

Customary land tenure in Mopani district today, and what it suggests about land titling¹

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By the early 1990s it was apparent that South Africa desperately needed land reform. Agricultural productivity in the Bantustans was low, poverty was high, and the political situation in the country was deeply unstable. Some reformers argued that granting freehold tenure/title to individuals in communal areas was the best route to economic development.² Title to land was considered the most secure form of tenure, as it would be registered and could be protected in law. Thus, people could securely invest in their land, which would now also have value that it did not have before, as it could be sold. This valuable asset could be used to get access to credit – which was not at all easily available for the very poor. Furthermore some suggested that it would allow some farmers to buy plots from others who were not interested in farming, thus allowing for larger, more profitable landholdings and a new farmer class. This was considered to be important as one of the many negative effects of apartheid and homeland land laws was to limit the amount of land any individual could hold, so that in the context of severe land shortage more people could have access to plots for subsistence purposes. The idea was that those who had sold their land would have the money to allow them to move to areas where they could find work – something that had also not been allowed during apartheid and had resulted in the migrant labour system, or, alternatively, a large population being trapped in homeland villages where there were no job opportunities. Communal land was also thought to be poorly managed; the “tragedy of the commons” was that people using a shared resource would pursue their own self-interest and deplete a resource rather than use it sustainably. Having individual title to land would encourage people to better manage their land and invest in it.

South Africa took a different route to tenure reform. The Interim Protection of Informal Land Rights Act gave people under communal tenure protection against the loss of informal rights to land. But since then, new laws and proposals pertaining to land tenure have tended to privilege the rights and power of chiefs over communal land, undermining the rights of ordinary people. In the post-apartheid era, the idea that chiefs “own” land on behalf of their people has been supported by the Communal Land Rights Act of 2004, which was eventually struck down in 2010 for being unconstitutional.³ The kinds of land policies that have been proposed more recently continue the same theme. The proposed Communal Land Tenure Policy would give chiefs title deeds over communal land. Regardless of the law some chiefs use their imagined “ownership” of land, the flawed land restitution programme, and their favour with the government and courts of law to use land as they please; sometimes dispossessing people in order to use their land for the chiefs’ own economic pursuits. In the meantime, land administration in

¹ This is a summary of a longer paper and contains selected references. Please see the original paper for full references.

² The key arguments outlined below are summarised in W. Beinart, “Review: Towards Freehold? Options for Land and Development in South Africa's Black Rural Areas by C. R. Cross and R. J. Haines”, *Journal of the International African Institute*, 60 (1), 1990.

³ A. Claassens and B. Cousins, (eds.) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*, Cape Town: UCT Press, 2008.

communal areas is chaotic; old systems have broken down and not been replaced, and the legal basis of people's land rights is unstable and uncertain.

Given this context, we conducted fieldwork in communal areas of Mopani district, Limpopo province, to see what the situation "on the ground" was with regard to agricultural activity, investment, and perceptions of tenure security. We found the situation strongly resembled some in other parts of Africa where scholars have increasingly found the stark division drawn between "communal tenure" and individual title to be unhelpful in understanding tenure in communal areas.

As in other parts of Africa people generally had a perception that their tenure was very secure and that a market in land existed.⁴ A "Permission to Occupy" (PTO) certificate was frequently referred to as a "deed of grant", understood to show "ownership", and transferred through inheritance. People could sell their stand (or, some said, just the house on the stand as the land itself belonged to the chief) and benefit from the sale – the money goes to them, not the chief. A "change of ownership" – which costs an amount of between R100 to R800 (or possibly more for some foreigners) – then has to be registered with the headman. Once a person has received a PTO certificate, this was understood to be a permanent transfer. There was no rental or lease to pay, and the stand could be inherited or sold at the discretion of the standholder. This perception of security was reflected in what appeared to be high levels of investment in housing in particular. The market in land enabled mobility, and allowed people interested in farming to access unused land. In these ways, some of the advantages of "titling" were present within a communal system.

Our interviews with active farmers revealed that a perception of secure tenure – to the extent that farmers felt the land "belonged" to them – was a factor that contributed to investment in land and a diversification of agricultural activities. One of our respondents, for example, initially leased a plot in an irrigation scheme, providing the PTO holder, who happened to be the chief, with maize grown on the plot in return. When the PTO was transferred to him, he was able to plant tomatoes and other vegetables for market and began diversifying – growing palms to rent out for formal functions, and citrus trees.

However there were other elements to his situation, which suggested that secure tenure alone was not enough to explain his success. He and his wife worked the land, thus labour was free. He also had assistance from the Department of Agriculture, which provided him with the citrus trees and assisted him with fertilisers for a year. And, critically, the former plottolders had given him the land for free. The chief was satisfied that he was using the land, and he received another plot on the same scheme from a friend who had tired of farming as he was getting old.

We found another active farmer in a village, growing spinach in neighbours' gardens. She had access to her own plot in the arable zone outside the village, but this zone had no access to water and the ongoing drought meant dryland farming was not an option. (Other plottolders across the district were not

⁴ See J. Ubink, A. Hoekema, W. Assies, (eds.) *Legalising Land Rights: Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America*, Leiden: Leiden University Press, 2008; HWO. Okoth-Ogendo, "The nature of land rights under indigenous law in Africa", in A. Claassens and B. Cousins, (eds.) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*, Cape Town: UCT Press, 2008.

cultivating their plots given the drought – availability of water was very obviously the most critical constraint to farming, above questions of title.) She had absolutely no security of tenure for the land she was using – she had not even made a written, witnessed agreement with the relevant standholders. Seasonal vegetables however did not require the same kind of long-term investment as, say, fruit trees. Furthermore she made a separate income as a teacher, which allowed her to buy necessary inputs, and she had no difficulty marketing her vegetables and making a profit.

We found that it was in fact very easy and cheap for people to access land and property for residential, farming, or other business purposes. In fact access to land or property was often free – or at least, the exchange did not involve a transfer of cash, which is very important in areas of extremely high unemployment and cash shortage. This points to some other advantages of communal tenure systems. Access to land is socially mediated; it comes from one's membership of a community, and social and family relations – or kinship networks – within that community. This did not necessarily exclude outsiders, who could access land by paying a fee and becoming otherwise integrated. The result is that when it comes to using land or property for the purpose of, for example, starting a business, socially mediated access to land acts essentially as a subsidy. It provides for free what would otherwise be a significant start-up cost (and high start-up costs make starting a business risky, especially for people with no capital). In the same vein, free access to land is a form of welfare – a critically important safety net for the poor.⁵ For example, one of our interviewees – a woman with five children and no prospect of employment – was able to get a plot from a headman for a sum of R150, which she had not yet paid. She was able to build her own house (with the help of a new partner) using local natural resources and the small amount of money she received from child support grants. She had land on which to cultivate a home garden, which provides food security. She felt secure on this land, despite the fact that she had not yet paid the headman, because she had cleared it herself and was using it.

Her situation brings us to another insight, also raised by others, which is that investing in land provides people with tenure security as it gives them a strong claim to the land.⁶ Thus the relationship between tenure security and investment could work the other way round. The corollary of course is that failing to invest in land could render one's tenure quite insecure – and we certainly found examples of this. This brings us to the disadvantages of communal tenure.

We found some constraints to people's economic activity in the context of a communal tenure system. Firstly, the rental market was very limited. While some benefited by getting free access to land, standholders were not benefiting economically from their land. The consequences of this were obvious – many houses and stands were dilapidated. The undeveloped rental market was where the limits to tenure security were revealed. In neighbouring Sekhukhune district Lahiff also found a stilted rental market, and found that people were unwilling to provide him with details of their land exchanges. The reason, he suggested, was that "There is a common perception among those on communal land that, because land is allocated on the basis of need (at least in theory), continued security of tenure requires

⁵ M. Adams, B. Cousins, S. Manona, "*Land Tenure and Economic Development in Rural South Africa: Constraints and Opportunities*", Working Paper 125, Overseas Development Institute, 1999, p.14.

⁶ S. Berry, "*Building for the Future? Investment, Land Reform and the Contingencies of Ownership in Contemporary Ghana*", World Development, 37 (8) 2009.

that a plotholder is seen to be using his or her plot.”⁷ Thus, accumulating land or property beyond one’s immediate needs was risky. For example, an interviewee had accumulated two extra plots above what she required for residential purposes; she planned to use these in the future for separate businesses. She did not yet have the money required to build, and kept finding one of her plots appropriated by others.

Further constraints were that people could not hold more than 5 ha of agricultural land under communal tenure (although it was possible to pay to lease more land). And without any collateral, people could not access credit. The inability to access credit was widely considered by locals to be a critical constraint to farming. However it is not altogether clear that providing people with title would result in them accessing credit. Firstly the willingness of banks to provide credit to otherwise unemployed and poor people is questionable. And it is also doubtful whether poor people would be willing to take the enormous risk involved in using their land as collateral. Some initiatives in Mopani district have shown that it is not necessary to give people title in order for them to be able to access credit. For example, with the Spar rural hub (led by the Spar supermarket chain), suppliers – smallholders in communal areas – are provided with the inputs they need, as well as technical support. This allows them to grow crops to the quantity and standard required by Spar. This essentially acts as credit, which suppliers then pay back when their crops are sold.

Land tenure reform is needed in South Africa’s communal areas. However our findings support the wider literature that recommends that reformers recognise and work with the apparent flexibility of communal tenure systems and existing institutions, rather than replace them wholesale by introducing land titling.

⁷ E. Lahiff, “Land Tenure in South Africa’s Communal Areas: A Case Study of the Arabie-Olifants Scheme”, in *African Studies*, 59 (1) 2000, p. 59.