Seeking Equilibrium: Land Rights Adjudication in off-register, non-formal, or formalising contexts in South Africa

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SUMMARY

In a conventional cadastral system, land adjudication refers to the painstaking checks performed by surveyors and conveyancers to ascertain the precise spatial and textual characteristics and parameters of ownership to prevent overlaying boundaries and overlapping rights when land is subdivided, consolidated or transferred. In non-cadastred areas, or where the cadastre has lapsed, this form of adjudication does not match the tenure situation on the ground. In developing countries the majority of land rights are not exercised, transacted or captured in the cadastral system. Neither are they fully contained within "traditional" systems since these have changed in response to internal and external pressures. In South Africa, tenure legacies resulting from colonial or settler interventions range from registered to off-register to informal rights, overwriting but not eliminating community rights mediated by custom or well understood local rules or norms. New land tenure dispensations provide protective measures for informal rights and recognition to customary rights. New land administration procedures associated with the Interim Protection of Informal Land Rights Act (1996) and the Communal Land Rights Act (2004) provide for "rights enquiries" prior to land subdivision or alienation or transfer of rights, in order to establish the beneficiaries and spatial dimensions of the rights to be transferred. In spite of these reforms, there are still lingering questions about local institutional arrangements and the manner in which communal rights are to be recognised by the formal system. This paper argues that one of the neglected areas is adjudication of rights and associated land information management. Rights Enquiries do not address the range of institutional reforms necessary to align the country's dominant Land Management institutions with off-register systems. The paper derives insights from a number of rights enquiries conducted in the Eastern Cape, drawing from case material. It attempts to show how a range of evidence (not just cadastre-based) was gathered and considered for the purposes of awarding land rights, mainly on occupied state land. It argues that the interpretation of this evidence needs to be balanced with locally legitimate decision-making. Decisions in socially mediated tenure situations are largely based on local rights hierarchies or layers. A third party "adjudicator" uncovers the range of evidence around which outcomes are negotiated. These decisions are not (and cannot be) made purely on technical or objective grounds, such as cadastral information. This introduces new dimensions to the notion of adjudication. Given that such outcomes require particular methods of information gathering and management, it is vital that information infrastructures and systems are designed to interpret and process this "unconventional" evidence in a manner that is regarded as legitimate, and can be easily stored, retrieved, disseminated and updated.

1. POLICY CONTEXT

The reconstruction of case material upon which the paper has been based led to the conclusion that adjudication should be viewed as a critically important policy issue in the emerging Land Management frameworks in the African context. In spite of its potential centrality as a tool for evaluating and securing tenure in the off-register, socially derived land systems that predominate in Africa, it is a highly neglected component of Land Management and Land Administration.

Land Management is defined as the overarching process of decision-making around land resources, including responsibility for the implementation of the decisions. From an institutional perspective it includes the formulation of land policy, the preparation of land development and land use plans, and the sub-systems for spatial planning and land use management, and the administration of a variety of land related programmes including land tenure. The decision-making realm can be centralised, decentralised, localized or a combination of all or some of these. Land Administration defines the activities that "actualise" these policies and plans (Kingwill, 2004).

Adjudication is widely accepted as "the process whereby all existing rights in a particular parcel of land are authoritatively ascertained". The process is not to be confused with the process in terms of which existing rights are altered or new rights created. Rather it is the "front end" process that systematically interrogates *existing* rights. (MXA 2003).

Where rights are governed by the Deeds and Cadastral system, adjudication refers to the painstaking checks performed by land surveyors and conveyancers - within statutorily defined codes of conduct and rules - of all information relating to the property and the owner before the owner is allowed to transfer the property to a new buyer and/or when a subdivision or consolidation is undertaken. The cadastral system in South Africa is understood in the conventional sense to mean a land information system that has two key components or subsystems, viz. 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).

Formal land management is conceived as a set of inter-related sub-systems which all nevertheless "tie up" via an extensive state machinery which derives its institutional (including political and technical) integrity from the cadastral system. The informal system, on the other hand, is usually "cadastre-less".

The scope of the "informal" system includes the range of socially derived tenure systems which are off-register or which are failing to be maintained in the formal registry. These tenures are usually identifiable by the socially embedded nature of tenure relations and their administration under a variety of local arrangements, such as civic organisations, traditional authorities or specially designed local

committees. Evidence of land tenure rights is thus usually wholly or partially unrelated to the cadastral system.

The formal cadastral system continues to elude the poor in both urban and rural contexts in many parts of Africa, including South Africa with its highly developed cadastral network. I have argued elsewhere (2004) that the persistence of institutional misfits between the dominant land management frameworks and the marginilised informal systems that serve the poor in both urban and rural contexts contributes to a rationale for people in the informal systems to stay outside the formal system. Locally regulated systems are in some respects able to respond more dynamically than the formal system to the stresses and shocks experienced by those whose livelihoods are vulnerable. Attempts in policy and practice to superimpose the formal system over the informal system continue to fail, and even to increase tenure vulnerability or insecurity in many cases.

There is neither a law nor policy on land adjudication in South Africa outside of its conventional practice in the formal system as defined above. Adjudication is arguably a crucial missing link between the perceived incomplete or unreliable information characteristic of unofficial land management and the perceived complete and reliable information of the Deeds and Cadastral system. Adjudication could provide ongoing and consistent support in off-register or formalising tenure contexts in the absence of accurate documentary records, at the same time creating a body of records or "library of evidence" alongside the cadastre.

In this context, adjudication could play a bridging function between the "fixed" cadastral-linked methods of ascertaining and recording "who has what rights where" and the non-cadastred, more "elastic" layering mechanisms that tend to mediate land rights (which are usually linked to other rights as well) in off-register or informal situations. It could provide predictable back up in the absence of fixed records, or lapsed or lapsing records.

For adjudication to fulfil this role, however, there would need to be a shift in the entire conceptual and institutional framework for land management in developing countries. The edifice of land management and land administration in South Africa, for example, rests on the building blocks of the cadastral system, including the regulation of land use through land use schemes. This in turn influences the way land information is interpreted, stored, used, regulated and generally managed. Since off-register systems cannot be "read" in this way, the majority of citizens whose rights are affected by these systems do not gain the benefit of the country's public and private services invested in land management.

Land adjudication in off-register systems, on the contrary, potentially provides scope for different sets of tools and mechanisms for understanding, interpreting, assessing, storing and using land information. The practical management functions would most usefully rest with local government and local civil society institutions, within a national framework of principles and norms. This would involve institutional restructuring of local government functions to integrate land

information systems derived from off-register land rights. Given the fluidity of off-register systems, it would be necessary to design provincial (trans-local) and local level "libraries of evidence" to house and maintain this unconventional evidence, i.e. evidence other than, and in addition to, Deeds and cadastral evidence. These libraries of evidence would inform ongoing adjudication and dispute resolution functions; strengthen community governance institutions; provide information to monitor local registries of rights - as and when these emerge; and play a critical role in planning and development programmes, such as land reform, housing, utilities, servicing, billing and local economic development.

For this kind of institutional restructuring to take place however, would require shifts in thinking about land management and land administration at policy-making level. For example, decentralising and restructuring key land administration functions at local government level to incorporate new ways of thinking about local land information systems and land registries. This could be sustained by a more systematic approach to adjudication of off-register rights. Although land rights enquiries feature prominently in current policy initiatives, the emphasis is different[1]. New policies remain tied to centralised cadastral intervention.

The saliency for current policy directions of the case material referred to below should be seen in the light of these observations and reservations.

2. UNDERSTANDING ADJUDICATION IN OFF-REGISTER SYSTEMS

The argument for adjudication in relation to land tenure 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, local governance institutions and the local economy if they are certain about their land rights.

Adjudication has been defined above as the process whereby all *existing rights* in a particular parcel of land are authoritatively ascertained. It is not the process whereby new rights are created (although there is often a close relationship between the two). In the context of titling[2], adjudication is a *systematic* process covering a whole unit of land, rather than a sporadic application on single parcels of land. In situations where base-line land tenure information already exists - based on prior systematic adjudication - adjudication may be sporadic.

[1] The Communal Land Rights Act of 2004 provides for centralised confirmation of land rights and titling of communities, groups or individuals within the Deeds and Cadastral system. Land administration is not among the listed functions for assignment to local government. Land Administration Committees are linked to Traditional Authority structures under the Ministry.

[2] Titling in this context refers to the creation of certainty in rights through a process of recordal, rather than necessarily registration in the central Deeds Registry.

In off-register situations adjudication is necessary to introduce certainty, or greater certainty, in situations prompted by a "new situation". Such a new situation might be a dispute between individuals or groups; intolerable levels of conflict within a community or between communities; expressed desire to formalise tenure by legal means in order to strengthen security; or, in the South African land reform context, it might be driven by the imperatives of public planning, for example, municipal land development or integrated development planning, land redistribution, state land disposal and restitution programmes. These circumstances might require property boundaries to be shifted to accommodate the "new situation" such as placement of services, or the confirmation of dispossessed or uncertain rights. This requires negotiation with landowners or land rights holders to reach agreement on the scope of the new rights, the new boundaries or for the payment of compensation for loss of land or for comparable redress if no land is delivered to valid restitution claims.

The general principle on which the case for adjudication rests is that, in the absence of complete certainty there must be predictability, namely that rights will be investigated and disputes will be resolved. In order to create predictability through the interrogation of rights and resolution of disputes, pre-existing rules must be developed and applied. This implies that the adjudication activities, procedures and products should be subject to a national framework of tenure norms and administrative procedures, so that all cases are dealt with in a predictable way. These should also be conducted in such a way as to satisfy *both* the attainment of the administration's objectives of good governance and efficiency, as well as satisfy the general body of citizens, who will be assured that private interests are taken into account.

Where rights are governed by the Deeds and Cadastral system, adjudication is a recognised function of the private sector (land surveyors and conveyancers) who perform this function within statutorily defined codes of conduct and rules when property is changing ownership or when a subdivision or consolidation is undertaken.

In off-register systems in South Africa, adjudication is not similarly recognised as a function of land administration. Although there is legal provision for "rights enquiries" prior to disposal or transfer of land under communal or informal land rights, the nature of these enquiries is insufficiently grounded within a Land Management framework. Official guidelines for rights enquiries associated with the newly legislated Communal Land Rights Act of 2004 emphasise protocol, consultative procedures and product, but not tenure norms, evidence and information systems. "Procedural rights" are increasingly seen as a critically important backstop to "substantive rights". To add meaningfully to substance, procedures governing rights enquiries merit stronger emphasis on evidence, particularly the collection, evaluation and storage of evidence and the kinds of evidence that should be admissible. The land information management aspects of enquiries need to be considerably strengthened.

Moreover, the close association of rights enquiries with the creation of new rights (or the transfer or upgrading of existing rights), as well as with spatial and development planning, has the potential to conflate adjudication with land transfer, planning and subsidy allocation. There are situations where consultant-driven rights enquiries have merged into planning to such an extent that it is not possible to separate the adjudicatory functions from the planning functions. The problem with this is that it may encourage social engineering and short cut the principle inherent in adjudication, viz. interrogating *existing* rights, which is "pre-planning".

Adjudication is also closely associated with the resolution of disputes between existing rights holders or sets of 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. Disputes can be between individuals, or between an individual or group of individuals and the administration. Both rights enquiries and dispute resolution processes form an integral part of the adjudication function, particularly in African tenure systems.

In a wide-ranging review of existing literature as a context to South African land reform proposals, Cousins (2000) examines the mixed experience of tenure reform in many African countries, in both the colonial and the post-colonial periods. He raises the question "whether or not it is possible to legislate land rights and design administrative systems which take into account the realities of African land holding systems" in view of their complexity, variability and fluidity and their imbedded social processes. He asks whether these systems are "inherently negotiable".

These questions cut deep into land tenure debates and proposals, and provide insights in support of adjudication as a more permanent, higher priority feature of land tenure reform in an African context. Experience of rights enquiries in the Eastern Cape Province of South Africa, upon which this paper is based, confirmed that meaningful long-term sustainability of adjudication requires local legitimacy, which in turn requires local negotiation. This may not be a once-off exercise.

The ordinary course of adjudication of off-register rights does not necessarily imply a judicial 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.

It is a mechanism that is used during a period of development where the tenure implications of incomplete information (which leads to uncertainty) must be balanced against political, social, financial and time constraints of extending the core system across the whole country. Adjudication thus assists in filling the gap between the relatively incomplete or unreliable information in the off-register

systems and the relatively complete and reliable information of the Deeds and Cadastral system. In addition, tenure confirmation or registration under conditions of incomplete information must have an in-built mechanism for processing disputes that result from the uncertainty of poor or 'unconventional' information. Moreover, there should be recognition that systems are informed by different *values* about what evidence is considered legitimate. This affects how the information is assessed, collected, stored and managed.

3. CONTEXT OF THE CASE STUDIES

The material upon which this paper is based arose from a number of rights enquiries with which I was involved in the Eastern Cape Province of South Africa. The enquiries were instituted for the purposes of state land disposal. In most cases I was appointed in this role as a consultant to the Department of Land Affairs' Provincial Land Reform Office (PLRO). The enquiries sometimes overlapped with restitution claims and the redistribution of privately owned land, each with their associated policy and legal frameworks.

There was a presumption that large state land holdings would provide a source of "empty" land for redistribution to new beneficiaries at the commencement of land reform in South Africa. During the course of state land disposal in the Eastern Cape, however, it became necessary to both argue for[3], and secure, the rights of informal occupiers of this land. This involved ascertaining the nature of all existing rights – known conventionally as "land audits" - on all state land prior to transfer. The land in question was occupied by a range of different land user or occupier categories. In most cases there were overlapping rights and claims on the land parcels. The state land was previously commercial farmland acquired by the former government for expansion of the "homelands". It was surveyed into land parcels.

The auditing of land rights was not conceived as an adjudicatory function *per se* at the time, and neither has it received this recognition since. It has therefore become necessary to work *backwards*, as it were, in order to reconstruct the process. We were not asked to develop the conceptual, legal or practical tools for "adjudication". "Adjudication" as a concept did not appear in the briefs. The briefs required recommending beneficiaries of state land for the purposes of land allocation, land transfer and household subsidy allocation. In addition to auditing land rights, a range of land use, socio-economic, infrastructural and environmental information had also to be cross-referenced with tenure with the view to land planning and development.[4]. The work was framed in the context of implementing

[3] A considerable amount of lobbying preceded the recognition of rights of informal occupiers on state land in terms of the Interim Protection of Land Rights Act of 1996.

[4] Examples of briefs: "…..drawing up a comprehensive land audit of all private and state land in ....., including identification of land needs, land rights and land tenure with recommendations for future land use and ownership"; "facilitating and preparing a disposal plan up to the Ministerial Memorandum stage for disposal of ..... state farms to qualifying and legitimate Land Reform beneficiaries in terms of state land disposal processes"; "an audit of ..... farms, indicating their extent, whether ..… sub divided, the condition of the land, an indication of who is occupying them and on what basis, [to] assist [DLA}in assessing the applications to purchase or acquire the land."

land redistribution. It was not an open-ended research process. Moreover, the recommendations had to fit within existing legal frameworks.

The South African Constitution contains an enforceable Bill of Rights, which includes socio-economic rights. The Constitutional Court has concluded that the Constitution obliges the government to address poverty and inequality, which are the result of a history of dispossession. This is to be done within the rights-based framework created by the Constitution. The new land dispensation enacted after 1994 recognizes this obligation. Land rights in the Constitution should however be read in conjunction with the property clause (S.25) of the Bill of Rights. In essence the framework sets out to balance the protection of existing private property with measures to redress the imbalances of the past through the enactment of enabling legislation and the implementation of land reform programmes (MXA, USN and Development Works 2004). The new rights framework for land reform laws secures or strengthens possessory rights in certain contexts. While they do not replace the common law governing property in South Africa, they are "prescription-like devices … which protect the *status quo* of possession on an interim basis" (Carey Miller, 2000, 207) pending confirmation or transfer.

The Interim Protection of Informal Land Rights Act of 1996 (IPILRA) provided the most important legal benchmark against which to weigh the evidence in the cases in question. This law prevents deprivation of rights - without the consent of the rights holder - derived from beneficial occupation on certain categories of land. In effect the Act requires the compensation of informal rights holders to the extent of the value of their existing use of the land should any removal or resettlement be envisaged. This amounts to more than an anti-eviction mechanism. Compensation implies quantification of the existing rights in land.

The enquiries spanned the period from 1997 – 2003[5]. That is, it post-dated a new set of tenure, development and planning laws and approaches in South Africa, but pre-dated the finalisation of the Communal Land Rights Act (CLARA) of 2004. The enquiries coincided with the radical restructuring of local government, extending the jurisdiction of municipalities beyond towns to include rural land, thus tentatively drawing district or local municipalities as important stakeholders into the scope of these enquiries - more effectively so in some cases than others.

Regional legacies affect land rights in South Africa. More so than elsewhere, the Eastern Cape regional colonial and settler governments at first attempted to legislate away communal tenure regimes in favour of a modified cadastral system, but later reverted to a statutorily defined system of communal tenure controlled by the state but with considerable scope for local authority by chiefs and "headmen". New systems seldom replaced old in their entirety. There remain, thus, complex

[5] The work was conducted on two large blocks of state land in former Transkei, seven localities of state land in former Ciskei, and with a self-constituted group of farm workers living on private farmland. Dr Monty Roodt of Rhodes University was co-consultant in two enquiries, and Simpiwe Seti, now at Afesis-Corplan, assisted with several others. Each enquiry was discrete and distinct.

overlays of tenure in the province. Surviving principles of communal tenure have infused individual titling contexts and vice versa. This has added layer upon layer of legal and administrative confusion in a large number of localities.

Kwazulu-Natal regional case studies in areas governed by customary systems provide a contrasting setting and methodology. The land is not surveyed, overlapping rights are less prevalent and tenure is manifested and maintained within a framework of customary principles. NGO adjudication in customary rural settlements illuminates different questions. A well-documented pilot project in Ekuthuleni involved comprehensive adjudication, land rights auditing and mapping of existing tenure arrangements[6]. There the challenge has been to develop local records and land administration systems that link to the formal system but mirror rather than replace tried-and-tested local practices. This approach has not struck a cord with current policy and legal frameworks (Hornby, 2004).

While different regional land tenure legacies, rural and urban, need to be taken into account in policy development, there seems to be sufficient convergence of tenure principles from the pilot cases already conducted to justify a common approach or methodology, as well as the advancement of an overarching institutional framework for land adjudication in a land reform context in South Africa.

4. CASE STUDY METHODOLOGY

The methods and tools for conducting the rights enquiries developed as an iterative process. There were few precedents to guide the researchers. This seemed to be pioneering work at the time. Repetition and fine-tuning over time attempted to overcome problems that interfered with the integrity of the process and the results. Since the enquiries were part of an implementation strategy and not a learning strategy, there was little time for reflection. In this sense this paper has to some extent involved the reconstruction of evidence; asking questions that have become more important with hindsight than they might have been during the research.

In all the enquiries, there were competing, conflicting and overlapping rights and claims to the same land.

The rights enquiries “tool box” consisted of:

1) National policy guidelines, which advocated the promotion of tenure security; recognition of informal land rights; and disposal or redistribution of land to qualifying beneficiaries using state land grants.
2) Laws: new protective legislation such as the Interim Protection of Informal Land Rights Act (IPILRA), Extension of Security of Tenure Act, Restitution Act; as well as legal mechanisms for land redistribution such as the Disposal of State Land Act and the Provision of Certain Land for Settlement Act. The legal definition of ‘beneficial occupation’ in the relevant laws is critical.

[6] The work was conducted under the auspices of two projects, PILAR (Piloting Land Administration Records), a project of the land NGO, AFRA (Association for Rural Advancement) and LEAP (Legal Entity Assessment Project).

3) The development of new approaches to collecting and assessing evidence. A range of evidence, not only cadastre-based evidence was used to re-construct rights on a systematic basis.
4) The espousal of the principle of local legitimacy. Local solutions were sought within the national legal framework. Considerable time was devoted to field research, local consultation and participation to ensure socially and politically sustainable results. A range of stakeholders had to be accommodated.

Beyond these broad principles there were few methodological guidelines. For example, should rights be assessed, quantified and recorded at the level of household, farm or plot, or 'community'? If the latter, on what basis?

It has become fairly common practice in redistribution contexts involving tenure reform to merely list names and identity numbers of beneficiary groups or communities as a substitute for detailed interrogation of existing rights and practices. This is sometimes passed off as "participatory research". This is time and cost effective. It is also justified by the idea that the old or existing situation is by its nature flawed, inferior or outdated and the emphasis is thus focused on the 'new situation'. The new situation represents tenure "as it should be". There is little understanding that new tenure regimes seldom replace prior rights and practices in their entirety. If unadjudicated, these prior rights and practices continue to hold some currency in a new situation and can lead to conflict and insecurity of tenure.

This approach is open to the possibility of local political manipulation and capture of land rights by the more powerful in the group. It has the potential to elbow women and youth to the margins, and reinforce locally inequitable practices.

The role of adjudication, on the other hand, would be to assess the nature of *all* existing rights *prior* to making recommendations about beneficiaries and land settlement. This would help identify all rights and uncover locally inequitable practices. Understanding local rules and practices would follow.

With this in mind, a decision was made to conduct the enquiries a house-to-house physical encounter basis. This obviated the risk of overt or unintentional political manipulation through name listing or reliance on voluntary attendance at a central meeting place. This decision was followed closely by another methodological question relating to the unit of study. Should a *spatia*l or *social* unit form the basis of measurement and assessment of rights and the relativity therof? Examples of spatial units are parcels, lapsed parcels or informal demarcations; whereas social units are households, groups or communities that may *straddle* spatial boundaries.

The latter question is particularly pertinent. In *all* the situations where rights enquiries were conducted, there were diverse social units with different underlying values as to how land is held and who should hold it. This was sometimes manifested in the extent to which social groupings *differentially* observed or respected the surveyed boundaries. There was a strong correlation between degree of boundary observance and underlying tenure values. This added another, much

more complex dimension to the adjudication process – adjudication was not only about decisions on overlapping or conflicting claims or rights to land, but about conflicting *values* around tenure systems and land use.

In the Eastern Cape cases there were generally the following groups or categories of land users, who in most cases tended to represent their interests collectively, each with different underlying values with regard to land tenure:

- "Owners" or "lessees" of surveyed parcels - generally beneficiaries of the *past* government's re-allocation of state land to black homeland aspirant farmers, or more commonly, to the emerging civil service or business elite. However, transfers had usually not been affected and lessees had ceased paying rent

- Occupiers – e.g. ex-farmworkers with interests in formally acquiring the land.

- Groups or individuals who had migrated from communal areas and who in some cases occupied the land on the basis of affiliation to a tribal authority.

- Traditional authority leaders who had been allocated farms by former homeland authorities – sometimes holding the land as putative "lessees", but usually also claiming (through restitution) large swathes of land on the basis of historic tribal occupation thereof.

- Communities on adjoining communally owned land spilling over onto state land, usually for grazing purposes, around the borders.

- Restitution claimants, usually individual or household claimants – sometimes reconstituted into groups or communities. The distinction between individual or group claims was important for the administration of the awards: whether adjudicated individually and restituted individually, or on a community basis.

The following spatial characteristics pertained, depending on its location:

- Surveyed district boundaries.

- In commercial or former commercial farming areas, the farms were surveyed into land parcels. These are captured in the Deeds Registry. On state land the current owner is registered under state departments except where sporadic individual transfers had been registered. These are shown on 1:250 000 maps.

- Unregistered subdivisions or consolidations – by homeland authorities.

- Informal demarcations by a local community organisation or leader.

- In communal areas, the districts are further subdivided into administrative areas (AAs) constellated into Traditional and Regional Authority boundaries – these

were surveyed in some cases, and in others merely described; boundary disputes are common. These are spatially represented on 1:250 000 maps. There might also be measured but not surveyed Certificate of Occupation or Permission to Occupy (PTO) household allocations, not registered or formally mapped. The case studies did not include this category of communal land.

Documentary and oral evidence gathered prior to the field research indicated that residential settlement patterns were to a surprising extent contained with surveyed land parcels: people tend to visualize their rights in spatial terms. For this reason, the methodology chosen, and agreed to by the clients and the communities concerned (in meetings prior to the field research), was to interrogate rights according to each parcel of land using cadastre and non-cadastre based evidence.

Since the documentary and oral evidence was scattered across a wide range of organisations and was sometimes contradictory, the field research that followed was important to validate the first layer of evidence.

It was found that where encroachments across surveyed boundaries occurred, the purpose was most frequently for grazing land. However, these encroachments were seldom completely random, and were usually associated with particular land parcels. This made it possible to link the spatial register (farm names, farm boundaries) with the occupiers and to quantify the rights according to the farm parcel(s). From a research point of view, using farm boundaries made it possible to reach each household our cluster of households; and to introduce a methodical and rigorous element to the enquiry.

Structured and semi-structured interviews were conducted on each farm with individual households or clusters of households. In some cases settlements were inaccessible by ordinary vehicle in which case 4 x 4 vehicles were used. This entailed traversing pitted and eroded roads and sometimes goat tracks. The evidence gathered in the field emerged as the strongest body of evidence, cross-referenced with documentary evidence and interviews with other key stakeholders.

Each beneficiary (over 18) – men and women, husbands and wives - was listed according to the farm name/number with all details pertaining to age, dependents, their incomes, assets (agricultural and non-agricultural) and their aspirations. Also gathered were ID numbers (for the purposes of claiming subsidies), whether full-or part-time occupiers, and the duration of occupation of the farm. Questions around governance, local allocation practices, local relationships and authority were also included in the evidence gathering, as these answers shed light on important institutional aspects of local land management practices and values. In smaller localities, the whole community was engaged in community mapping sessions. Transect walks were undertaken wherever possible and always when necessary for boundary identification.

The relationships *between* the different groupings occupying or claiming the same land were marked by deep contestation over the land. Under these circumstances, key indicators for tenure had to be developed.

Duration of occupation of land (the "temporal" factor) is a key indicator for qualification for rights of beneficial occupation in terms of the Interim Protection of Land Rights Act (IPILRA) and this coincided strongly with people's own perceptions of tenure eligibility. IPILRA has two elements: (a) the nature of the relationship with the owner of the land. If occupation is sanctioned or there is a contract the law does not apply; and (b) length of uninterrupted occupation - within a certain cut-off date. In the cases in point, the occupiers (usually ex-farmworkers or "farm dwellers") were seldom in formal occupation or in contractual relationships; the majority qualified in terms of duration of stay.

Lessees, who generally claimed the same farms as the farm dwellers occupying them, were in some cases politically protected in terms of agreements with the authorities to transfer the land. Few live permanently on the farms and most do not pay rent. They sometimes engage migrant workers from distant places to deflect possibilities of permanent settlement; or engage the rival farm dwellers to double up as casual farm hands. Some lessees are traditional leaders who benefitted from political allocations during the homeland phase of governance.

Social identities emerged as a powerful factor in people's relationships to the land. Local legitimacy is determined by social ties – in the case of ex-farmworkers the social ties were strongly associated with particular farms where they had lived for several generations. Farmworkers frequently name the farms according previous white owners, such as "Kwa-Peter" (place of Peter), and align their own claims according to the farm boundaries of their erstwhile employers.

On large state land blocks, with their extensive land use and settlement patterns, communities prefer the current small settlements of 5-15 households on the farms of their former employers. In localities with more intensive land use, the poorest, most vulnerable sectors of the communities tend to prefer serviced villages. Numerous factors influence these choices, such as ecology, history, previous lay-out, position of rivers, agricultural activities and so on. In the Mpofu district (known historically as the well documented Kat River Settlement), the prior lay-out of the district for the settlement of Khoi and coloured people in the early nineteenth century – before the land fell into white hands at the turn of the century - favoured closer residential/arable settlements in river valleys, with common property fanning out over the surrounding hills. These boundaries are still in place even though white farmers consolidated land and adopted more extensive settlement patterns. The ex-farmworker communities have tended to revert to the earlier spatial patterns with closer settlement, individually owned plots and common property for grazing.

In each case a complex mix of tenure rights, tenure forms and physical settlement patterns had to be taken into consideration. Spatial elements of the cadastre

continued to have some currency, while the registerable, textual record of owners or occupiers had fallen into complete disrepair.

In a situation that could be described as land abandoned by the administration - land which had fallen under informal governance regimes clustered around different categories of land users - the spatial component of the cadastre had remained remarkably resilient in the face of the almost total collapse of the register and external forms of governance and land administration. Even more remarkably, the land had remained relatively impenetrable to uncontrolled land invasions. The complexity of overlaying settlements and claim to the land belied a certain 'order' that might be partly attributable to a 'balance of power' between conflicting claimants. This appears to have protected the unadministered land from descent into complete informality. Within each land category were discernible norms and internal rules governing the informal land regime.

What was absent was recourse to external enforcement and investment. The 'balance of power' cannot be maintained - nor political and social expectations contained – indefinitely. Though protected from eviction through new land tenure laws, the various occupiers could not be described as having 'tenure security' in the sense that tenure security amounts to more than protection. It includes rights to greater certainty or *recognition*, to fair administration, and to reaping the fruits of one's labour. The collapsing infrastructure on the farms provided evidence that continued uncertainty meant that no re-investment on the land was taking place, and opportunities for local economic activity were highly constrained.

In addition to conflicting individual/group claims to particular land parcels, different norms governed tenure regimes. In these circumstance the adjudicator cannot approach the investigation from a technical or legal point of view alone. Some technical tools (such as prior surveys) proved to be important for the purposes of adjudicating and quantifying conflicting claims. A land administration *infrastructure* that may not be the conventional cadastre provides an additional measure of stability and a point of reference against which to adjudicate rights. However, this evidence cannot be the sole point of reference.

4. DEVELOPING A "LIBRARY OF EVIDENCE"

Section 3 has already alluded to forms of evidence in off-register contexts. These are inextricably linked to the *de facto* settlement and land use patterns. E*xisting rights* must, however, be evaluated in terms of the available legal frameworks.

Within the legal framework, the following, sometimes overlapping, forms of evidence were considered:

1. Physical evidence: existing occupation and infrastructure, viz. *de facto* occupation and settlement patterns.
2. Spatial evidence: cadastral boundaries (objective criteria) and *de facto* social or general boundaries.

3. Textual evidence, viz. formal registers, local/informal registers or written records including correspondence or invoices, etc.
4. Temporal dimensions, that is, occupation measured in length of time or stay.
5. Norms and values governing tenure; historical circumstances (subjective; normative).
6. Social identity. That is the relationship of the person to others in the household or family and the latter to the broader group (or lineage or "tribe").
7. Oral evidence (on 1-6 above).
8. Documentary evidence (on 1-6 above).

Textual evidence proved to be the most unreliable, but nevertheless important form of evidence. Firstly it was inaccessible – files scattered across different government or NGO organisations; secondly, it was very seldom current and thirdly, records regarded as important in a community context may have very little bearing on the formal land information system and vice versa. An occupier regards any form of documentation as evidence of entitlement, e.g. bills, letters, lapsed lease agreements, old lapsed title deeds. The latter are regarded as "absolute" proof of ownership no matter how out of date. In one case a "lessee" proudly produced as evidence a dated Order of Court ordering him to vacate the farm on the grounds of prolonged failure to uphold the lease conditions. Documents such as these are regarded as having the attributes of "title". When cross-referenced with other forms of evidence, textual evidence was an important *secondary* source of evidence.

Evidence derived from social identity is a key identifier for rights qualification within communal tenure arrangements, and even in some individual tenure arrangements. This dimension is not reliably captured in law.

Spatial evidence proved to be the most stable form of evidence for adjudication, both from a socially-derived perspective (what people on the ground regarded as important) and from a legal perspective (what the new land laws have highlighted as an important objective test for the awarding of land rights, namely the dimensions of the land lost/used/claimed. Naturally spatial evidence must be backed up with oral, textual and documentary evidence.

Spatial evidence was derived from:

- Maps - official, showing surveyed farm boundaries, and unofficial, showing unregistered subdivisions – the latter were inaccessible and sometimes missing.
- Cadastral information from the SGO and Deeds Registry.
- *De facto* settlement patterns derived from fieldwork and community mapping. The latter involved informal mapping of the 'existing situation' as well as preferred spatial settlement.
- Transect walks, where the adjudicator(s) "walked the boundaries" accompanied by community representatives – this helped to reconcile official maps and cadastral information with *de facto* settlement and new informal maps.

Textual evidence was derived from:

- Deeds Office records. These reflect the state as current owner, but show all past owners which often provided the important link between farms and occupiers, since the latter remember prior owners rather than cadastral information.
- Lists of allocations by former authorities (e.g. Dept of Agriculture) – these would always relate to cadastral units.
- Claims recorded by the Land Claims Commission – by registered farm or erf but frequently incorrect where claims had not been verified or validated.
- Lists of names compiled by the Land Claims Commission – these usually did not relate to existing cadastral units or surveyed boundaries.
- Beneficiary lists compiled by community leaders – these did not relate to existing cadastral units or surveyed boundaries.

The documentary evidence that is available is scattered (sometimes missing) across various organisations such as state archives, Deeds Office, SGO; national, provincial or regional departments; local government; defunct parastatals; NGOs; community; consultancies etc. Other forms of evidence in core homeland or "communal" areas are sketch maps, betterment plans, PTO's, traditional authority allocations, orthophotos and archival material, e.g. District Commissioner, chiefs and headmen files and files on settlement and land disputes, etc.

Oral evidence in the circumstances of off-register adjudication is the most critically important source of evidence, but must be cross-referenced with a range of other sources of evidence.

A decisive issue during adjudication was the question of what outcome was likely to be supported by the greatest degree of local legitimacy. In other words, what decision was likely to result in a sustainable tenure solution? This was often a question of balancing the objective evidence of a wide range of contesting parties and applying a judgement based on whether equilibrium of power could be reached between them, and on what spatial basis. The outcome had to be informed by some kind of balance of probability of success. This was especially important in the absence of strong capacity for external enforcement. Thus ultimately decisions had to be made in the context of local negotiation, but supported by objective evidence and always informed by principles opposed to the arbitrary deprivation of rights.

The discussion on evidence has shown that in a fluid or highly contested situation, evidence may also be subject to ongoing changes that are difficult to record in conventional registers. Evidence should be viewed, not always as 'fixed' but in some situations more 'fluid' as a result of patterns of socially interlocking rights.

In 'flatter' social orders, such the farm dweller communities, social relations are 'layered' over *time*. The strength of a right is measured against the strength of the relationship with the previous owner or the length of occupation on the land. In older communities where customary principles prevail, there are more clearly defined rules and norms based on more complex social hierarchies. In such cases it may not always be possible for the state to clearly define hierarchies of admissible evidence, that is, ranking evidence according to the weakest or strongest forms of

evidence from the point of view of awarding rights. In these circumstances pilot studies in different tenure contexts could contribute to the development of criteria for admissible evidence and information systems for the custodianship thereof.

This kind of information system requires a more dynamic approach to collecting and storing evidence. Systems need to be designed as repositories of "living evidence" rather than "fixed evidence" due to the ongoing fluidity of socially regulated tenure relationships or politically unstable situations resulting from situations of rapid change. Under these circumstances, tenure relationships tend to expand and contract. They are not as fixed as a conventional cadastral system.

The first step would be to archive all forms of evidence derived from auditing and adjudication exercises. An accessible land information system would need to be designed to store this evidence. The second step would be to assess alternative ways of storing this information in the long term, making use of digital systems to expand accessibility and use. A third step would be, at the policy level, to critically assess issues such as criteria for admissible evidence. These libraries of evidence could initially operate alongside the cadastre and over time become more integrated with local registries.

Given that such outcomes require particular methods of information gathering and management, it is vital that information infrastructures and systems are designed to collect, interpret and process this "unconventional" evidence in a manner that is regarded as legitimate, and can be easily stored, retrieved, disseminated and updated, starting with paper-based evidence. The evidence could over time be housed in integrated data sets to make them accessible to adjudicators and the public and to cut out the time consuming searches for historic records, currently housed in a wide range of institutions and much of which is rapidly disappearing through lack of storage policies. Official records, consultants' reports, NGO records, plans, maps, etc, are filed in miscellaneous places under different systems and it is left to the ingenuity of researches to locate them.

5. CONCLUSION

The practical implementation of adjudication in off-register or formalising contexts in South Africa is still in its infancy and involves a certain degree of "messiness" as illustrated above. My contribution to this matter is still in the realm of debate or argument. The work was time, place and product-specific. In order to reflect on the lessons learnt, it was necessary to "work backwards" to reconstruct the process. However, taken together with other case material in different South African contexts, these 'pilots' could provide valuable evaluative material to engage in a process of reassessment and policy formulation.

Internationally, adjudication is considered a priority land administration issue, particularly in countries undergoing rapid change such as land reform and development programmes. Yet, in South Africa, it has not been seriously debated in policy, nor is there administrative infrastructure to support it systematically.

There are political, institutional and conceptual issues that constrain its application as a recognised sub-system of land administration in non-cadastred situations.

In the context of off-register systems adjudication makes up for the imperfections of the registration system. This is a departure from the usual thinking in the land administration field, which is to regard the registration system as "perfect" and off-register system as "necessarily imperfect". What the paper has tried to show is that different property systems have different underlying values, and that the current registration systems do not appear to be meeting the demands of tenure in many African contexts. This implies a re-allocation of public investment priorities away from massive formalisation of title, towards the development of more appropriate information systems. The concept of a "cadastre" faces challenges in Africa in its evolution from a system derived from western and colonial land legal origins towards a more appropriate foundation in contexts of socially mediated land tenure.

The point has also been made strongly that in the pursuance of certainty of land rights, adjudication could complement the land and property identification systems, in ways which have not yet been thoroughly addressed in policy. For example, building up policy on evidence and designing an integrated information system for the collection and storage of the evidence. With a uniform information framework in place, uncertainty will still occur but at least there will be predictability because there are pre-existing rules. The first step in policy might be to address the development of rules regulating the function, such as (MXA, 2002):

- The role of the private sector
- The role of the public sector
- What kind of skills adjudicators should have and where the emphasis should lie: survey, legal, agricultural, land use planning, mediation, anthropological, etc?
- What rules of evidence will be created?
- What rules governing record keeping are needed?
- At what scale will adjudication be undertaken – systematic/sporadic?
- What will the procurement policies be?
- How will standards be developed, evaluated and enforced?
- How will fees be set and according to which criteria?
- Does a statutory body of adjudicators need to be created for registration, discipline purposes and for evaluating training?
- How will public-private partnership be regulated?

At the moment rights enquiries are undertaken on the basis of tender and cost and hence overly dependent on the vagaries of the market. They are sporadic, once-off, 'snap shot', product oriented exercises, with insufficient regulation.

This paper argues that adjudication is a function that rests between the public administration and the citizenry. 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 (e.g. a public interest programme on state land with rights on top of it) or 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, regulated by the state in terms of rules and norms.

A regulatory framework and standardisation could be developed taking into account and evaluating lessons learnt in the various "pilots" or projects already undertaken and developing best practices, formulating objectives, assessing delivery at scale, etc. As a first step towards developing pre-existing rules, uniform and acceptable standards and procedures - including procurement standards – and methods of record keeping need to be developed. Current completed projects and "pilots" should be assembled, examined and evaluated. A start has been in within the parameters of Rights Enquiries. However, since projects are approached on an application basis, i.e. sporadically, lessons learnt are not yet being fed back into the system, resulting in loss of valuable and accumulated experience and possible compromising of standards, procedures and products. This results in loss of cost-efficiency and failure to develop good governance practices, which protects both the administration and the citizens.

Scale of application and cost implications also need to be addressed. Rules that work for sporadic high cost once-off application-driven approaches may well not be viable or sustainable when they have to be systematically applied to thousands of rights. The lack of a system for adjudicating and storing evidence pushes up costs of land reform and development because each time a project is initiated, the issue of rights ascertainment is started from scratch and accumulated knowledge, experience and documentation in a given area is being lost. The accumulated building up and updating of integrated data sets would also cut out a large bulk of present costs that are incurred through these searches (MXA,2002).

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.

ACRONYMS

CLARA - Communal Land Rights Act, 2004
DO - Deeds Office
DLA - Department of Land Affairs
ESTA - Extension of Security of Tenure Act, No of 62 of 1997
IPILRA - Interim Protection of Informal Land Rights Act, No 31 of 1996
NGO - Non-governmental Organisation
PLRO - Provincial Land Reform Office of the DLA
PTO - Permission to Occupy – old order right with certificate of occupation
SGO - Surveyor General's Office

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Biographical Notes

Rosalie Kingwill is a Core Team member of the Legal Entity Assessment Project (LEAP) which is an action research project being undertaken by a collective of 6 core team members across the country, concerned with increasing tenure security for the poor in rural and urban areas. LEAP is exploring and testing land management and land administration practices with regard *existing* customary, off-register and informal land management systems with the view to developing a better understanding of the disjuncture between the formal and informal systems and contributing to the design of more appropriate systems. She has worked primarily in the land sector since 1986. From 1987 to 1994 this work was conducted within the NGO sector. She was a staff member of the Border Rural Committee (BRC), the longest standing land NGO in the Eastern Cape, from 1987-1995, where she set up and coordinated a research unit in 1993. She is currently a non-executive Director of BRC's Board of Directors (treasurer). She started working as a freelance consultant in 1996, becoming an Associate of McIntosh, Xaba & Associates in 1997. Her work has mainly comprised policy, programme and project research in land reform, including land redistribution, land tenure and land restitution. She has concentrated her research on historical and evolving land rights institutions in the Eastern Cape's communal areas and has applied the national Department of Land Affairs' legal and policy framework for land rights protection and land redistribution in a number of projects, including state land disposal plans. She was involved in a major study on land administration in the Eastern Cape in 2002-3. In 2003 she joined LEAP and Mbumba Development Services, a small company of former NGO workers who have joined to provide services in development in a wide range of sectors.

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