal assessments of how land regulating institutions are supposed to be functioning and the actual performance of land administration functions.

4. INTER-SYSTEM INTERACTIONS

A recent investigation (Durand Lasserve, forthcoming) identifies some systems in African countries as “neo-customary” under certain conditions. Neo-customary practices are a combination of reinterpreted customary practices with other “informal and formal” practices. This fluidity in classification is in tune with the continuum concept. Examples are where land rights were initially delivered by customary systems, and where practices that have been part of a customary system are currently being used. Durand-Lasserve notes that all case studies confirm that commodification is the important factor that transforms customary into neo-customary land delivery systems.
Reviewing research in some Western Cape settlements, Huchzermeyer (2002) identifies a process of entry into informal settlements that has parallels in rural tenure systems. Furthermore, in the late eighties and early nineties in informal settlements in Durban, exploitative practices of rent tenancy based on a private ethic gave way, under the leadership of mass democratic movement structures, to a land ethic closer to the communal land holding in rural areas.

Robins (2003) draws attention to the complex and diverse ways in which individuals and cultural groups make decisions in relation to housing. He cautions against making sweeping generalisations about cultural beliefs and practices and identifies that faulty assumptions are frequently made. Anthropological critiques draw attention to socio-cultural obstacles to creating formal low-income markets, noting that housing is often not perceived simply as an individually owned asset, but is also a social and cultural asset. When there are multiple stakeholders with many interests in the property transacting is complex and can be seen as anti-social. The property can also be part of building and maintaining complex social networks that contribute to livelihoods. This is true of communal property generally, not just housing.

Evidence from titling experiments in South Africa over the past century suggest that registration and titling of land in former black rural and informal urban areas has had unexpected results. Of particular note is that the formal registers have not been maintained. Informal sales and intra-family transmission without registration are the more usual methods of transferring land in this sector. (Kingwell 2004)

There are also a range of transitional tenure situations where past interventions have had a marked effect on current land tenure arrangements. (Leap 2005) These interventions, induced by both external and internal pressures, brought permanent and incontrovertible changes to customary principles of land tenure, whilst not overruling them completely. In this configuration, rights holders often express a desire to move along the continuum to more official recordal of land rights and regulation of land use, whilst also maintaining some elements of (adapted) customary tenure. There is also a tendency towards more individualised land use rights and fixed spatial demarcation thereof.

Some land tenure systems have thus clearly moved away from customary principles. However, these systems continue to resist full incorporation into the centralized registry and spatial cadastre. There is much evidence, based on situations where titles were issued historically (e.g. in the Eastern and Western Cape and Kwazulu-Natal) or more latterly in urban housing programmes, that these systems are unable to embrace fully the principles of a national land registry system and tend to revert to more localized, affordable and practically workable arrangements.
Customary tenure legacies also impact significantly on the efficacy of the system in former homeland rural areas. Various customary forms of land holding that depend on social indicators and not technical indicators (such as land parcelling through survey) for allocating and enforcing land tenure have survived in various forms all over South Africa. In some regions and particularly in urbanising contexts, these “social tenures” have adopted certain tenets of a fixed cadastre system, while others remain more rooted in historical African land tenure practices. These systems rely on a logic that differs significantly from the legal registration system.

4.1. Some consequences of multiple dynamic tenure arrangements

The official systems have difficulty engaging with hybrid tenure arrangements. Land management and planning models make integration of neo-customary models difficult, which is compounded by lack of resources, a low level of registration of titles and the lack of an appropriate land information system and cadastre. While local paper records are emerging everywhere, the lack of backing for an appropriate public record can lead to conflict around the use of multiple authorities for land administration, lack of access to private and public investment in development and governance difficulties related to the ability to tax and recover costs of services.

The anomalies that arise from this are carried into the land management environment. There is disjuncture at numerous intersection paths, including spatial planning and land use management. The latter relies on a cadastre in the form of land parcels to carry the necessary land information to activate its functions, for example, through town planning schemes and zoning. The implications of this argument is that the current formal land management system in South Africa does not have the mechanisms to “recognise” land tenure rights of individuals or groups who live in contexts that function outside the legal property information system, that is outside the cadastre.

Multiple authority levels are compounded in communities with multiple governance structures for allocating and adjudicating rights. Multiple regulatory institutions affect the way in which rights holders: i) wish to transmit their rights to others; ii) protect rights within the community or family from being transmitted to others; iii) resolve overlapping rights; iv) draw subsidies from the state for land or housing development, or v) access private or public services. In situations where there is more than one recognised system of authority, different segments of a community, or even one individual or household, may appeal to different authorities for intervention. Rights holders act opportunistically in order to achieve the most desirable outcome.

While these institutional uncertainties might not amount to tenure insecurity at scale, it can lead to tenure uncertainty at a local level. At a micro level, it can mean tenure insecurity for certain groups
who are vulnerable to eviction or downward raiding of property, and also members of the family, particularly women and children. The latter is compounded in the case of families affected by HIV/Aids.

The gap between law and practice also has implications for the benefits of accessing services. In South Africa, formal planning is the pathway to servicing and its maintenance. Servicing is usually accessed after formal planning, which is interpreted to mean formal settlement lay-outs, surveys according to the national standards, and formal conveyancing of title through the centralised Deeds Registry.

However, there is increasing evidence that these formal procedures (lay-out planning, surveying and titling) are “points of entry” into officially recognised state systems. Once the subsidies have been accessed and bulk infrastructure established, these tenure systems tend to lapse back into more locally recognised systems. For example, land transfers are not evidenced through registration in the Deeds Registry, but are evidenced by means of locally recognised systems, such as local witnessing of land transactions, or local allocation of use rights that may not accord with the formal lay-out.

4.2. Opportunities arising from the continuum

Tenure systems in transition have the potential to reveal alternative tenure systems and forms, and may reveal what adaptations may be possible or appropriate at points in between the two extreme ends of the continuum. There may be clues as to what elements of an alternative tenure system are operating optimally and robustly, and what elements detract from tenure security in a transitional environment. A study of the tenure systems along the continuum may provide indicators of what factors distinguish customary systems from the legally recognised registration system. Are these tenures suspended between customary tenures and registered formal tenure or do they represent potentially new forms of tenure in themselves? If so, what are the possibilities of recognition in their own right rather than viewed as incomplete versions of the either of the two polarities on the continuum? How would such recognition impact on the range of relationships that depend on tenure, including development and servicing, legal protection of land rights and sustainable, planned land use?

5. WHAT NEEDS TO HAPPEN THEN?

The concept of recognition is an attempt to provide an intermediate tool for describing the legitimacy of tenure arrangements that fall between legally acceptable on the one hand and socially unacceptable on the other. The term “extra-legal” has often been used to depict this range of tenure arrangements but its focus on legality directs attention only to law rather than the processes and procedures by which a set of tenure arrangements may become socially legitimate. From the perspective of the state, an act
of recognition could include service delivery to a group of people living within the city without title, once the city has determined, for example, that the area is suitable for fluid urban-rural migration patterns. Such recognition would begin to provide an incremental base outside of the cadastral model for securing the tenure of the urban poor.

Further work is required to explore the characteristics of the customary, local/ off-register and registered tenure arrangements and the mobility between them. To do this, it is important to apply an inter-systems approach, i.e. how the various arrangements relate to each other. Questions of articulation between different tenure arrangements need to identify how various notions of ownership contradict, support or elude the Roman-Dutch derived notions that are characteristic of the county’s official set of tenure arrangements as found in the Registration of Deeds system. This is necessary because interventions must address the officially recognised arrangements, which receive political approval despite their failure to service the needs of the majority. Identifying more precisely issues of articulation will assist in showing how the official systems fail and what possible areas interventions should focus on.

Furthermore, in reality the land tenure arrangements are dynamically connected to an interactive economy, a mobile population with rural-urban linkages and engagement in labour and consumer markets and a services sector. There is a cadastral network in much of the country, and a demand from urban and rural rights holders for development and basic services. These factors influence linkages between the various tenure arrangements. No tenure arrangements operate completely outside of the broader economy, market and service sector. However, the degree to which the various tenure arrangements are regulated by the state, local government, local structures or traditional governance institutions varies greatly.

In summary, we need to develop and advocate for a more appropriate approach to securing tenure, which is one that:

- Recognises the reality of multiple tenure arrangements;
- Identifies the relationships between them, including the tensions and incongruities;
- Finds solutions to integration; and
- Increases tenure security for poor and vulnerable, individuals and groups in order to:
  - Enhance livelihood strategies
  - Enable improved delivery and maintenance of services
  - Enable improved equitable access to economic opportunities

Central to this approach is a shift from thinking about what forms of tenure bring security towards the ability to enforce a socially meaningfully and socially legitimate tenure system.
6. REFERENCES


Kingwill, R (2004 ) *Investigation of possible unintended consequences upon proposed repeal of Section 7 (and, with it, schedule 2) of the Black Administration Act, No 38 of 1927 as regards the present status of the title deeds relating to Fingo Village and Hottentot Village properties, Grahamstown, Eastern Cape*. Report prepared for the Department of Land Affairs, Provincial Land Reform Office, Eastern Cape, submitted by Mbumba Development Services, August 2004


Pienaar K (2005) Personal correspondence to R.Kingwill; 27 May

