

ONLINE DEBATE

CUSTOMARY LAW AND INSTITUTIONS - PROTECTING OR UNDERMINING COMMUNITY LAND RIGHTS IN SOUTHERN AFRICA?

**Report from the online discussion
held on the Land Portal between
28 June and 9 July 2021**



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INTRODUCTION

From 28th June to 9th July 2021, the Land Portal hosted an online discussion focusing on the role of customary law and institutions in southern Africa in protecting or undermining community land rights. Drawing on a pre-discussion survey completed by 48 respondents from nine countries across the Southern African Development Community, the subsequent online discussion attracted 25 participants and over 50 contributions.

Our discussion took place in a challenging and rapidly changing context in southern Africa with several countries facing political and social instability. The third wave of the Covid-19 pandemic has accelerated sharply across the region with reports of food insecurity and unemployment at dangerous highs, while the health services were coming under extreme pressure in a number of countries. In increasingly stressed socio-economic settings, both in rural areas and urban informal settlements, customary norms and practices that recognise inclusive access and ownership rights to land and natural resources are fundamental to household livelihood strategies.

A series of in-depth contributions sourced from participants drawn from different countries in the region helped us to better understand the diverse realities within the SADC member states.

The discussion illustrated how an understanding of context is key. It highlighted the dynamic and multifaceted character of customary law, descent systems and local institutions where norms and practices can vary significantly within a single country. It exposed the dangers of narrowly associating customary law with the powers and functions of 'traditional leadership', rather foregrounding the family and the clan as central to the interpretation and evolution of living customary law.

The complexities surfaced through the discussion underscored the challenges for policy and the identification of key principles to underpin the recognition of hybrid legal systems to give equivalence to both statute and customary law. Given these complexities it is probably no coincidence that searches of the SADC website yield no returns for "land policy" or "customary law" and provide only tangential references to "traditional leaders and chiefs".

The very different histories and approaches of SADC countries, which have shaped the legal standing of customary law and the recognition of customary leadership and institutions in the administration and protection of community land rights, suggest that regional policy development could focus on three linked tasks:

- » finding ways of recording customary land rights alongside all other informal land rights;
- » developing agreed methods and tests so as to be able to distinguish authentic living customary law from past processes of codification which often fundamentally distorted norms, values and practices;
- » supporting the development of hybrid legal systems which align customary and statutory law and advance universal human rights and gender equality.

Country Insights

This discussion took place in the frame of Land Portal's Country Insights initiative, which seeks to expand the knowledge about land governance challenges and innovations at the country level. As part of this initiative, Land Portal publishes country profiles about their specific land governance context and promotes debates to allow practitioners, researchers and policy makers to share information and experiences, and refine the theory and practice of governing land equitably and sustainably.

DISCUSSION BACKGROUND

The role of customary law and institutions in land governance and administration in southern Africa remains deeply contested and highly context specific. These contestations span both the colonial and post-colonial eras.

The colonial project sought to implement systems of indirect rule over subject peoples, whereby local leaders were often elevated as 'chiefs' to act as proxies for colonial powers. In the post-colonial era, governments of newly independent countries adopted very different positions on the status of customary law and the place of chiefdoms/traditional leadership structures in society. These positions have also evolved significantly over time.

Today SADC countries can be ranged along a spectrum. At one end is Eswatini, where the monarch, customary councils and customary law are preeminent. At the other is Tanzania where chiefdoms were abolished and replaced by village councils in the 1960's, never to be reinstated. In between are those SADC countries that explicitly recognise customary law and institutions of traditional leadership in their Constitutions, together with a number of other countries where customary law, norms, practices and hereditary leadership lack formal legal recognition, but nevertheless continue to play an important role in land related matters.

Almost without exception, customary institutions have proved to be resilient and adaptive, with analysts pointing to a resurgence in their influence and powers. At the same time, attempts to 'reform' land governance and customary tenure systems have attracted criticism for the ways in which they have enabled global capital, acting in concert with local elites to grab land and resources and place the livelihoods of local land and resource users at risk.

Previous **online discussions** on the Land Portal have examined the role of chiefs in the documentation of customary land in Zambia, while the **dialogue on land and corruption** in Africa focused in part on the role of traditional leaders in customary land administration, with a focus on Ghana and Zambia. This online discussion sought to take a deeper dive to critically examine the role of customary institutions in securing community land rights across Southern Africa.

PRE DISCUSSION SURVEY

Prior to the launch of this discussion prospective participants were asked to complete a survey profiling relevant issues relating to customary law and institutions in their countries. The idea was to encourage potential participants of the online discussion to start reflecting on some questions and use their responses when the debate was open. Some of the survey results are shared along this report. The detailed data and responses are available upon request to hello@landportal.info

Survey responses were received from the following countries and are ranked numerically below.

Table 1: African countries featured in survey responses

Country	Number of responses	Percentage of total respondents
South Africa	14	26.4%
Zambia	10	18.9%
Mozambique	6	11.3%
Namibia	5	9.4%
Zimbabwe	5	9.4%
Tanzania	3	5.7%
Botswana	2	3.8%
Madagascar	2	3.8%
Eswatini	1	1.9%
Uganda*	1	1.9%
Sudan*	1	1.9%
	50	

*Countries which are out of the discussion scope

A total of 50 responses were received from people with knowledge from 11 African countries. Nine of these countries are members of the Southern African Development Community (SADC) ¹.

Most of the people completing the survey had an institutional affiliation (see the list below). However, some students and individuals interested in land issues based in particular countries also completed the survey.

- » ALARM
- » ANAM Nampula
- » Associação Nacional de Extensão Rural
- » Association for Rural Advancement
- » CamNature Institute, Cambodia
- » Central Dept of Anthropology. Tribhuvan University, Kathmandu
- » CENTRO DE MUJERES AYMARAS CANDELARIA
- » Copperbelt University

¹ Additional response were received from respondents in Nepal and India.

- » Department of Land Management and Administration, Namibia
- » DG ECHO
- » Eduardo Mondlane University
- » FAO
- » Federal Judicial Service Commission
- » Namibia University of Science and Technology, now self employed
- » GIZ ProPFR
- » Grassroots Trust
- » Greeningpreylang
- » ICRISAT
- » Institute for Poverty, Land and Agrarian Studies
- » Institute of Rural Development Planning
- » IWMI
- » Kashangura Associates
- » Khuphe & Chijara Law Chambers
- » Kingsford International Education
- » Land and Accountability Research Centre, University of Cape Town
- » Land Portal Foundation
- » Lawyers' Environment Action Team
- » Link Africa Knowledge
- » Medici Land Governance
- » Namibia University of Science and Technology
- » Nascency Global Impact Research and Consultancy
- » National Law Institute University, India
- » Participatory Education and Action for Community Empowerment
- » Partners Empowering AgroEcology & Community Education, Source of the Nile, Uganda
- » PLAAS UNIVERSITY OF WESTERN CAPE
- » SACAU
- » SAHAN
- » Sustainable Development Institute_ Liberia
- » Tanzania Land Alliance
- » Terra Firma
- » Tetra Tech
- » The Nordic Africa Institute
- » TYSOG CONSULTING
- » UCLGAFRICA
- » Umhluma Women & Youth Foundation
- » UNDP
- » University of Cape Town
- » University of Fort Hare
- » University of Gothenburg, Sweden
- » University of Namibia
- » Vietnamese-German University
- » Zambia Integrated Forest Landscape Project

OVERVIEW OF THE DISCUSSION PER COUNTRY

The discussion lasted for two weeks. It attracted 25 unique participants who made a total of 53 posts which explored a variety of issues. The format of the discussion was experimental in that we created different country clusters where people taking part in the online discussion could contribute content relevant to their particular country experiences.

Our discussion started out by trying to explore something of the colonial and postcolonial history of the different countries in the SADC region and the impact of colonial rule on customary law and institutions of traditional governance. In this we sought to identify some of the forces which have shaped the evolution of customary law, the current form and relative influence of 'traditional' leadership and the ways that these vary across different country contexts. The sections below highlight some of the issues raised in the cluster discussions.

Angola and Mozambique

In this country cluster **Allan Cain** provided insights into the massive disruption caused by the arrival of the Portuguese which impacted on all aspects of traditional society in Angola including wide-scale appropriation and alienation of land by Portuguese settlers and land speculators. He noted that the first post-Independence Land Law passed in 1992 did not give formal legal recognition to customary rights in land. Nor did it recognise the rights of those in urban informal settlements, or those who had reclaimed estates abandoned by the Portuguese.

Simon Norfolk contributed a **rich piece** which tracks the changing position of the state vis a vis customary structures and traditional authorities in Mozambique. In 1975 the Frelimo government nationalised all land and abolished all customary structures which fuelled conflict and civil war. By 1989 with the collapse of the Soviet bloc, following the symbolic fall of the Berlin Wall, Mozambique's socialist policies took a neo-liberal turn. However, this did not affect Mozambique's stance on customary authorities which remained marginalised. It took ten years for the state to recognise the de facto role of customary systems in local land administration, but for a long time it resisted conferring meaningful powers to local structures. Simon describes Frelimo's "schizophrenic journey" alternating between centralisation and decentralisation. He notes that despite all the policy twists and turns customary authorities have remained resilient and are positioned "to continue to provide a local, accessible, affordable land administration service, solving conflicts and witnessing transactions".

At the same time the complex conflict situation which has developed over the past few years in **Cabo Delgado** illuminates the consequences of large scale investments and accompanying local land alienation and forced relocations. It raises the question of how land gets allocated for investment and who are the winners and losers as a consequence of these deals? How are local people and customary structures involved in these processes and their situation properly addressed? Lasse Krantz joined the discussion to examine the different powers and roles of chiefs or 'regulos' when it comes to administration and governance of land and how they articulate with government policy of formalising communities as collective landholding units. For more on Mozambican land policy and law see the responses to the survey.

In the plenary in week 2 Alan Cain followed up with an extensive piece **examining women's tenure rights and land tenure reform in Angola** and reflecting on the role of traditional leaders in a post conflict society.



The role of traditional authority in land management had been eroded through the years of colonial rule and civil war. However, the return and resettlement of almost 3 million people to their rural areas of origin provided a renewed role for traditional leaders in dealing with local land conflicts and providing testimony regarding families' historical land claims.

Traditional authorities, such as local chiefs (sobas) are often the only administrators, mediators, and adjudicators of land rights that women will ever encounter. Less than one percent of the traditional chiefs are women. These individuals and local institutions of governance and dispute resolution generally apply customary law and local practice to guide decisions regarding land rights. Under traditional succession practices, Angolan women generally do not have land access equal to men's, as family land passes to sons and male relatives of the deceased husband. Women generally move to her husband's house upon marriage and often live on and cultivate land owned by the husband's family or granted by the family or soba (traditional authority) to the husband. If the women are subsequently widowed, abandoned, or divorced, the former husband or relatives of the husband may force the women from the husband's land and home.

Eswatini, Lesotho and Botswana

Sean Johnson provided an important **background piece** comparing and contrasting customary law and institutions in Lesotho and Eswatini. He notes that "in both Kingdoms, chiefs are the 'pivot' on which both Liswati and Basotho define their collective need for land and how rural communities govern, manage, and administer land use. In this setting the principal task of the chief, working with a council of elders, is to allocate land to families who are, or will become, part of the community and chiefdom."

Sean noted that in both Lesotho and Eswatini "traditional authority and customary law, land tenure, and governance are rooted in political struggles over limited land resources". He concluded with an important question about the optimal role for traditional authorities in the administration of land.



Which is the right approach? Improving traditional authority or substituting the chieftaincy with ministerial authority? Both? After all, context is key. The conclusion is consequent on the outcomes and impact: on less land disputes, increased tenure security, good governance, reduced inequality, protection for vulnerable groups, and improved rural livelihood.

The answers to Sean's question, both implicit and direct varied widely according to country contexts. This also raised the questions about the relationship between customary law – in its three variations (living, codified and academic) and statute or common law. They also

highlighted the extent to which the powers and functions of traditional authorities are recognised and regulated in terms of statutory law. As we shall see below, some countries in SADC explicitly recognise and legitimate traditional authorities within their constitutions, reinforced through dedicated statute law, while others leave these institutions informal and without legal recognition.

In the country clusters and the subsequent plenary session these questions surfaced pros and cons relating to the codification of customary law.

Writing elsewhere about this relationship, Laurence Juma has noted:

African customary law scholars have been preoccupied with finding points of convergence between two divergent paradigms instead of seeking to develop African customary law as a distinct legal tradition that espouses rules and supports institutions of its own kind.

Arising from the push by post-colonial governments towards unified legal systems, scholars have seen their role as that of sanitizing customary law and redefining its principles to fit modes of western legal tradition—an approach that has rendered African customary law even more precarious.²

This raised important questions which were only partly addressed by the subsequent discussion:

- » *How is customary law best developed as a distinct legal tradition?*
- » *What examples are there of processes to attempt this and with what result?*

In this country cluster **Ian Manning** cited analysis by Liz Alden Wily focusing on Botswana where Tribal Land allocation has been centralised under the Land Boards. It was argued that this has undermined opportunities for villages to formalize their traditional rights to specific rangelands and enabled individuals to access these lands under common law leases.

Again, important questions arose:

- » *Do institutions like Land Boards protect community land rights or create spaces where powerful people can appropriate resources?*
- » *Are people better protected by customary systems and locally developed and sanctioned access and exclusion rules grounded in customary law and practice?*

Towards the end of the first week of discussion **Protests against King Mswati III** in Eswatini resulted in a state shutdown of the internet, making it difficult for people to participate further in this discussion.

Namibia and South Africa

Romie Nghitevelekwa, author of a recently published book **Securing Land Tenure: Communal Land Reform in Namibia** focused on how the functions of traditional authorities in Namibia are regulated by the Traditional Authorities Act and the Communal Land Reform Act.



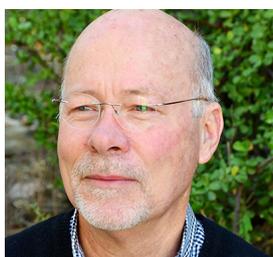
Land managed under customary tenure is administered by the traditional authorities which function under their respective customary laws, the Traditional Authorities Act and the Communal Land Reform Act. Traditional Authorities have hierarchical structures comprising of different fora where decision making is done. For example at the lower level of traditional authorities' structure there are headmen or Councillors who are supported by village level leadership committees in land allocation. The next level of hierarchy is a district and then high level office of the particular Traditional Authority. Because of the diversity of traditional authorities, the processes may differ.

² Juma, L. (2011). "The Laws of Lerotholi: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho." *Pace International Law Review* 23(1): 92-145.

Traditional authorities in Namibia have retained significant powers, allocating land, mediating disputes and levying fines for a range of offences. However, their powers are mediated by the functioning of Communal Land Boards. The relationship between the functions and composition of the Land Boards and the role of traditional leaders became an issue emerging from the discussion.

Wolfgang Werner, provided a comprehensive picture of the Namibian situation, noting that currently 40% of land in Namibia is held under customary tenure systems. Traditional leaders continue to play a central role in the allocation, verification and cancellation of private customary rights to land. Private rights refer to land for cultivation and residential purposes, which by custom include rights of inclusion and exclusion. However, he noted that the role of traditional leaders in managing access to commonages for communal grazing are very weak.

Wolfgang highlighted the all important question of transparency and downward accountability of traditional leaders:



Despite the central role the traditional leaders play in the administration of customary land rights, the current legislation does not provide for improved accountability and transparency downward. Communal Land Boards have been introduced to ensure that land allocations and cancellations are done according to the law, i.e. introducing accountability towards the state. But traditional leaders are not obliged by law to consult members of their community on major land alienation decisions such as for large-scale irrigation projects or oil exploration.

Different perspectives emerged on whether traditional leaders are required to obtain informed consent of communities before divesting any community owned land for investment purposes. Charl-Thom Bayer seemed to differ with Wolfgang Werner concerning their obligations in this regard. Charl-Thom focused on how the legal requirements to consult are so easily ignored or set aside, which enabled elites to circumvent, or break the law with minimal consequences.

He asked whether the alienation of customary land should be regarded as equivalent to a process of expropriation which involves much stricter requirements with regards to valuation and compensation. In a context characterised by mounting pressure on natural resources and the search for lucrative land-based investment these remain critical questions.

Charl-Thom Bayer highlighted that although traditional authorities are not required to consult with the community in decisions to alienate land for investment, their powers to independently approve such alienation are tightly constrained as approval from both the Land Board and the Minister are required before such transactions can be made. From a community land rights perspective, questions must still be asked about the adequacy of this approval process and the extent to which it safeguards the majority interest.

Wolfgang Werner in his response highlighted the uncertain relationship between customary and statutory law. He notes that although the legislation provides “traditional leaders with considerable powers in the administration of customary land rights, it does not provide for appropriate measures to enforce their decisions”. This suggests that there is a long way to go before systems of legal pluralism which recognise both statutory and customary law find ways to actually do this in practice. In the Namibian example there remains a legal pyramid with statutory law at the apex.

The controls on the powers of traditional leaders to alienate land for investment was an important theme in the discussion which also surfaced in other country clusters.

The issue raised by Wolfgang illuminated one of the central questions underpinning our discussion:

- » How can these institutions best be protected against corrupt and authoritarian leadership and capture by local elites and global business partners?

A contribution by Ben Cousins originally published as an **article** from the Conversation focused on a recent legal judgment in South Africa ruling on the rights of people living on cus-

tomary land administered by the Ingonyama Trust in the Province of KwaZulu-Natal. Ben noted that in communal areas in this province, most daily land administration tasks, such as approving applications for allocations of land, are carried out by traditional leaders (amakhosi) and village-based headmen (izinduna). He clarified that customary land rights derive from locally accepted membership of rural communities, mostly through descent but also of newcomers. They are also protected by statute in the form of the Interim Protection of Informal Land Rights Act 1996.

The judgment sets out how land is allotted to a family head as residential and arable plots and access to communal pasture; no financial payments are involved, and land rights are inheritable. Land becomes the property of the family, and nothing may be done with such land without the involvement and consent of the owner. The judgement notes that:

Land rights are closely tied to social and cultural relationships, and tenure security is derived in large part from locally legitimate landholding.

Ben Cousins concluded that “the challenge for tenure reform policy is to express these principles in law in a way that provides certainty and ensures the protection of land rights holders. This will lay a firm foundation for administrative systems focused on both support for rights holders (for example, in resolving disputes over land), and to facilitate development planning and service provision”.

In response Siyabu Manona highlighted how:

This particular case is the latest in a string of others which demonstrate how the judiciary has consistently taken a pro-poor approach in defending the constitutional imperative of recognition of customary law as an independent source of law.

Siyabu cited a range of legal judgments³ upholding the community's customary rights against the state. In the Maledu judgment, Justice Petse began his ruling by quoting Frantz Fanon's *The Wretched of the Earth* “[f]or a colonised people the most essential value, because the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity”. The judge observed that “Thus, strip someone of their source of livelihood, and you strip them of their dignity too.”

In *Gongqoshe and Others v Minister*[1] the case pitted customary law rights of local communities to access natural resources and fishing in a conservation area against the mandates of conservation authorities. Siyabu observed that notwithstanding the implications of these judgments and their validation of customary law, there is a disconnect between lawmakers and government, with different parts of the state having “no coherence around customary law and customary land rights”.

In a recent article Tania Murray Li has raised important questions about the effectiveness of ‘lawfare’ in protecting community land rights. She argues that:

Advocates have invested most of their efforts on strengthening the legal standing of customary land rights, but legal changes have not translated into effective protection on the ground. Laws themselves are contradictory and weakly enforced; and there are other ‘powers of exclusion’ including money politics, brute force, and the still-persuasive legitimization of ‘development’ that sustain dispossessory processes and extend them⁴.

This raises important questions about the political and economic forces which seek to co-opt customary leaders and institutions so as to legitimate the grabbing of community land and resource rights.

In South Africa the Land and Accountability Research Centre and other civil society groupings have long argued that clause 24 of the Traditional and Khoisan Leadership Act (TKLA) has empowered traditional councils to enter into agreements with external entities such as mining companies and failed to take into account the need to obtain consent from land rights holders.

³ Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Limited and Another [2018] ZACC 41 2019 (1) BCLR 53 (CC); 2019 (2) SA 1 (CC) (25 October 2018).

⁴ Murray Li, T. (2020). “Epilogue: Customary Land Rights and Politics, 25 Years On.” *The Asia Pacific Journal of Anthropology* 21(1): 77-84.

Monica de Souza Louw focused on how in South Africa Section 24 of the recently promulgated Traditional and Khoi-San Leadership Act could allow traditional leaders to sign away people's land rights.



Section 24 of the TKLA ... enables traditional councils to conclude agreements with other traditional councils, municipalities, government departments and "any other person, body or institution", including private developers and mining corporations.

While informal land rights are protected by the 1996 Interim Protection of Informal Land Rights Act (IPILRA), which provides that rights holders must consent before being deprived of their land rights, it seems that Section 24 may override these protections.

This uncertainty places rights holders within traditional communities in an incredibly vulnerable position and potentially threatens their homes, crop fields and grazing lands. Based on the unlawful land deals that have already been happening in traditional communities like Xolobeni, Somkhele and Lesetlheng before the TKLA came into force, it is not a far-fetched concern that IPILRA will be ignored.

In this instance it seems that the policy direction of the state is specifically delegating authority to fast track mining deals on communal land to the benefit of elites.

Our survey returns indicated the prevalence of elite capture of land and natural resources across several SADC countries. Mineral rights remain a prime source for elite deals which can leave rural communities displaced and **poorly compensated**.

Tanzania, Zambia, Zimbabwe and Malawi

Tanzania is the one country among the SADC member states where traditional leadership was banned in the 1960s and has never been reinstated. Ian Manning provides a detailed post reporting on the findings of a 2015 Parliamentary Select Committee report in Tanzania which found that:

- » Tanzania has no comprehensive mechanism to deal with land.
- » There was weak law enforcement, contradictory legal regimes and ineffective and incompetent leaders which were the main factors driving land conflicts.
- » Only 1200 villagers out of more than 10,000 had been surveyed, and only a handful of these had land use plans.

Ian also highlighted how in terms of the 1999 Land Act in Tanzania certificates of customary right of occupancy were issued on 162 000 hectares of land to the pastoralist Maasai, Barbaig and Hadzabe. He argued that the processes of "neoliberal enforced development involving land evictions" had highlighted the precarious nature of pastoralist land rights in the face of 'fortress conservation' programmes in the Ngorongoro conservation area.

Participants from Zambia were prominent in this discussion with Matt Sommerville highlighting the **evolving role for customary law** and the need for building more transparency and documentation within the customary structure. Betty Okero focused on the place of women's voices and visibility in customary structures – an issue which became a focus in Week 2.

Ian Manning provided **historical background** on how Zambia fell under colonial control, chronicling the establishment of 'native reserves', the formalisation of 'tribes' and the appointment of chiefs by statutory appointment. Matt Sommerville provided a caution against elevating customary law as a magic bullet to prevent elite capture

I don't think we should expect that customary law will involve less elite capture than the state system in any country / context. While I think that some "codification" / system strengthening and formalized structures can help reduce some of the ambiguities and discretionary decisions that lead to elite capture. Customary systems have the benefit of being able to evolve extremely fast and I believe there is an appetite for bridging the customary and statutory systems, both from a legal perspective and from a socio-cultural perspective as well. There are the areas where there may be tensions for example in the application of justice, inheritance, fee structures, etc., but these are places where dialogue, written rules, can help to navigate what is an acceptable norm and how it interacts with the statutory law.

Ian Manning posed a related question:



How to re-capture the spiritual kinship power of old and infuse it with true democracy? I believe this is possible if customary land is held sacrosanct, if the chiefs, headmen and spiritual guardians are democratically assisted by Citizens' Assemblies, and manifestos produced that affirm the new kinship.

With respect to Zimbabwe a closely researched think piece contributed by Dr Phillan Zamchiya focused on **Zimbabwe – State politics and customary power of chiefs**. Similar to Simon Norfolk's earlier piece reflecting on Mozambique, Phillan unpacked the complex history underpinning the changing role and influence of Chiefs in Zimbabwean society. In both colonial and postcolonial settings, the state has set out to influence and manipulate chiefs and customary institutions in the service of very different political agendas.

When Zimbabwe obtained independence in 1980 after fighting a bitter liberation war, many, though not all chiefs and customary institutions had been discredited, perceived to have been co-opted by the white Rhodesian regime. His post tracks how for almost two decades after independence chiefs were politically side-lined, and their functions were taken over by village and ward development committees. However, with rising resistance to the ruling party in Zimbabwe, politicians decided to restore the powers of chiefs and headmen, who now 'returned' to the chair of the village and ward committees respectively. In more recent years there has been overt deployment of patronage to win the political support of chiefs who "were subordinated to a partisan state".

In the new Zimbabwean Constitution passed in 2013, the powers of Chiefs were explicitly recognised. They have jurisdiction and control of communal land and powers to allocate residential and farming land. However, these powers are not unfettered, as land allocations are required to be approved by the Rural District Council and allocations must also be consistent with norms of customary law.

Phillan concluded that:

Any policy efforts to democratise Chieftaincy, preserve its authentic customary role of representation or gradually modify it will need to face the reality that it is shaped by the developmental visions of the State, the political interests of the ruling elites and contested versions of customary practices.

This supports earlier contributions in this conversation which highlight the overwhelming importance of context and the dangers in generalising about customary institutions which have been shaped in very different ways by the diverse developmental visions of SADC member states.

Madagascar

Faly Ranaivoson provided a profile of the role of customary law and institutions in Madagascar noting that:



There are established institutions such as chiefdoms, traditional chiefs, and customary decision-making forums that play a role in land allocation and governance. These vary between different regions; each region has its own way of managing the land according to its own customs. However, there is currently no enacted national legislation governing the role of traditional leadership institutions in Madagascar, although legislation is under development.

Overall there is limited legal or state recognition of customary law in Madagascar, which remains largely informal and marginal. However, many local communities rely on living customary law and customary institutions to allocate and verify land holdings and resolve disputes.

Teresa Connor confirmed that in Madagascar:

Generally customary land is not recognized although it operates informally. This means that traditional leaders do not receive salaries or stipends from the state and nor do they have powers to impose levies or fines on the communities they represent. Generally speaking, traditional leaders do not have any powers unless they are co-opted by the state as community leaders.

THE PLENARY DISCUSSION

In the second week the discussion reverted to a plenary format. Nominally the plenary discussion focused on three questions:

- » How is living customary law adapting to protect women's land rights?
- » What good practices exist in linking state and customary institutions for improved land governance?
- » If SADC was to develop a policy on land governance what should be the role of customary law and traditional leaders?

How is living customary law adapting to protect women's land rights?

With regard to the first question it seems that the rights of women to access and land independently of men are strengthening across several different settings

Gaynor Paradza observed that:

Customary practices are localised and nuanced to accommodate peculiar circumstances of domestic unit. My research in Zimbabwe (Makura-Paradza 2010) and others in the region have highlighted that the domestic unit has evolved beyond the marital to an increase in single women and child-headed households. This evolution is in part a result of increased autonomy of women, independence, HIV and AIDS induced mortality and work by advocates for women's land rights. As a result evidence on the ground shows that traditional leaders are allocating land to unmarried women, allowing widows to continue using land after their marriage and orphans have been able to "inherit" land. When divorced daughters return to their villages of birth - they too have been accommodated and allocated a place to run their independent household. These practices have increasingly been observed as a norm rather than an exception.

Several of our mini survey responses support Gaynor's findings, but also suggest that this still has yet to be cemented as a consistent trend.

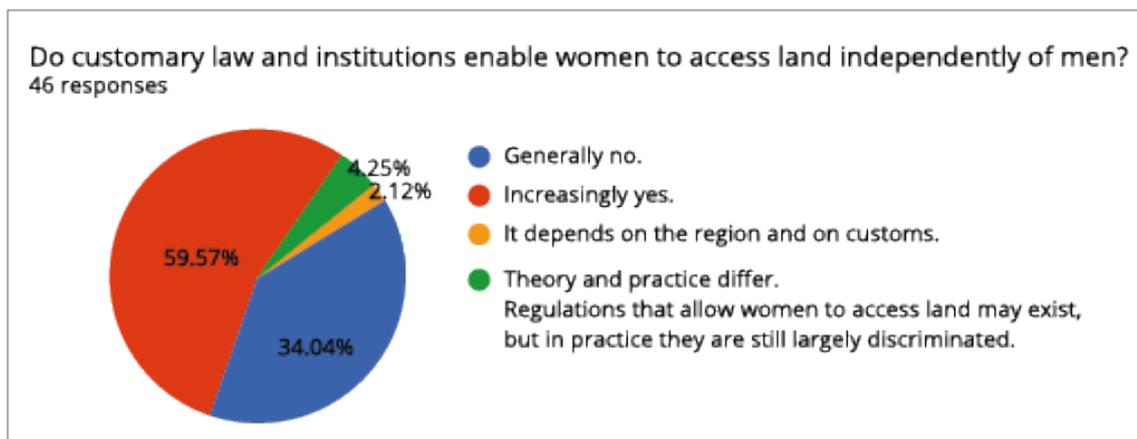


Figure 1: Women's rights to independently access land in customary systems

Survey respondents continued to discuss the relative insecurity of women's land rights under systems of customary tenure. Within each country there is quite a spread of rankings (figure 2).



Scale:
1 being highly vulnerable and insecure
10 being legally and socially recognised and protected

Figure 2: ranking by survey participants of the security of women's land rights under customary systems, per country

iting from Eswatini, Sean Johnson noted that:

Tenure insecurity for women is a big issue when they are widowed or divorced. Traditionally, a widow may either remain on a family landholding or return to her original community. The old custom of marrying a brother of the deceased now seems quite rare. Issues arise if the widow or divorcee wishes to remarry a foreigner (someone from another community); traditionally, this can be perceived as alienating the landholding to a foreign family and another community. Insecurity is now compounded by 'modernist' views of inheritance, that upon death the homestead is inherited by the eldest son or divided among all the (male) siblings; the traditional outcome is always that the homestead remains a family asset, a new family head recognised, and the widow provided sufficient fields in the homestead's landholding for subsistence.

The insertion of 'modernist inheritance norms' chronicled by Sean suggests that in practice 'living customary law' may not always evolve to promote inclusive ownership and protect the rights of all, but may be appropriated to entrench those with social power.

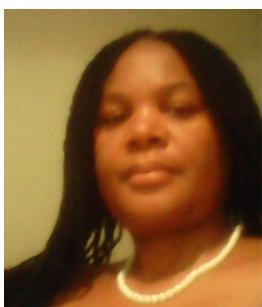
⁵ Ubink, J. M. (2011). *Stating the customary: an innovative approach to the locally legitimate recording of customary law in Namibia. Traditional Justice: Practitioners' Perspectives Working Paper Series Paper No. 8. Leiden, International Development Law Organisation.*

In the process the discussion examined advantages and pitfalls in the past and present processes seeking to codify customary law.

A contemporary example was highlighted from Namibia⁵ which involved facilitated processes resulting in the 'self-statement' of customary law principles, norms and values. One of the positive outcomes cited was in the recognition of stronger protections for the rights of widows.

Identifying good practices

The discussion around the second question largely diverted from the identification of good practices. However, Makanetsa Makonese noted that:



One good practice at customary law in Southern Africa is that traditional leaders make decisions through a consultative process and often have an inner council to provide advice and help with decision-making. This should be re-purposed to ensure that the inner council includes people with appropriate knowledge in human rights, including land rights to advise the traditional authorities. This can assist in removing arbitrariness in decision-making but also in guarding against corruption and abuse of authority as decision-making will not be concentrated in one individual. The SADC region should therefore use the positive aspects of customary law and institutions in coming up with a land policy.

While highlighting good practices inherent in customary decision-making norms, Makanetsa was alert to:

The increasing use or abuse of traditional authorities for political ends needs to be addressed. This has contributed to authoritarianism by traditional authorities who feel that governments are indebted to them for helping them stay in power and they in turn abuse their power when dealing with issues affecting local populations such as land rights. Constitutions and laws in SADC must therefore provide that traditional leaders must be non-partisan and must not align with political parties.

Conceptualising institutions

During the final days of the discussion very different understandings of what we mean by institutions, what these look like, and the role played by different actors in the interpretation and adjudication of customary norms and values, particularly in relation to community land rights began to emerge.

This is where we encountered contestation around the roles, functions and the role played by 'traditional leadership' in the interpretation and application of customary law. Siyabu Manona highlighted what he saw as the pitfalls of conflating customary law and chieftaincy systems:



Firstly this frame incorrectly places chieftaincy systems at the centre of customary law, when they are not - they are a very small part within a bigger system.

Secondly such a frame essentialises chieftaincy system, by default.

Thirdly such a conception forecloses on other more important institutions of customary law such as marriage, inheritance and succession, which are centred around family, lineage and clan scales. For example chieftaincy systems have no role in marriage rules - these operate outside of traditional leaders. Much of the land is accessed via marriage and inheritance institutions, which are not controlled by chieftaincy systems. In a nutshell customary law institutions cannot be limited to a debate about chieftaincy systems.

The fourth problem emanating from this conceptual flaw results in recognition of customary law as adjunct to chieftaincy systems instead of the other way round. This anomaly is not only prevalent in South Africa, but unfortunately repeats itself in many countries in Southern Africa. This is particularly evident in South Africa's constitution which also falls into this flaw, by recognising traditional leaders and then customary law as adjunct.

The debate about customary law should not revolve around traditional leadership institutions, but should explore the system of customary law in its entirety -- go beyond the role of chieftaincy. In my view this conceptual flaw constitutes the most fundamental flaw for policy development linked to customary law.

Fifthly, this conceptual flaw does not only misdirect policy questions, but it limits policy debates to a narrow space.

While there was much support for Siyabu's position there were also critical questions raised by Lisa del Grande about the possible dangers of reifying customary law and practices and divorcing traditional authority systems from day to day land governance in favour of family focused property norms and inheritance systems.



Fundamentally property rights and land tenure systems require systems of authority, rules and regulations, as it is about relationships, whether in a small localised "customary" type system or in a democratic or undemocratic nation state. So the discussion about creating unified tenure systems or enabling plural tenure systems to exist surely has to include a discussion about traditional authority systems and their role in land governance.

Contributions from the different countries illuminate the different ways in which community land rights are under threat. While there is evidence that the social values and ways of seeing which are at the heart of living customary law intrinsically resist this dispossession and marginalisation, it is important to heed Tania Murray Li and her caution that:



Most rural communities are stratified by class and gender; in addition to common lands, members have individual landholdings and are engaged in land markets; and they engage in commercial farming activities to increase their family incomes, sometimes at the expense of their neighbours or the environment.

The internal fractures of actually existing communities with cus-

tomary landholdings are exacerbated by the 'divide and rule' tactics deployed by the state-crony-capitalist cabals that profit from dispossessory development. ⁶

Going forward – at SADC scale

We had aimed to conclude the discussion by identifying broad recommendations to inform the development of a SADC wide policy conversation. In this regard it is instructive to note that a search of the SADC website yields no returns for “land policy” or “customary law” and contains only tangential references to “traditional leaders”.

It is clear that there is still a long way to go before SADC is in a position to facilitate such a discussion. Given the very different approaches in SADC countries to the legal standing of customary law and the recognition of customary leadership and institutions in the administration and protection of community land rights this will probably rank as a difficult conversation. Notwithstanding the above there were some suggestions:

Siyabu Manona identified the following in his conclusion. There are a number of key concrete overarching questions which we could be grappling with at SADC scale.

- » The first challenge is to find ways of recording customary land rights alongside all other informal land rights. This could be undertaken by taking forward some of the work that is being carried out by UN Habitat.
- » The second challenge we need to grapple with is developing methods and or principles of ‘ascertainment’ of customary law.

Here Siyabu was asking the all-important question: How do we recognise authentic customary law and what are the tests that should be applied to determine this? This remains a difficult, complex and contested task.

In South Africa a Constitutional Court Judgment ⁷ by Justice Langa on the constitutionality of the principle of primogeniture in customary law focused on this exact challenge noting that:

The official rules of customary law are sometimes contrasted with what is referred to as “living customary law,” which is an acknowledgement of the rules that are adapted to fit in with changed circumstances. The problem with the adaptations is that they are ad hoc and not uniform. ⁸

The court argued that there was:

“...insufficient evidence and material to enable the Court to determine the true content of customary law as it is today... The difficulty lies not so much in the acceptance of the notion of “living” customary law, as distinct from official customary law, but in determining its content and testing it”⁹.

In a dissenting judgment prepared by Justice Ngcobo it was argued that:

It is now generally accepted that there are three forms of indigenous law:

(a) that practised in the community; (b) that found in statutes, case law or textbooks on indigenous law (official); and (c) academic law that is used for teaching purposes. All of them differ. This makes it difficult to identify the true indigenous law. The evolving nature of indigenous law only compounds the difficulty of identifying indigenous law.¹⁰

This complexity is further compounded by the existence of different norms and practices. Living customary law varies according to context and social setting. This makes codification at any coarse grained scale likely to repeat:

...mistakes which were committed in the past and which were partly the result of the failure to interpret customary law in its own setting but rather attempting to see it through the prism of the common law or other systems of law. That approach also led in part to the fossilisation and codification of customary law which in turn led to its marginalisation

⁶ Murray Li, T. (2020). “Epilogue: Customary Land Rights and Politics, 25 Years On.” *The Asia Pacific Journal of Anthropology* 21(1): 77-84. P. 79.

⁷ Constitutional Court of South Africa Case CCT 49/03

⁸ Constitutional Court of South Africa Case CCT 49/03 P. 53

⁹ *Ibid.* P. 65

¹⁰ *Ibid.* P. 91-92

The South African Law Reform Commission prepared a draft Application of Customary Law Bill which proposed that:

8(1) In order to prove the existence or content of a rule of customary law, or foreign customary law, a court may –

(a) consult cases, textbooks and other authoritative sources;

(b) receive expert opinions either orally or in writing; and

(c) appoint assessors from the community in which the rule of customary law applies.¹¹

However, this Bill never saw the light of day.

So, overall across the SADC region, we are left with the challenge of developing methods and principles of 'ascertainment' of customary law. Perhaps it is only through such a process involving the parallel recalibration of legal systems to manage plurality within a single polity.

As Rosalie Kingwill put it:

The issue is about how to restructure the current systems of governance to provide a framework to enforce rights and responsibilities in the present. That will involve, again, to quote Siyabu, "[p]olicy debates should be about a cross-spectrum of institutions of customary law, hybridisation approaches, procedures and principles for ascertainment, etc [to meet the] challenges in Southern Africa

It is clear that there is much thinking and work still to be done.

¹¹ Bekker, J. C. and I. Van der Merwe (2011). "Proof and ascertainment of customary law." *Southern African Public Law* 26 (1): 115-127.

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- » Those who registered accounts on the Land Portal, joined the discussion and commented
- » The many people who visited these pages to observe the process.

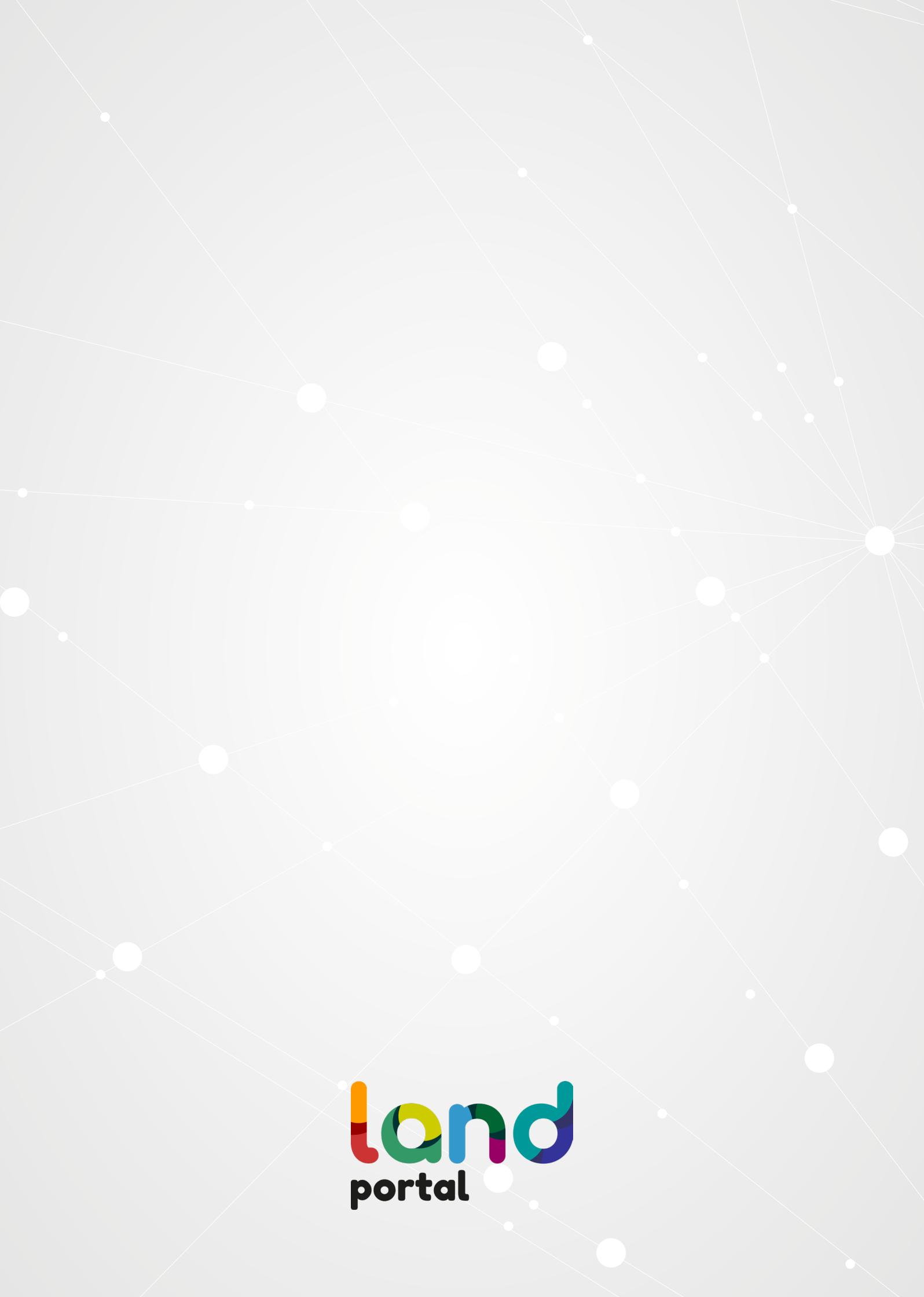
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