# Filling the Gap: Customary Land Tenure Reform in Mozambique and South Africa

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## Abstract

*Using a conceptual framework for guiding cadastral systems development in customary land rights contexts, the drafting and implementation of the 1995 Land Policy and 1997 Land Law in Mozambique from the early 1990s to the present is analysed for its successfulness, sustainability, and significance. The framework looks at the theory underlying development, the drivers of change, the change process, the land administration system, and the review process. Each of these are further broken down into aspects, elements, and indicators. Through grounded theorising, the Mozambique case is compared against the framework to highlight its successes and challenges. This is a desk-top study using secondary data (published literature, reports, policies, and legislation). Recommendations for land tenure reform in South Africa draw on the experiences from Mozambique. The paper has significance for academics, professionals, and policymakers involved in land reform in South Africa and hence has particular relevance in the current South African context.*

## 1. Introduction

### 1.1 Land reform in South Africa

South Africa and Mozambique have been dealing with their own 'land question' in their own ways since the early 1990s. For South Africa, the current land question has arisen with the fall of apartheid in 1994 and the subsequent need to address skewed land distribution, ownership, and tenure security patterns. Land reform has been on the democratic government's agenda since the publication of the Constitution in 1996, particularly Section 25, sub-sections (5) – (9). These sub-sections obligate the State to promote equitable access to land for her citizens, improve tenure security for those whose tenure is insecure due to apartheid, and allow for restitution of land for those dispossessed of land under apartheid (*Constitution of the Republic of South Africa*, 1996). Section 25 (9) obligates the State to pass legislation to bring about improvement of tenure security. The White Paper on South African Land Policy (Department of Land Affairs, 1997) sought to address these constitutional requirements and paved the way for land reform in South Africa.

Per the 1997 White Paper, land reform in South Africa comes in three thrusts: land restitution, land redistribution, and land tenure reform. Land tenure reform is the subject for this paper. It is about securing and protecting customary and informal land rights that were left vulnerable by apartheid. Land tenure may be insecure when land rights-holders are uncertain that their rights to land will be upheld in the face of challenges to those rights. Their tenure is improved when land rights are recognised as legitimate by relevant stakeholders, when there are few incidents or threats of violence and natural disasters (high level of certainty) and are upheld by the law (legality) (Whittal, 2014). In South Africa, land tenure security is a problem for four categories of land rights-holders (Kingwill, Royston, et al., 2017):

1. Farm labourers and their families living on privately owned land,

2. People living on former mission stations – the so-called 'coloured rural areas',

3. People living in situations of insecure tenure in urban areas, such as informal settlements, and backyard dwellings,

4. People living under customary tenure systems in the rural areas of the former Bantustans. It is these situations of *customary land tenure reform* that form the focus for our research.

Land reform in South Africa has been criticised for being too slow, lacking vision, and moving away from its initial pro-poor focus. "There are also *significant gaps*, such as on tenure security, where legislation has not been passed" (High Level Panel, 2017: 81, emphasis added).

## 1.2   Land reform in Mozambique

In Mozambique, the General Peace Agreement signed in October 1992 ended 17 years of civil war and 25 years of armed conflict in the country (Tanner, 2002; Van den Brink, 2008). Competition for land quickly became a major issue as millions of refugees and internally displaced persons (IDPs) returned home. Investors were encouraged by the State to bring abandoned, empty land into production again, only to find returning refugees or IDPs claiming a right to the land. To complicate matters further, colonial-era landowners were also returning to their abandoned farms, attracted by the improved political and economic situation in the country. Many had documentation supporting their claim to these old farms, only to find them occupied. "The new Government taking office after the first multiparty elections in October 1994 therefore faced a 'land question' that was both potentially explosive and extremely complex" (Tanner, 2002: 9).

This situation paved the way for an amended Constitution and a new National Land Policy. Under Article 109 of the Constitution (Government of Mozambique, 2007), ownership of all land in Mozambique vests with the State, but use rights are granted to Mozambican citizens. The National Land Policy (Government of Mozambique, 1995) aims to protect Mozambican people's land rights while promoting investment and ensuring sustainable and equitable use of natural resources. Importantly, the 1995 Land Policy recognised and accepted customary systems of land allocation

and conflict resolution and provided for their accommodation in land legislation (Tanner, 2002). These goals were enshrined in the Land Law, no. 19/1997 (Government of Mozambique, 1997), which "aimed to achieve a balance between safeguarding the interests of communities and facilitating investors' access to land [and] to halt speculative land grabs that were leading to increased landlessness among the poor" (Van den Brink, 2008: 1). The focus of the Land Law was hence on tenure security, not redistribution or restitution, and the promotion of the conditions for economic investment.

To realise these twin goals, in Chapter III of the 1997 Land Law (Government of Mozambique, 1997) a landholding known as a DUAT (in Portuguese, *Direito de Uso e Aprovetamento dos Terras*) established rights of use and benefit of land. While not conferring full ownership (which vests in the State), it does confer use rights for up to 50 years. It is also inheritable, secure, renewable, and transferable subject to certain conditions. There are three land tenure types:

1. Occupation of land by a community governed under customary law (a customary DUAT);

2. Occupation of land for an uninterrupted period of 10 years as if the occupier were the owner (so-called 'good faith' occupation);

3. Allocation of a 50-year lease by the State to a private investor, after consultation with the affected local community (granted DUATs).

## 1.3 The challenge

Both countries have, at the same time, been on their own journeys towards improved tenure security and economic growth. Both countries have faced numerous challenges, setbacks, and restarts. But the glaring difference between their experiences is that, while South Africa's legislative code is incomplete concerning land (Kingwill, Royston, et al., 2017; Hull & Whittal, 2018), it took Mozambique just two years to draw up their 1997 Land Law, including a broad and exemplary participatory and consultative process (Tanner, 2002). Hence, the "Mozambican case offers important lessons at a time when land policy and reform is high on the agenda in many African countries" (Ibid.: 1).

Customary land tenure reform involves identifying who has rights to what, where, and when, and somehow recording this information. Part of the challenge in South Africa and in Mozambique is that there is not a one-to-one relationship between people and land in customary areas, meaning that land rights-holders and their land rights are multiple and overlapping on one piece of land. Different people can have rights to use the same piece of land for different purposes and at different or the same times (Cousins, 2007). Recording such complexity requires changes to the current legal and cadastral systems, which are only designed to record formal land rights (High Level Panel, 2017; Kingwill, Hornby, et al., 2017).

In accordance with its obligation under Section 25 (9) of the South African Constitution, the State has passed several laws to improve tenure security for people whose tenure is insecure due to apartheid discrimination: The Land Reform (Labour Tenants) Act 3 of 1996; The Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA); The Extension of Security of Tenure Act 62 of 1997 (ESTA); The Prevention of Illegal Eviction Act 19 of 1998 (PIE). Of these, only IPILRA applies to customary areas (Cousins, 2016). It is *interim* legislation and needs to be renewed every year. It is also little-known and oft-overlooked by developers. Hence, despite over two decades of democracy and the State's constitutional obligations, there is currently no *permanent* legislation providing tenure security for people living in customary areas (Weinberg, 2015). There is a *gap* in the legislation that needs to be filled (High Level Panel, 2017) because the people affected comprise nearly 60% of the population of South Africa (Hornby et al., 2017).

The objectives for this paper are:

1. To assess Mozambique's land reform programme particularly regarding their recognition of customary land rights and associated tenure security.

2. To propose lessons for South African customary land tenure reform, drawing on the experiences of Mozambique (positive and negative).

## 2. Methodology

### 2.1 The conceptual framework

The conceptual framework for guiding cadastral systems development in customary land rights contexts (Hull & Whittal, 2017) is used to assess Mozambique's land reform programme in terms of its success, sustainability, and significance for customary land rights-holders. The framework consists of four levels of specificity: there are 5 evaluation areas, 13 aspects, 32 elements, and 87 indicators– see Table 1 for a selection of these. At the area and aspect level, the framework should have universal applicability. But as the specificity increases, so the field of application of the framework narrows. Hence the proposed elements and indicators (Ibid.) are specific for customary land rights areas, but others may propose different elements and indicators for different contexts. The basic premise of the framework is that, for land reform to become *successful*, the process and outcomes should be *significant* for existing land rights-holders, while *sustainability* also needs to be built into any land administration systems linked to land reform. These outcomes are mutually interdependent. *Success* is the achievement of the goals of development. *Sustainability* is the ability of the cadastral system to keep on being successful. To be successful and sustainable, the goals of development should arise from the citizens' or communities' needs, which means that the goals will carry *significance* for them. The failure of land reform in South Africa is attributed to an inappropriate logic of land reform (Cousins, 2016). In other words, it lacks *significance* for the beneficiaries of land reform.

Table 1. Simplified conceptual framework showing selected indicators with high groundedness

| Areas | Aspects | Elements | Indicators |
|---|---|---|---|
| **Underlying theory** | Understanding land | Human & land rights | Acceptance<br>Changing attitudes |
| | | Justification | Land titling theory |
| **Change Drivers** | Demand-based | Deficiencies | Tenure security |
| | | Pressures | Promoting investment<br>Land conflict |
| | Supply-based | New policy | Political and legislative change |
| **Change process** | Getting to the end state | Good leadership | Consulting experts<br>Community acceptance |
| | | Building on existing practice | Local, indigenous knowledge<br>Adopt / adapt good practice |
| | Community / country context | Historical | Awareness |
| | | Current | Capacity |
| | Working together | | |
| **LAS** | Pro-poor land policy | Existing rights | Recognise & protect<br>Increase awareness |
| | Strategic level | | |
| | Implementation level | LTIS | Delimitation / demarcation<br>Clearly defined standards |
| **Review Process** | What is reviewed? | Outcomes | Unintended consequences<br>Lessons learned |
| | When is it reviewed? | | |
| | Who does the reviewing? | | |

## 2.2 Grounded theorising

Researchers using the conceptual framework begin by collecting relevant data in a variety of formats, e.g. interviews, documents, reports, and publications. This is the knowledge acquisition phase of the conceptual modelling methodology (Cooper, 1998). The second phase is model abstraction (Ibid.), and during this phase researchers begin by coding, conceptualising and categorising the data to identify themes and extract meaning (Allan, 2003; Holton, 2007). The intent is for the researcher to adhere, as far as possible, to the three pillars of the grounded theory approach: emergence, constant comparison, and theoretical sampling (Holton, 2017). *Emergence* requires the researcher to have an open mind when approaching the data, not being influenced by prior knowledge or theories. *Constant comparison* requires the researcher to keep comparing the emerging codes, concepts and categories to those that were previously collected. Codes, concepts and categories thus acquired may be compared to the indicators, elements and aspects in the conceptual framework respectively. It is here that the methodology deviates from a pure grounded theory approach into what Holton (2017: 242) calls 'grounded theorising'. Constant comparison with the conceptual framework allows the researcher to identify gaps in the data, leading to *theoretical sampling* as data is specifically collected to fill in the gaps (Glaser & Holton, 2007).

Once this iterative process has been repeated several times, the researcher will identify which indicators feature prominently in the case, and which do not. This is referred to as the 'groundedness' of an indicator/code. Other indicators, not included in the conceptual framework as

published (Hull & Whittal, 2017), may emerge from the data as relevant for the particular case under study. Hence, strengths and weaknesses are identified related to the significance of the change process for land rights-holders, indicating potential for success and sustainability of the project.

### 2.3    Data collection and analysis

Through knowledge acquisition and theoretical sampling, 20 publications were reviewed related to the drafting and implementation of the Mozambican Land Law 19/1997. Publications were drawn from conference proceedings, journal articles, reports, donor websites, and online newspapers – see Table 2. The publications were coded and categorised first using emergence, to allow the data to speak for itself, and then through comparison with the indicators, elements, and aspects of the conceptual framework.

Table 2. List of publications included in Mozambique case study

| # | Citation | Abbreviated title |
|---|---|---|
| 1 | (Negrao, 1999) | The land campaign in Mozambique |
| 2 | (Tanner, 2002) | Law-making in an African context |
| 3 | (Trinidade, 2004) | Upgrading and land titling in informal settlements |
| 4 | (UN-HABITAT, 2005) | Land tenure, housing rights and gender in Mozambique |
| 5 | (Van den Brink, 2008) | Land reform in Mozambique |
| 6 | (Mole, Monteiro & Quan, 2012) | The Community Land Initiative (iTC) |
| 7 | (Norfolk & Bechtel, 2013) | Land delimitation and demarcation |
| 8 | (Quan, Monteiro & Mole, 2013) | The experience of Mozambique's Community Land Initiative |
| 9 | (Monteiro, Salomão & Quan, 2014) | Improving land administration in Mozambique |
| 10 | (Bicanic, Nielsen & Sehested, 2014) | Securing community land rights in northern Mozambique |
| 11 | (EDG, 2014) | Evaluation of community land use fund |
| 12 | (Locke, 2014) | Mozambique land policy development |
| 13 | (Agência de Informação de Moçambique, 2015) | Mozambique: government launches forum on land management |
| 14 | (Christoplos et al., 2016) | Midterm review of GESTERRA |
| 15 | (apolitical, 2017) | Land registration is fighting exploitation in Mozambique |
| 16 | (Schreiber, 2017) | Putting rural communities on the map |
| 17 | (The World Bank, 2017) | Mozambique land administration project (Terra Segura) |
| 18 | (Balas et al., 2017) | A fit-for-purpose land cadastre in Mozambique |
| 19 | (Frey, 2017a) | World Bank advocates change in Mozambique land law |
| 20 | (Frey, 2017b) | Mozambique government intends to grant 5 million land titles |

For this paper, it is not appropriate to reflect how all 87 indicators have held up. Instead, we present a selection of indicators with high groundedness that provide valuable insights for South Africa. These are shown in Table 1. This is not the full picture, but space does not allow for a thorough description of every indicator, and what is presented illustrates the process undertaken.

## 3. Filling the gap – lessons for South Africa?

### 3.1 Underlying theory

Tanner (2002: 21) highlighted that the 1995 Land Policy adopted "a rights-based approach that took as its starting point an analysis of *existing* local land rights" (emphasis in the original). It sought to guarantee the equality of men's and women's rights and to defend human rights in general (UN-HABITAT, 2005). But in the patrilineal centre and south of the country, formal rights "are far outweighed by traditional mores and social pressures" (Norfolk & Bechtel, 2013: 18) and widows' and divorced women's inheritance rights are not protected in practice. The 1997 Land Law, compiled through a broad consultation process involving a wide range of role players with interests in land, reflects "*an underlying reality that is genuinely African*" (Tanner, 2002: 49; emphasis in the original). It seems that this 'African reality' persists in the face of 'Western' notions of human rights, with consequent tensions.

In Hull & Whittal (2017), the notion of human rights is shown to be a mould that doesn't always fit the context for development. Despite the claim that human rights are universal, their universality is contested (Cobbah, 1987; Otto, 1997; Mutua, 2001; Ishay, 2004; Nagengast, 2015). In some contexts, communities and cultures, there is resistance to change from established ways of doing and being, even if such change is meant to benefit the community (see e.g. Winkler, 2017 for an elaboration on this topic). We see evidence of this in Mozambique from Norfolk & Bechtel (2013). On the other hand, they also report evidence of changing attitudes as awareness of formal laws increases. Such paradigm shifts are necessary to ensure that the social and cultural mores of the implementers of legislation do not stand in the way of inclusivity.

The theoretical foundation for the changes witnessed in Mozambique is that land titling leads to economic development, known as land titling theory (de Soto, 2000; Nkwae, 2006; Barry & Roux, 2012). We see this in Tanner (2002: 1), who refers repeatedly to the need for citizens of Mozambique to "realise and use the capital value currently locked up in their one key asset (their land)". Access to this 'locked up capital' was a fundamental goal of the development process. But Norfolk & Bechtel (2013), while acknowledging the importance of land tenure security for promoting investment and sustainable land use, highlight that the link between tenure security and access to investment credit is weak, especially in rural areas. The validity of land titling theory in sub-Saharan Africa has been questioned because it ignores the multi-functional, multi-generational view of land from a broadly African perspective (Platteau, 1996, 2000; Nkwae, 2006; Akrofi & Whittal, 2013; Hornby et al., 2017). This is possibly at odds with the lived experience of customary land rights-holders, signifying the need for developers to address the mismatch between the underlying theory of development and the lived experience of customary land rights-holders (Kingwill, Hornby, et al., 2017).

*Recommendations:*

(1) Development agents and land policymakers in South Africa need to be aware that their understanding of human rights may be at odds with the notion of rights for customary land rights-holders. They may come up against resistance even though they are addressing land rights-holders' needs, because the basis of development stems from Western systems of thought (Winkler, 2017).

(2) With its focus on titling as a remedy for insecure tenure, the South African government appears to be drawing from land titling theory, which is at odds with the living, social tenures of the majority of South Africans (Cousins, 2017; Hornby et al., 2017). Following Kingwill, Hornby, et al. (2017) and the recommendations of the High Level Panel (2017), there needs to be a shift away from land titling theory and towards recognition of social tenures and living customs per traditionalist (Nkwae, 2006) or adaptation (Arko-Adjei, 2011) theories.

## 3.2 Change drivers

Given the aims of the 1995 Land Policy, it is unsurprising that prominent drivers of change were the improvement of tenure security, promotion of investment, and reductions in land conflict. Insecurity of tenure discourages long-term agricultural investment and inhibits the productive use of land, while security of tenure enables customary land rights-holders to negotiate with investors (Van den Brink, 2008; Norfolk & Bechtel, 2013). Only once communities have secure tenure, can they begin negotiating with investors who want access to natural resources on community-held land. The 1997 Land Law creates the conditions that make this possible (Mole, Monteiro & Quan, 2012). Through the provisions of the Law, communities can delimit their land and register community tenure rights. With the ensuing improved tenure security, investors know with whom to negotiate, and the community is enabled to provide access to natural resources and, as partners with investors, reap part of the rewards (Norfolk & Bechtel, 2013; Quan, Monteiro & Mole, 2013; EDG, 2014).

*Recommendations:*

(3) South Africa currently has three policies related to land reform: the White Paper (Department of Land Affairs, 1997), the Green Paper (DRDLR, 2011), and the Communal Land Tenure Policy (CLTP: DRDLR, 2013a). The State Land Lease Policy (SLLP: DRDLR, 2013b) aligns with the Green Paper which differs significantly from the White Paper in departing from the overriding favour of freehold to promoting leasehold. Weinberg (2015) notes that the CLTP and the SLLP contradict one another. There is need for a single, clearly articulated, non-contradictory policy on land reform. Existing legislation should then be revised to bring it into alignment with such policy. The aim of new policy and legislation should be to secure tenure for all land rights-holders in South Africa while ensuring continued and improved productivity of the land. We argue that the example of Mozambique should be followed: one clear land policy enacted via

one clear land law that brings together all related laws on land reform and fulfils the obligations of Section 25 of the South African Constitution. This recommendation supports current calls for a single, overarching legislation (Eglin, 2017; High Level Panel, 2017) but is aimed firstly at the level of policy (strategic level – see Hull & Whittal, 2017), and legislative review should follow.

### 3.3    Change process

Prior to the drafting of the 1995 Land Policy, a thorough sociological analysis of existing customary law and institutional practices was undertaken. Input from knowledgeable experts was sought: NGOs, specialists, and academics. Examples were studied from similar nations that had successfully integrated customary and formal land management systems, e.g. Botswana (Tanner, 2002). It was found that customary land management accounted for over 90% of land access and use in the country. Through embarking on a broad consultation process during drafting, and awareness-raising while the policy was still in draft form (Negrao, 1999), the new policy and law were accepted as legitimate and relevant for affected land rights-holders (Tanner, 2002; Schreiber, 2017). Tapping into such local, indigenous knowledge was important in securing community consultation and participation in the management of natural resources, using customary norms and practices. Hence, under the 1997 Land Law, occupation under existing customary and 'good faith' arrangements are considered to be legitimate (UN-HABITAT, 2005) and are protected under the DUAT system.

One of the 1997 Land Law's great triumphs is the recognition and protection of existing customary land use rights as legitimate, based on historical occupation. Historical context is also accommodated in customary land delimitation, wherein communities are encouraged to "define their land occupation borders [based on] their specific *historical*, cultural and land use story" (Tanner, 2002: 45, emphasis added). An "historical profile" is defined at community information meetings prior to delimitation (Bicanic, Nielsen & Sehested, 2014: 12). This is important for documenting displacement and resettlement during Mozambique's tumultuous past, and to establish how community boundaries have changed over time (Schreiber, 2017).

Tanner (2002) noted that, between drafting and implementation, the greater challenge is implementation of the land law. Institutional and community capacity are limitations, and several interventions have been, and are currently being, enacted to improve the situation (see e.g. Norfolk & de Wit, 2010; Mole, Monteiro & Quan, 2012; Locke, 2014; Christoplos et al., 2016; The World Bank, 2017).

*Recommendations:*

(4) South African policymakers should draw from the experiences of comparative nations, both 1st world and 3rd world, learning from knowledgeable experts. The conceptual framework (Hull & Whittal, 2017) is built with this in mind. But such experience should not be taken out of context – see recommendation 5 below.

(5) The necessity of building on existing practice comes through strongly from the experience of Mozambique. This is supported by South African land reform critics (Loate, 2014; Weinberg, 2015; Eglin, 2017; High Level Panel, 2017; Kingwill, 2017). For example, there is a mismatch concerning the government's "interpretation of customary law, [which is] centred on traditional leadership and away from living custom" (High Level Panel, 2017: 81). This misunderstanding is embedded in the CLTP, with potentially disastrous consequences for customary land rights-holders (Loate, 2014). South African policymakers should seek first to understand existing tenure patterns and then draw up policies that protect legitimate land rights.

(6) South Africa's unfortunate past has provided the impetus for land reform but attempts at undoing past injustices have replicated or exacerbated the problem (Cousins, 2008; Loate, 2014; Hall & Kepe, 2017). Is it not time for policy to shift from attempting to undo the past to at least, and most urgently, focus on *protecting existing land rights-holders* and *creating the conditions for them to rise out of poverty*? Attention should also be given to reducing the spatial and economic inequality in South Africa (High Level Panel, 2017).

(7) Institutional and community capacity issues have already scuppered many attempts at land tenure reform in South Africa (Rugege, 2004; Weinberg, 2015; Cousins, 2016). Policy should include strategies for implementation of related legislation that empowers affected institutions and communities, see e.g. GESTERRA in Mozambique (Locke, 2014; Christoplos et al., 2016).

## 3.4    Land administration system context

Recognition and protection of existing land rights is a fundamental principle upon which the 1997 Land Law was built. Integration was a key concern: the legal team avoided a dualist interpretation of land rights wherein customary and legal rights are separated. Instead they sought to integrate customary rights and institutions into the legislation (Tanner, 2002). The Law recognises existing customary land rights with full legal protection – the customary DUAT. *De facto* occupation of land by people displaced from their former homes for 10 years or more without objection, is recognised as good faith DUATs. While recognised and protected by law, customary and good faith DUATs do not have to be registered, leaving them invisible to investors (Norfolk & Bechtel, 2013). Raising awareness is hence important because investors and communities need to be alerted to existing rights in an area. This is especially true in situations of transient and communal land rights, such as grazing, water, and farming rights (Tanner, 2002).

To be protected, local communities needed to be defined both legally and spatially. Section 1 of the Land Law provides a general definition of a local community that is vague enough to be applicable across the myriad of different cultural and geographic contexts in Mozambique, while creating a juridical personality that could enter into legal partnerships with potential investors (Ibid.). Concerning spatial definition, the Regulations provide for delimitation of the boundaries of local communities, and demarcation of plots for investors. Demarcation requires the placement of

concrete boundary markers using high precision land surveying techniques, whereas delimitation does not require any boundary markers, and the positions of the boundaries can be fixed using hand-held GPS with position accuracies of 10 – 20 metres (Bicanic, Nielsen & Sehested, 2014). Proof of delimitation may be by expert witness or oral evidence, in recognition of the high illiteracy rates in the country (UN-HABITAT, 2005; Norfolk & Bechtel, 2013). Maps of delimitations are recorded in the provincial cadastral offices (Norfolk & Bechtel, 2013). The approach is sporadic or voluntary for customary and good faith DUATs, but compulsory for so-called granted DUATs (DUATs granted to investors).

*Recommendations:*

(8) Policy and legislation should seek to make existing, legitimate land rights visible. Legitimacy may be through adherence to living custom or through continuous, uncontested occupation for a reasonable period (e.g. 10 years). IPILRA provides for such visibility, but as noted earlier, it is interim legislation and needs strengthening (High Level Panel, 2017). The CLTP and SLLP both contradict the protections provided for under IPILRA (Weinberg, 2015).

(9) Concerning cadastral development, fit-for-purpose methods (Enemark, McLaren & Lemmen, 2015) should be adopted to allow for cost-effective designations of plot boundaries that are significant for the affected land rights-holders. The different practices of delimitation and demarcation used in Mozambique (Norfolk & Bechtel, 2013) could be replicated in South Africa if appropriate enabling legislation is enacted. Thus, customary land rights areas may be delimited by, and in consultation with, the affected communities, and records could be kept in a national database. Care would need to be taken to allow for flexible boundaries according to living customary law (Bennett, 2008; Diala, 2017).

### 3.5   Review process

Much can be learnt from the unintended consequences of interventions. Bicanic, Nielsen & Sehested (2014) reported that community land delimitations, intended to reduce conflict, have instead *caused* conflicts between *some* neighbouring communities who struggled to agree on boundary positions. Delimitations may also exclude communities from communal land required for grazing, timber, water, etc. (EDG, 2014). These problems have arisen despite the emphasis on community engagement and participation in delimitation activities. These examples of unintended consequences should be evaluated and subsequent interventions adjusted accordingly. For example, Balas et al. (2017) used a pilot study to first gather experience before adjusting their fit-for-purpose methodology to reduce errors and problems that had been reported.

*Recommendations:*

(10)    The unintended consequences of previous interventions should be assessed, and future interventions should be designed to reduce such consequences. The High Level Panel Report

(2017) lists several such unintended consequences of current legislation in South Africa (see also Spoor, 2014). South African policymakers should heed the lessons learned and design future interventions to avoid replicating past mistakes.

## 4. Conclusions

While the Mozambican case has been described as exemplary (Tanner, 2002), it is by no means perfect. It serves as a good case for comparison because some things have been done very well (drafting the Policy, Law, and associated Regulations), while others leave much room for improvement (namely, implementation). The great strength of the Land Law is that it accommodates all land rights-holders under one Act, leaving no room for contradictory or overlooked legislation (e.g. IPILRA vs. competing legislation in South Africa). Within this law, the DUAT recognises and protects existing, legitimate land rights for all Mozambicans and makes provision for outside investors to consult with communities before beginning their mining, agriculture, tourism, or forestry activities.

Following the evaluation of the Mozambican case, recommendations have been made for customary land tenure reform in South Africa. Table 3 provides a summary. Recommendation 3 calls for a single land policy akin to Mozambique's 1995 Land Policy. This is the cornerstone of our suggestions. Recommendations 1 and 2 concern the theoretical foundation underpinning the policy, addressing the mismatch between living custom and development practice. Recommendations 4 and 5 suggest the sources of inspiration – there is no need to 'reinvent the wheel' when examples of good practice abound, both internationally and at home. Recommendations 6 – 9 concern what should be included in the policy, and Recommendation 10 provides for reflection to avoid unintended consequences. If the South African government is serious about bringing about land reform that is successful and sustainable, it should make sure that the process and outcomes are significant for all land rights-holders. By following these recommendations, such significance is more likely to be achieved.

Table 3 Summary of recommendations

| | Recommendation | Evaluation area |
|---|---|---|
| 1 | Hold human rights principles in tension with living custom. | Underlying theory |
| 2 | Reassess the focus on titling as the panacea for tenure security. There are better alternatives. | |
| 3 | Draw up a single, all-encompassing land policy that satisfies constitutional obligations for land reform, especially tenure security, while creating conditions for productive and sustainable land use. | Change drivers |
| 4 | Draw on the experiences of other nations. | Change process |
| 5 | Build on existing practice. | |
| 6 | Address past injustices without replicating or exacerbating the situation. | |
| 7 | Build capacity enhancement and empowerment strategies into land policy and implement these strategies. | |
| 8 | Seek first to understand. Make existing, legitimate land rights visible. | LAS context |
| 9 | Adopt fit-for-purpose standards for measuring and recording land rights extents. Include flexibility to allow for recognition of existing practices. | |
| 10 | Learn from past mistakes and unintended consequences. | Review process |

## 5. Acknowledgements

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