

Boekbesprekings

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LAND LAW AND GOVERNANCE: AFRICAN PERSPECTIVES ON LAND TENURE AND TITLE

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Background

The publication is a product that was initiated by the International Alliance for Land Tenure and Administration, following the Conference of the Commission on Legal Pluralism that was held in conjunction with the erstwhile Centre for Legal and Applied Research at the University of Cape Town in September 2011.

The book consists of eight chapters. The first chapter, co-authored by three of the editors – Mostert, Verstappen and Zevenbergen – contextualises the research theme and provides insight into the approach and main findings of the project. The remaining seven chapters deal with various issues pertinent to the overarching theme constituting land law and governance, with a special focus on tenure. These perspectives highlight issues in relation to South Africa (communal land tenure – chapter 2 (Mostert and Jacobs) and land title in social context – chapter 4 (Kingwill)); Botswana (customary land rights in an urban context – chapter 6 (Akrofi and Whittal), land administration tools in peri-urban Gaborone – chapter 7 (Van Asperen, Kalabamu and Zevenbergen)), Namibia (registration of communal lands – chapter 8 (Amoo and Mapaure)) and Kenya (chapter 3 (Wairimu and Hebinck)). Chapter 5 (Chenitz and Richardson) contains a general analysis, not jurisdiction-specific, regarding the risks associated with the individualisation of land rights generally, whereas Chapter 6, alluded to above, also has a legal comparative dimension as it reflects on Botswana, Namibia and Ghana.

Aim and focus of the publication

The focus of the publication is on the different ways of conceptualising secure landholding, especially in relation to individualisation of title, versus collective or group tenures. In this process different, often contrasting, views are raised. This is aligned with one of the aims of the publication to open up the discussion of tenure forms by juxtaposing differing political and academic viewpoints (chapter 1 at 2). Linked to the issue of tenure, is the governance of land, in particular, the administrative structures employed and the ways in which these rights are recognised and enforced. In this light tenure security embodies the legal, administrative and social frameworks governing the protection of individual or group rights to land, as well as acknowledged sets of rules, procedures and systems that would support reliance upon such frameworks (chapter 1 at 4). Linked herewith are the two pertinent questions: who should be the beneficiaries of tenure security on the one hand, and what types of tenure should be secured, on the other. These pivotal questions are dealt with throughout the publication, within respective contexts and jurisdictions.

A further theme that resonates in the publication is that, in search of tenure security, various options posed will always embody both benefits and disadvantages. Phrased differently: irrespective of the option employed, be it privatisation or a communal approach, advantages and disadvantages will unavoidably ensue. There is thus no such thing as the perfect solution that will work for everyone, in all instances. For example, privatisation and individual title, options often resorted to, have both economic and non-economic advantages. However, these options may also have drawbacks, for example, land-related conflicts are often aggravated, it may lead to increased negative environmental effects and the ineffective and unsustainable use of natural resources (8).

It is within this context that governance, land reform and registration enter into the picture, thereby encapsulating the real value and contribution of this publication. Good governance refers to all necessary elements, including transparent processes in policy-making; professional bureaucracy, an accountable executive arm of government, civil participation in public matters and adherence to the rule of law and judicial control (9). With these elements forming the background, the value of each of the chapters in the publication is highlighted further.

South Africa

Two chapters deal with issues pertinent to South Africa, namely chapter 2, dealing with communal land rights and the unconstitutionality-finding of the Communal Land Rights Act (CLARA) 11 of 2004 and chapter 4, which deals with land title in social context.

While the unconstitutionality-finding of CLARA by the constitutional court in May 2010 is by now well-known and has been commented on extensively by academics prior to this particular publication, the chapter remains valuable as it highlights the implications of particular policy choices. The unconstitutionality-finding as such – on the basis that the bill had been tagged incorrectly – is thus not the main focus of this contribution. Accordingly, it is not a mere rehashing of well-known material. Instead, the analysis is of a substantive nature in which various policy options, tied to particular political considerations and viewpoints, are explored. The concluding part of the chapter focuses on the revised communal land tenure policy of 2013. While the latest policy was published in the course of 2017, and thus not reflected on in this chapter, the conclusion reached is arguably still valid, namely that government's policy proposals reflect a very specific view of how the constitutional mandate to achieve tenure security has to be realised. This view is not necessarily aligned with the needs and demands of the relevant communities to which the policy applies. The question thus rightly remains whether communities, who are supposed to benefit from these developments, actually benefit in practice.

Chapter 4 is a very interesting contribution that explores the social context of land title in relation to particular case studies in the Eastern Cape. The case studies were done a decade ago, in two areas, namely Fingo Village, an urban settlement, now a suburb of Grahamstown and Rabula, a rural village in Keiskammahoek district. While the "usual approach" as regards the two main categories of title is well-known in that land may be held communally (traditional customary law) or in freehold (so-called "Western-style" tenure). The second "tier" under freehold land usually encompasses private, individual title. However, in this contribution the relevant land is held in freehold (as title was issued mid-nineteenth century), on a *family-basis*. In this context a "Western-style" form of ownership was super-imposed on existing social norms, with interesting implications. For one, pre-existing property relations and social norms were not extinguished when land titling was introduced. Instead, existing social networks and familial relationships prevailed. This has critical implications for especially reform-related tools and mechanisms. While the data is again somewhat outdated as the empirical research was conducted a decade before this chapter was published, this contribution has underlined the value of this kind of "real life" research and its relevance for reform endeavours. Social and family contexts are very resilient. Superimposing reform mechanisms, for example, freehold, will not automatically eradicate the underlying foundations. In this instance the property-holding structure is held together by kinship ties and is safeguarded by a family custodian, a representative selected to manage, maintain and defend the family property. This contribution underscores that "[p]roperty relationships are fundamentally about how society regulates the distribution of power, ... The distribution of social entitlements, which are connected to personal and collective entities" (69). This is even more pertinent where, as in South Africa, property is also linked to other rights in the bill of rights, including the right to culture and to live in accordance with one's cultural background.

Kenya

Chapter 3 deals with how the Maasai accommodate privatisation in Kenya. The contribution is approached from a socio-relational perspective. This entails, amongst other, that the Maasai are not merely passive receivers of new land tenure policies, but instead, accommodate policy proposals in different and innovative ways to suit their particular needs. For example, the subdivision of former communal land to group ranches and later on, to individual families, has opened up other, new opportunities for land use and new practices. Where previously land was used for pasture, new spaces resulted in new practices like the cultivation of crops. New spaces and new practices have especially contributed to women being more actively involved in land-related activities. The most important finding of this chapter is that new property arrangements mean new forms of land use. By unlocking new or further property constructs the available options are effectively diversified. This is a lesson South Africa can take to heart.

A theme that resonates throughout the whole publication, is the value of land and what it means to individuals and communities. The importance of land for the Maasai is set out in detail (59-61). It is also linked to identity and a sense of belonging – something South Africans can also relate to. As a social construct it also has social and relational implications, important dimensions that are also explored further in the South African context in chapter 4, alluded to above.

Botswana

Two chapters highlight pertinent issues relevant for Botswana, chapter 6, that also has a legal comparative dimension, and chapter 7. The former deals with customary land rights in the context of

urbanisation and development, whereas the latter relates to land administration tools on security of tenure amongst the poor in peri-urban Gaborone.

Essentially both chapters underline the inherent difficulties where development and urbanisation are concerned, given the “usual” point of departure that traditionally, land in Africa has been in customary landholding, governed by groups sharing the same cultural identity. Within the context of urbanisation and development, these premises are contested fundamentally. Experience has shown that, in these conditions, effective land management requires an approach to land that accommodates a suite of land rights forms, including forms that can retain some form of customary landholding. This approach is also reflected in the South African chapter, chapter 4, where the finding was highlighted that legislative amendments will not automatically eradicate foundational traditional or customary law approaches. Within the context of Ghana specifically, and to a lesser extent Botswana, such a customary-contextual approach has contributed greatly to the protection of the rights of the poor especially.

The latter theme was expanded further in chapter 7 that deals with the evaluation of land administration tools on tenure security amongst the poor in peri-urban Gaborone, Botswana. The focus of this chapter is tied to the complexity of tenure forms in peri-urban areas, as statutory, informal and/or customary regimes often apply (150). While it is trite that weak land governance and administration impact detrimentally in general, it is exacerbated in relation to low-income families. This finding was underscored following empirical studies in two peri-urban settlements: Tlokweg and Mogoditshane. With respect to legally secure tenure, it was interesting that, while land administration tools did not specifically include pro-poor elements as it was contained in a “neutral design”, adequate tenure security was generally achieved. That was the case because some pro-poor elements were contained in the overall process. For example, land was allocated free and the registration fee for the certificate was affordable, also for persons with a low income. Persons who were in possession of a certificate perceived their tenure to be secure. However, where informal occupation prevailed, those persons endured insecure tenure and faced the possibility of evictions. The shortage of land suitable for settlement and the inability of government to deal with these matters effectively and expeditiously, including the inadequacy of land administration tools, are also relevant in relation to the South African needs and demands.

Namibia

Part of chapter 6 also related to some aspects of the Namibian land question, in particular the role of customary land rights in the context of urbanisation and development (135-137), whereas the whole of chapter 8 focuses on “[t]he registration of communal lands in Namibia: [a] critical analysis of practical legal intricacies”. Due to historical reasons, land in Namibia is generally divided into one of two main categories: communal land on the one hand and commercial land on the other. This contribution centres on this particular distinction and how this approach creates a dual system of land ownership, linked to an even more complex land registration system. Recent legislative developments require the registration of communal land. While this development underlines the importance of registration as a land administration tool, it does not alleviate the complexities. Lessons learnt in this context can be of immense value for the South African endeavour to increase tenure security on communal land, reflected on in chapter 2.

Risks involved in privatisation

Chapter 5, co-authored by Chenitz and Richardson, is one of the pivotal contributions in this publication. While all the other respective chapters highlight various options, possibilities and tools to be employed in developing or achieving greater tenure security within specific jurisdictions, this chapter zooms in on one mechanism that is often resorted to, namely that of privatisation of land rights. This chapter is aligned with the introductory chapter underlining that, irrespective of the particular option employed, there is no perfect solution that will work for everyone, in all situations. The contribution is a detailed analysis of the benefits and disadvantages tied to privatisation and is of immense value for the South African land question, given that similar attempts had been made locally by way of the Transformation of Certain Rural Areas Act 94 of 1998 (see Pienaar *Land Reform* (2014) 326-331) and some components of the former CLARA, discussed in detail in chapter 2.

Conclusion

The publication is welcomed and adds value to existing research within the context of land governance and tenure security. It is not an all-encompassing investigation as only certain jurisdictions are reflected on in particular. The sample jurisdictions, however, embody a good spectrum of neighbouring countries, with similar historical backgrounds and colonial remnants, and case studies from Kenya and Ghana. Although a rather lengthy period of time has lapsed since the conference in 2011 and the publication in 2017, and despite the material not being up to date in all respects, the contents of the book

remain relevant. That is the case because the main issues raised and the themes explored are not time-based, but issue-based. Accordingly, the issues have remained relevant and important and the themes explored in the book have remained contentious, thereby warranting further elaboration, debate and research. In this regard the publication has provided the necessary information to inform the audience of key questions and remaining issues to be explored further. As a guiding force for future research this publication is especially useful.

The content is well-researched and well-written and will be an excellent resource for researchers and academics specifically, as well as for post-graduate studies or elective modules offered at an advanced level. The publication will also be very useful for policy drafters and governmental staff involved in land administration. This publication can be studied alongside an older, but still relevant publication, Home (ed) *Essays in African Land Law* (2011). Combined, these two publications offer valuable insights into Africa-specific land- and property-related concerns.

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