

## 1 Introduction

“Rights-based approaches” are increasingly seen as a core component of development by donors, NGOs and governments alike (see, for example, Häussermann 1998, Maxwell 1999). With clearly specified, legally-enshrined and universal rights, it is argued, citizens can voice their demands on the basis of clear, transparent legal provision, sometimes with constitutional backing. With the law providing the basis for negotiation, parties are accountable and decisions are clear. More generally, particularly with a constitutionally enshrined framework, there is a basic political signal that rights matter, and that people should organise and claim rights through accountable political and legal processes. Such a vision is therefore very much in line with the liberal, democratic form of governance being promoted by development agencies around the world. For livelihoods potentially the broad range of human rights, political, economic and social, matter. But the key question, and one the Sustainable Livelihoods in Southern Africa programme has focused on, is how can these be made real for poor people in rural areas?

In southern Africa and perhaps globally, South Africa has led the way with its progressive post-1994 constitution. A range of legislative provisions has been passed which are seen as models of a rights-based approach. A rights perspective in the southern African context has potentially very important implications for rural livelihoods. Improved access to land, water and other resources can improve incomes and restore livelihood security. Legitimising and institutionalising rights to resources and justice can redress past inequalities and power imbalances, which systematically denied access to assets necessary for securing and maintaining a sustainable livelihood.

This works well in theory, but the big question is how can new-found rights be translated into practice and does the envisaged level of rights claiming by poor people exist? This in turn raises a host of questions: How organised are poor people? What access to information and organisational, negotiation, legal and other skills do they have? How do they construct their citizenship in the contemporary setting, as rights holders, or more passively, as consumers or beneficiaries of state or donor assistance? How do politics, power and

# 8. Rights Talk and Rights Practice: *Challenges for Southern Africa*

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interests affect the ability of rights claiming in practice in particular settings? How do complex institutional arrangements and overlapping legal systems affect the ability of people to claim rights? Which gain precedence over others and who wins out in the end? Is the institutional context for rights claiming effective? To what degree is it really a level playing field set by principles of equality in the constitution? How do local contexts – institutions and politics – affect the ability of people to negotiate access to resources to which they are entitled?

The SLSA research in Mozambique, South Africa and Zimbabwe sheds light on the practice of rights claiming on the ground, in the context of “legal pluralism” and complex, politicised institutional settings. Rather than an emphasis on rights in abstract legal or constitutional terms, the research has explored instead the practices of rights claiming, and the complex politics of actors and institutions which affect this. In the southern African context rights are formulated and claimed in a very unlevel playing field and are highly contested. In practice, rights are realised through complex negotiations about access to resources at a local level. Broader rights frameworks enshrined in the constitution, in legislation and in policy can, despite their progressive nature, be irrelevant unless the local institutional context is conducive to encouraging effective rights claiming by poor people. A rights-based approach for sustainable livelihoods must therefore concentrate on institutional mechanisms for gaining access to resources, rather than only on establishing universalised legalistic rights frameworks.

## 2 Contexts

Across the three SLSA case study countries a variety of rights provisions are provided legally and constitutionally. Each of these is embedded in a longer history where traditional, colonial and more recent provisions compete in the contemporary setting. The following sections provide brief outlines of recent rights debates in Mozambique, Zimbabwe and South Africa, highlighting both similarities and differences.

### 2.1 Mozambique

In Mozambique, a constitutional debate initiated in 1990 resulted in a new constitution. Although this

constitution also ushered in political pluralism for the first time, from a rights perspective one of the most important reforms was the integration of some elements of customary law and the official recognition of rights, particularly those relating to land, that were derived from it.

In common with many other constitutions from around the world, the notion of the state owning the root title to natural resources is firmly entrenched. The constitution follows the global trend by then also making provision for the development of mechanisms (laws, decrees, regulations and technical annexes) that enable the state to grant other forms of rights to these resources to its citizens. With regard to land, for example, the constitution is unequivocal in its stipulation that the right of ownership is vested in the state and that no land may be sold, mortgaged, or otherwise encumbered or alienated. However, the same provision also stipulates that the use and enjoyment of land shall be the “right” of all the Mozambican people.

Although the 1990 constitution contained provisions that imposed limitations on the rights of use and enjoyment of land that could be granted to individual or collective persons,<sup>1</sup> it also obliged the state to recognise an entirely new category of rights-holders: those that were occupying land in good faith or through customary inheritance systems. It was this amendment that initiated the subsequent revision of the land law and led to the legal recognition of customary and other rights to land. Mozambicans had, through this amendment, finally ceased to be squatters in their own country.

The rights approach adopted in respect of land was not followed quite so strongly, however, in other legislation relating to natural resources. Forestry and Wildlife legislation, for example, concentrates on protective provisions aimed at guaranteeing access to forest resources for subsistence or cultural purposes, rather than a fuller recognition of underlying ownership rights. And, as with land, those who wish to obtain exploitation rights to forest resources, are obliged to follow an administrative process that contains no judicial recourse or review mechanism. The strength of the rights approach is therefore considerably diluted

by the nature of the state system within which it operates. In Mozambique, this remains dominated by administrative *dictat* and the role of the judiciary in the interpretation and enforcement of rights on behalf of those who would claim them is extremely limited.

## 2.2 Zimbabwe

The Zimbabwean legal system is made up of a combination of imported British common law and Roman Dutch law, on the one hand, and customary laws on the other. This is overseen by the Constitution which vests much authority in the President, or his delegates. Thus rights are bestowed through a dual system of formal legislation and customary law and practice. Rights discourses have entered particular areas of legislation, often pushed by activists and donors with concerns for more marginal groups, but the overall constitutional framework remains a centralised one, with the President having bottom-line powers in almost all cases.

Recent legislation, most notably the Water Act, has recognised the limitations of this system, whereby out-dated colonial laws often excluded substantial portions of the population from gaining access to resources. The 1976 Water Act, for instance, was based on the “priority date system” where people were granted rights in perpetuity on the basis of ownership of the land. Thus principles of private property ownership, based on land title, were used hence disenfranchising the communal area populations whose water rights were claimed on their behalf by the District Administrator. Under the 1998 Water Act, all water is deemed public, vested in the President, and rights are allocated instead through a permit system operated by catchment councils where different stakeholders are present. Rights to water for basic needs is given high priority in the Act, and the advantages previously given to private land holders (essentially large commercial farmers) are, at least in principle, swept away. While this shift clearly extends the rights claiming possibilities for poor people in rural areas, the practicalities of this are of course more complex (see below).

The major legal disputes over land issues in the context of the government’s recent attempts to

acquire land compulsorily and without significant compensation, have further raised issues of who can claim rights on what basis. The formerly sacrosanct right to private property has been questioned, when other rights, based on historical, social and economic claims, have been brought to the fore. While much of the recent land struggles have been fought out in local sites, in the context of nationalist rhetoric and outbreaks of violence, the parallel contests in the courts have raised questions about how “the rule of law” is upheld, or indeed what “law” is most appropriate for Zimbabwe given its colonial inheritance.

Concern about undue Presidential influence over legislation and its implementation, was one of the issues raised by the civil society-led National Constitutional Assembly (NCA). This group questioned the role of Presidential powers and, in particular, argued for limited-term Presidencies. In constructing a new constitutional framework, the NCA offered a rights-based approach, recognising a range of rights and claimants. The constitutional referendum of 2000 proved a key moment in Zimbabwe’s recent political transition, with the newly formed opposition party, the MDC, supporting this alternative constitution, based on a rights framework. Quite how this was to be implemented, and rights made real, was not at all clear, even by the time the parliamentary elections were held in 2000. Fearing the growing success of the opposition, the ZANU(PF) government clamped down, and centralised, party-based powers were asserted vigorously, and sometimes violently. With this the central authority of the President allied now to the war veterans movement, was asserted, and the prospects for the flowering of a bottom-up rights-based perspective effectively quashed.

## 2.3 South Africa

South Africa’s post-apartheid constitution is widely recognized as one of the most democratic and pro-poor constitutions in the world, in part because the Bill of Rights contains powerfully positive definitions of “second-generation” socio-economic rights. These include rights to housing, health care, food, water, social security, and a healthy environment.

**Box 1: Three contending rights discourses currently being marshalled around the “land question” in Zimbabwe**

- The property rights of commercial farmers (an individual assertion)
- The right to land for “the [indigenous] people”. This is a nationalist discourse on the right to regain the land immorally appropriated by colonialists (a national collective assertion)
- The right to ancestral land for a particular group of people. These are exclusive claims by defined communities rather than a general demand for land for “the people” (a local collective assertion)

The conflicting and overlapping nature of these discourses is illustrated by the recent history of the cattle and game ranches in Chiredzi District. These were individually owned properties, in the main owned by white commercial farmers. Since 2000, most of these ranches have been occupied and subsequently “fast-tracked” for resettlement in a process spearheaded by local war veterans invoking an assertion of a right to that land as reparation for the ills of colonialism and return of “our land”. This was an explicitly nationalist claim for land for the black/indigenous majority. This moral claim was repeatedly, and ultimately unsuccessfully, challenged in the courts by the commercial farmers advancing a legalistic individual property rights discourse. The former ranches were rapidly settled by people from all over Masvingo Province and some from even further afield. Some of these new resettlement areas replicated in miniature the commercial farm setup with individually titled stand-alone properties. These were acquired by members of a relatively affluent and politically well-connected new black elite advancing a claim for “indigenisation” of the economy, linked to economic rights for black Zimbabweans. These developments led to rumblings of discontent from some of the local ethnically Shangaan population who had specific historic claims on the ranches from which they or their ancestors were evicted and where graves are still located. They wanted the restitution of “their” ancestral land rather than a broad process of redistribution of that land to landless blacks regardless of provenance. Their right to land was justified, in part, in spiritual terms. In one instance the flattening of huts and uprooting of crops by marauding elephants was interpreted as the ancestral spirits punishing inappropriate settlement.

*Source: SLSA Research Paper 3.<sup>2</sup>*

In relation to land, the constitution enshrines rights to restitution of land dispossessed after 1913, and a right to security of tenure, or to “comparable redress”, for those whose tenure is insecure as a result of past discrimination, and requires parliament to enact legislation to provide appropriate measures. A property clause protects existing property rights from confiscation without “just and equitable” expropriation, but allows expropriation in the public interest, which includes land reform. The Bill of Rights also affirms that the state must take ‘reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis’.

South Africa has a long tradition of legal activism in relation to human rights, and this has continued after the demise of apartheid. In 1999/2000 public interest lawyers brought the government to court, seeking relief for squatters whose homes were being demolished by local government. Their victory, in the famous Grootboom judgement, established clearly that socio-economic rights are justiciable, and HIV/AIDs activists in the Treatment Action Campaign are now using this precedent to win constitutional court cases focused on government’s health policies. Debates over “how to make rights real” feature prominently in political and policy discourse.

**Box 2: Rights to sacred areas**

The Forestry and Wildlife Law holds the possibility for communities to “register” the fact that a particular forest area holds cultural and religious significance for them. The law defines such areas as: ‘zones of historical-cultural use and value ... destined for the protection of religious interests and other sites of historical importance and cultural use, in accordance with the norms and customary practices of the respective local community’. Within such areas the law permits the use of resources in terms of customary practices. The draft regulations contain provisions that amplify how these areas may be registered; to obtain this status, they must be officially declared by the provincial governor and geographically delimited, although the exercise of customary rights within the areas is not prejudiced by the absence of this declaration or the delimitation of the area.

Sources: Article 13, *Forestry & Wildlife Law 10/1999*; Article 7 *Forestry & Wildlife Regulations 12/2002*.

**3 Competing discourses and framings of rights**

In southern Africa, rights frameworks, be they constitutionally enshrined, as in South Africa, or in particular pieces of natural resource legislation as in Zimbabwe and Mozambique, often obscure the multiple meanings in the ways in which rights are conceived within local discourses. This is not to deny the importance of universalist conceptions of human rights. Clearly, these serve as good reference points for local struggle, and indeed many legal provisions in the region explicitly draw on positive notions of rights upon which people can draw. However, the notion that rights-based approaches to development must necessarily draw on universalist notions can lead to a neglect of locally-rooted conceptions. Universalist discourses draw largely on individualist readings of rights-based or liberal notions of citizenship, where individuals are seen as the bearers of rights. This is contrasted by many examples in southern African where rights are derived from “collective identities” based on affiliations with the community, nation or ethnic group. In fact, in practice, competing rights discourses co-exist and they can all be deployed to justify rights claims as the “land question” in Zimbabwe shows (see Box 1).

Rights discourses in southern Africa must also be understood in relation to colonial history. Colonial legislation surrounding natural resources, particularly land, water and wild resources, created an individualist system of allocation of rights that sought to privilege white settlers at the expense of the indigenous populations. This rights regime was

largely sustained by a legal structure that undermined, disregarded and criminalised the traditional claims of right to access and use of natural resources. In Zimbabwe, for example, the past rights regime supported commercial exploitation and use of water at the expense of non-commercial use, to the extent that farming activities of indigenous people, like *dambo* (valley wetlands) and streambank cultivation, were considered insignificant and often illegal. Clearly, rights-based approaches to development and natural resource management will be influenced by these colonial legacies.

Similarly, the politics of cultural identity can also form the basis of rights claims. Apart from ethnic groups claiming resources on the basis of ancestral claims, rights claims can be bound up with the reinvention or reinvigoration of a territorialised ethnicity. For example Shangaan-speaking communities in South Africa, Mozambique and Zimbabwe are claiming a right to share in any dividends generated by the newly established (at least on paper) Great Limpopo Transfrontier Park. As well as fulfilling conservation and development goals the initiative's advocates hope it will reunite a Shangaan community divided by national boundaries (*SLSA Research Paper 4*).

It would of course be wrong to dismiss all newly formulated laws and rights-based approaches as insensitive to locally-rooted understandings of rights. For example, the Forestry and Wildlife Law of 1999 in Mozambique explicitly recognises the right to sacred groves (see Box 2).

### Box 3: Mr Jonasse's multiple sources of rights to land in Mozambique

In Mangaja da Costa district, Mr Jonasse, a middle-aged man, explained how he acquired rights over the land he is now cultivating. As a national of Mozambique, Jonasse enjoys rights derived from national policy and legislation, rights that are shared by all the citizens to access, use and control natural resources. As a member of the Mamonye ethnic group, the most predominant in the Ngaúme locality, he also has obtained rights. As a family member, when his father died he acquired some rights to control plots of land which previously belonged to his father. He shared the rights with his two brothers and as he was the eldest, he gained the largest part of the plot and acquired more rights.

The Jonasse family also has some rights conferred on the land in which their ancestors are buried. The site has sacred meaning and is where traditional ceremonies of the lineage group are performed. Only the lineage members can gain access to land or natural resources around the area. Finally, Jonasse, as a member of PPM party, the opposition party and most powerful in the region, acquired some rights to explore a fertile plot of land along the Mudine river. Thus Mr Jonasse has acquired land rights by virtue of multiple affiliations: as a citizen, a member of an ethnic group and the opposition party and as a brother and son.

*Source: SLSA Mozambique Fieldnotes.*

The Forestry and Wildlife Law also recognises customary practices and the role of “local communities” in the preservation and conservation of biodiversity. This is a positive step in recognising customary user rights for subsistence purposes. Still the law does not go far enough in permitting a stronger manifestation of “ownership” and control over forest resources, which by contrast can be found in the provisions of the Land Law. This is because it does not recognise more fully an inherent right to the resources (which could then not only be safeguarded by the community, but used by them as a natural capital asset with which they could negotiate). Instead, the law establishes a licensing framework for development and exploitation of such resources on a commercial basis. While it is true that members of local communities can apply for and hold the licences for hunting and exploitation of timber resources, they are required to do so (mostly) in terms applicable to any other user.

## 4 The messy nature of property rights

In many post-colonial societies, the legal systems instituted by former colonial administrations coexist with customary and informal institutions at the local level (see Nyamu-Musembi 2000; Merry

1988). This “legal pluralism” includes statutory or common law, global and regional legal regimes, customary law and local-level means of dispute settlement that may or may not be recognised by the state. Thus multiple legal systems interact with each other and co-evolve (Moser and Norton 2001). This pluralism, as Lund (1997: 100) puts it: ‘engenders incongruence and competition over jurisdictions between the various institutions and ambiguity and contradictions in terms of which principles should be upheld’. Thus rules and laws themselves are subject to negotiation, reinterpretation and change. The way in which people call upon different legal orders and the negotiation between them, provides some of this dynamism: ‘different legal orders should not be seen as isolated from one another, but as interacting, influencing each other and mutually constitutive’ (Meinzen-Dick and Pradhan 2001; Nyamu-Musembi 2002).

The increased demand for natural resources by the private sector and other powerful people in Mozambique, for example, has led people to draw on a variety of rights-claiming mechanisms to gain access to natural resources. These include legal instruments, rights based on ethnic or lineage systems, rights acquired through the inheritance system in use, and rights based on ancestral values,

#### Box 4: Multiple sources of rights to land in Zimbabwe

Zimbabwe's very rapid and seemingly chaotic land reform programme has provided openings for opportunistic individuals to argue for land rights on the basis of all three discourses outlined in Box 1 simultaneously. One local councillor in Chiredzi District, for example, has acquired numerous new plots for himself and his family. These have been variously justified on the basis of a return of land to the Zimbabwean people, the restitution of ancestral land, and the need to "indigenise" commercial farming. In the process he has drawn on the authority and associated rights-claiming mechanisms of very different institutions and actors. These include the district and provincial war veterans association, the local (ZANU(PF)) MP, the (ZANU(PF)-supporting) chief, the provincial governor, the District Land Committee and government agencies such as the agricultural extension service, District Development Fund and the Department for Wildlife Management. Perhaps surprisingly one of the few institutions not to feature markedly in this "forum shopping" exercise is the council he represents. Access to land for the councillor depends not so much on formal rights *per se* but on his political affiliation, power and contacts, and links to networks of influence.

Source: SLSA Research Paper 3.

and political loyalty. Boxes 3 and 4 illustrate this type of "forum shopping" in Mozambique and Zimbabwe.

In some cases, as with Mozambique's community courts for example, different legal models are melded in one institution. Both "customary" and "formal laws" are deployed to enforce rights and solve conflicts over natural resources management. Traditional leaders, elected respected people and the president of the locality or the secretary of the *bairro* (representing the administrative authority in the village) are all present.

Recognition of legal pluralism forces us to embrace the flexible, variable and diverse nature of property and tenure arrangements as well as rights claims. However, it is precisely this ambiguity that can provide opportunity for powerful stakeholders to manipulate this uncertainty and ambiguity and capture resources. Some of these problems can be witnessed around debates and processes surrounding the long-awaited Communal Land Rights Bill in South Africa. This bill sets out government's proposals to resolve urgent land tenure problems in the former "homeland" areas, where most rural South Africans live, and where most land is registered in the name of the state. Lack of adequate legal protection for right-holders under communal tenure systems has created opportunities for abuse by powerful elites and

perpetuation of gender inequalities. Development efforts are also severely constrained by lack of clarity on landrights.

Even where rights are formally defined, however, individuals may encounter difficulties exercising their rights. Under the South African land reform programme, group titles have been issued to over 500 communal property associations and community trusts since 1996, but many of these are now dysfunctional. Constitutions were poorly drafted and misunderstood by members, rights for individual members were poorly defined, and infighting has resulted. Newly-created organisations often cut across and overlap with older community structures, creating tensions between members and non-members. In some cases traditional leaders have contested the authority of elected trustees, and in others elites have captured the benefits of ownership (see Box 5).

Simple forms of land titling based on notions of private property, clearly, may not be the answer in South Africa. In practice, as in Mozambique and Zimbabwe, access to land hinges not so much on formal rights but rather more dynamically on social identity, status, membership of groups and networks. Ambiguity exists between the jurisdiction of traditional authority and contemporary tenure systems. And the institutional context is rendered even more complex by the

### Box 5: Elite capture of titled land in South Africa

In Mkemane, in the Maluti District of South Africa, a group of wealthy local elites wanted to graze their commercial breeds separate from other cattle. These cattle owners requested land from the chief for their venture, arguing that the government encourages black farmers to pursue commercial farming practices. The chief allocated the group one of four communal grazing camps in the village, from which other members of the community were now excluded. This camp is better positioned than other camps in the village; warm in winter with a river passing through it, and is well-endowed with thatch grass (an important source of livelihood for local women), which the group planned to sell back to the community. This land grab brought conflict in the village because those who were excluded from grazing their livestock or collecting thatch grass from the land felt marginalised. While the conflict persisted, the elite group managed to acquire two other camps, shared by a number of villages, which in the past were reserved for winter grazing. They continued to graze their cattle on the commons but had exclusive rights over the piece of land they had privatised. This shows the vulnerability of (informal) communal tenure systems to well-organised, politically influential claims from powerful interests.

Source: Ntshona (2001).

politico-legal legacies of the colonial and apartheid eras. Making defined rights to resources become “real” effective command over resources, in this context, requires that focus is placed on the interactions among different formal institutions at different levels, and between formal and informal institutions; it also requires analysis of the power dynamics through which rights are defined in both law and practice (Cousins 1999: 67). Thus a policy framework that seeks to strengthen people’s capacity to realise their rights requires an emphasis on institutions and processes as much as on a formal, legalistic definition of land rights.

But in South Africa, a redefinition of those rights is still necessary, if not sufficient on its own. The highly discriminatory and dualistic property regime inherited from the apartheid past means that legal reforms are required that give a much clearer and stronger legal status to the land rights of rural communities and the individuals who comprise them. But this does not necessarily mean the conversion of “communal” tenure systems to private property regimes (as the current (2003) draft Bill proposes).

African systems of land tenure are based on the principle that everyone within the community of origin has rights to land, but that individual rights are balanced against their obligations to the social group. Rights are thus shared and relative. Systems

tend to be inclusive, not exclusive, and rights and obligations are held at a number of levels of social organisation, from the neighbourhood to the village to the larger community. The variability, flexibility and nested character of many African tenure systems must thus be retained and incorporated into the definition of land and resource rights, and mechanisms found for balancing group and individual rights against one another.

The draft Communal Land Rights Bill is proving controversial precisely because it does not recognise these features, and seeks instead to provide private title deeds to the occupants of state-owned “communal” land (to both groups and individuals). It is also being widely criticised for not providing adequate levels of institutional support for rights holders, to mediate the socially and economically embedded processes of defining and allocating land and resources.

## 5 The politics of competing rights claims

These messy, overlapping and often competing claims to rights are constructed around power relations and the politics of rights claiming. We must ask whose rights gain precedence over others? How are competing claims resolved? Is there an argument for basic rights to livelihoods to be seen as particularly important?

### Box 6: Competing rights claims on the Wild Coast, South Africa

In the Wild Coast study area, there are a variety of claims on land and natural resources made by different players, and considerable confusion around who has the right to make decisions about development on communal land. The proposed Wild Coast Spatial Development Initiative (SDI) has not got off the ground, largely because of the failure to resolve conflicting rights claims and to establish legal mechanisms whereby informal rights holders could enter into legally-binding agreements with outsiders around land use.

The encouragement of external private investment as a route to rural development through the SDI has added private sector tourism and service sector operators to the array of rights claimants. For a long time private individuals have run cottages as tourist enterprises along the Wild Coast. Permission to do so had been granted by local chiefs and headmen, often in exchange for some form of payment. However, these cottages have been deemed “illegal” by the state, and rights to tourist development granted to other investors under a regulated development plan. The current uncertainty and ambiguity over rights has put external investors (particularly larger ones) off. New efforts have emphasised partnerships with “communities”. But this too has proven difficult, as, again, different interpretations of who has rights over what have emerged. The extension of the Amadiba trail under the European Union-funded Support to the Wild Coast Spatial Development Initiative Programme, has also run into difficulties, due to lack of clarity around the rights of local communities and various government departments, especially with regard to establishing camp sites.

*Source: SLSA Research Paper 6.*

In a particular area, then, there may be a range of rights claimants all wanting to make use of particular resources. Each may draw upon different justifications, as well as legal and institutional mechanisms for realising such rights. As we have seen for the case of the land reform areas of Zimbabwe (Box 1), a mixture of rights discourses are deployed. But who actually gains access to land in a particular area will depend in large part on politics. For example in the Gonarezhou resettlement area in Chiredzi District, Zimbabwe, a nationalist discourse of “land for the people” provided a justification for the occupations. However, different people, depending on their political, ethnic and other affiliations got different sizes and locations of land during the process of dividing up the area. Thus, although there was a common rights discourse which mobilised people for invasion and occupation, it was the politics of the particular setting that determined the allocation of resources, and so the livelihood outcomes.

Such conflicts over rights claiming become particularly pertinent when powerful private sector actors, also in their own way mobilising discourses

of rights, enter the fray, particularly in marginal, rural areas. The politics of how “public-private-community” partnerships are formed around the allocation of resources is thus highly pertinent to how rights are realised in practice. While there may be high-sounding rhetoric about the rights of citizens as consumers, market actors and so on, the reality of rights claiming, again, is very much in the political domain. The contests over land resources in the Wild Coast area of South Africa are a good case in point (Box 6).

Such tensions are not merely restricted to land resources. The poorly defined nature of water rights can lead to conflicts over access. If rich farmers’ land rights allow them to use communal sources, it can undermine their poor neighbours’ right to water. In the case of Zimbabwe, prior to the Water Act of 1998, the prior right of commercial farmers for water use was assumed. This often denied communal people access to water on the basis that they did not have rights to the land. However, the Water Act was meant to redress this situation, and put in place an institutional framework that provided equal access to water

through a permit system. The catchment and sub-catchment councils are the key institutions that ensure the opening up of access to water, particularly for communal people, so as to improve their livelihoods. Today, water rights have been redefined, but in practice gaining access to water resources for poor rural communities is plagued with problems. While catchment councils offer the opportunity for the allocation of water rights to all potential users in a fair and equitable manner, in practice the politics of such negotiations mean that the relatively rich and powerful gain the lion's share. Recognising the politics of water access is therefore key in designing institutional mechanisms for rights allocation, and not assuming that conflicts and power politics will be absent in the competition over limited resources.

There is however, an inherent tension between the public and private nature of resources. Take water: the South Africa White Paper on Water Policy acknowledges the right to water and fixes a basic water requirement of 25 litres *per capita* per day. But at the same time there are parallel trends towards cost recovery and a push to price water, use it efficiently and treat it as an economic good. Thus a resource, which has the characteristics of a public good, is increasingly treated as a private good from which people can be excluded. A similar trend can be seen in Zimbabwe, where despite the rhetoric of public provision of water and integrated management, many richer farmers in Sangwe communal area have established their own private boreholes, and opted out of the management committees of the public boreholes.

Ironically, property rights, seen as sacrosanct and central to liberal notions of individual rights, can impinge on rights to property, and so livelihoods. While very often rights frameworks offer positive rights to citizens, their ability to claim these is highly variable. What many legislative frameworks do not contain are clauses to "protect" rights for particular groups of people, or for particular basic livelihood or survival activities. There are some exceptions, however. For example in South Africa, the Interim Protection of Informal Land Rights Act of 1996 prevents people from being unfairly dispossessed of rights to communal land, and this strong emphasis on protection needs to be included in the more permanent piece of

legislation that is now being discussed; the draft Communal Land Rights Bill. Of course, protection is not enough; rights also need to be more positively defined to allow rights holders to receive the full economic benefits of resource use.

In unbundling the complexity of competing rights claims and examining the array of rights claimants, a livelihoods focus suggests more careful attention is needed to which rights are important, and which claims are more or less legitimate. Among the variety of right claims, some may be more important than others. Rights to livelihood survival perhaps are the most basic, suggesting a normative, political interpretation of rights claims. But, for this to be effective, given the variability and complexity of rights claiming, a level of institutional stability, authority and legitimacy is required, and this, most often, needs to be provided by the state. The degree to which this is either likely or expected, given the particular historical interactions between the state and citizens in southern Africa is one of the central dilemmas faced in making rights real.

## 6 The long road to claiming and implementing rights

It is in the complex, messy process of implementation where most of the challenges to implementing a rights-based approach to development lie. Before rights can become "real" a range of intermediary factors are key. These range from varying perceptions and trust in the state's intent, to local political dynamics, to the role of mediators, to practical administrative hurdles and to actual financial resources and local capacity to implement these rights. We examine five themes briefly.

### 6.1 Perceptions of the state

The degree of trust in the good intentions of the state has a major impact. Depending on the national or local context, the state in southern Africa can be viewed either as an impartial, technical arbiter or defender of claims or a power-hungry, centralising body preying on people's rights. In Chiredzi District Zimbabwe ZANU(PF)'s frequently espoused nationalist moral discourse on the right to land appropriated by colonialists is distrusted by many political opponents who view it

### Box 7: Land claims on a plantation, Qaukeni municipality, South Africa

In the Qaukeni municipal area there are land claims lodged by two tribal chiefs on behalf of their followers on land which is now used as a state plantation. The Qaukeni municipality is currently using part of the plantation as one of the sources of its revenue. The Qaukeni municipality has made it clear that when the claimants win their land back, it will oppose any use of the land for purposes other than forest plantation. This, the municipality argues, is the most effective and sustainable use of the land, and keeping it under the control of the municipality will ensure that the benefits are used for the good of the wider community.

Source: *SLSA Research Paper 5*.

as a judicious bit of electioneering which was conspicuously absent when the party's political authority went unchallenged. Some of the newly resettled farmers remain unsure of the security of their title. Those on individual plots have yet to receive title deeds and have been threatened with repossession if they fail to pay tax or farm sufficiently productively (*SLSA Research Paper 3*). In Mududwa village, South Africa, by contrast, people look to the state to deliver on rights. Local councillors have been proactive in providing information on citizen's rights and in neighbouring villages the results, such as improved access to water and electricity, can be clearly seen. Although sometimes, as seen in South Africa, local authorities' need to generate revenue may militate against transferring rights (see Box 7). In Mozambique the state is trusted in its ability to transfer rights to people to some extent, although party political preferences may again enter the fray especially in areas where the opposition is more active. In potentially lucrative cases, such as the tourist developments at the Vilanculos Coastal Wildlife Sanctuary or the proposed development of the deep-water port at Ponto Dobela, there is a common suspicion that the private sector, the wealthy and politically well-connected are able to usurp the rights of the poor (*SLSA Research Paper 18*).

### 6.2 Information, brokers and mediators

The role of information, brokers and mediators in helping make rights "real" is also key. Can something be a right, even if you are not aware of it? Often people are made aware of rights through activists who can also impose new cultural

frameworks on communities which can cause conflict at the local level and create resentment from, say, the Chiefs (in the case of women's rights and gender equality). Moreover, information is never neutral and vested interests can shape the way in which information about constitutional rights are presented to local people by mediators. For example, in Mozambique, the state has accused the NGO ORAM of presenting the wrong information to people and has labeled them as agitators (*SLSA Research Paper 11*). Moreover, laws have to have to be interpreted even before they can be claimed and implemented and the "land question" in Zimbabwe shows that this is often a very conflictual and power-laden process.

Mediators, such as lawyers and activists are the ones who translate local claims to national and international contexts, and are often those most central to new donor-funded rights based approaches. They are often the ones who highlight the injustices around violations of socio-economic rights. Consequently their influence on how society thinks of rights is immense. Given their backgrounds, they often espouse international human rights and universalistic views. However, they may not be familiar with the informal nature of rights as embedded in customary law or local notions of rights based on ethnic, group affiliations around which rights are claimed at the rural level. Thus we may encounter parallel processes of rights claiming mechanisms: an urban-based transnational donor-funded discourse and a local (often rural) discourse based on customary law and ethnic affiliation; with the two discourses co-existing and in practice rarely coming together in local contexts.

### Box 8: Land in Mdudwa

Everybody at Mdudwa has a right to land for residential and arable purposes. The headman, who is responsible for allocating land in the village, unequally applies these rights. Some people accuse the headman of neglecting their rights in favour of others. Those who complain most see the headman as representing a certain clan within the village. There are allegations that he exercises his powers to favour certain households and intentionally marginalise others. Those who are favoured can be allocated up to three big plots, other plots for their sons, and those who are marginalised complain about the small size of the single plot they own.

With the introduction of the elected local government, those who feel marginalised by the headman were hoping that the new municipality will be involved in land allocations but this did not happen. This means that the channel to claim land rights at Mdudwa will continue being the institution of traditional leadership and past injustices are unlikely to be addressed for the historically marginalised section of the community.

*Source: SLSA Research Paper 5.*

### 6.3 Local power dynamics

Local power dynamics also influence the process of rights claiming. Often the access to and rights over resources are linked to affiliation with political power brokers such as chiefs. For example, in Mdudwa village in the Eastern Cape access to land is linked with the power of the chief (Box 8).

As this case shows, when “headmen” are made responsible for allocating rights, it is not surprising that certain clans are favoured over others. All three countries are still struggling with legacies of indirect rule in the form of chiefs. Thus transparent processes around decision-making and allocation emerge as key and there is a need to ensure that processes around rights allocation and rights claiming can transcend colonial and other historical legacies which often serve to perpetuate existing inequities. There is also a need to ensure that correct governance structures and mechanisms are in place in order to solve disputes and make sure that the claiming process is fair and avoids being captured by powerful elites. Thus at times, a separation of powers between “impartial” judicial institutions and implementation agencies may be necessary in order to make rights real.

### 6.4 Administrative hurdles

Administrative hurdles impede the process of implementing rights. While rights may exist on

paper, states can exercise administrative vetos. Administrative vetos are, for example, a very enduring part of the Mozambican environment. With respect to community rights of use, communities have no *right* to register those rights or to force the state to certify them; their registration and certification is subject to administrative discretion. In terms of the land law a community may only delimit their land and request its registration in the cadastral atlas if the district administrator approves this. Similarly there has been a marked lack of political will and budgetary resource allocation for rights registration. It is widely recognised that the annual plans for the land component within the PROAGRI initiative bear little resemblance to the actual work programmes. In Zambézia, for example, two of the three major tenure reform activities contained within the 2000 PROAGRI budget for the provincial land services were completely unrealised at the end of the year, except to the extent that these had been planned, budgeted for and realised under the separately funded ZADP land programme. A detailed analysis of the budget lines reveals a large number of activities aimed at securing local community tenure rights, costed in excess of US\$40,000, which were similarly unrealised and for which no implementation plans were ever developed (*SLSA Research Paper 11*).

### Box 9: Realising the right to free and basic water in South Africa and enhancing universal access

In February 2001, the Minister of Water Affairs in South Africa announced that the government was going to provide a basic supply of 6,000 litres of safe water per month to poor households free of charge. The National Water Act of 1998 also explicitly tries to redress old inequalities by making the government the custodian of all water resources and especially earmarking water for basic needs. These measures are in keeping with the overall mission of the Department for Water Affairs and Forestry (DWAF) to overcome the backlog of water underprovision that it inherited in 1994. The results have been quite striking: South Africa provided seven million rural people with clean water in the first seven years of democratic government and aims to achieve full coverage by the year 2008, with another seven million who will be reached by that year.

The free and basic water policy, in theory, has the potential to create universal access to water across the country which could reduce the spread of diseases, improve health, dignity, and well-being and contribute to sustaining and maintaining livelihoods. Still there have been numerous problems in its implementation. One, while it was conceived at the national level in a rather *ad hoc* and top-down manner, the responsibility for implementing it rests with local government. Against South Africa's rapidly changing policy and institutional environment, there is a lack of clarity about rights, policies and the division of responsibility between local municipalities, district municipalities, provincial government and the national ministries. Two, research in the Eastern Cape suggests that district municipalities (especially in the historically disadvantaged areas) neither feel consulted nor empowered to implement the policy. Several officials complain about the lack of financial resources and institutional capacity to implement the policy. Three, many of the 'Build Operate Train and Transfer' (BOTT) schemes that were created to enhance access to water have been very top-down and expensive. Many have not adequately involved local communities or local NGOs in their design, operation and maintenance or drawn on local knowledge of water. Thus, their long-term sustainability and ability to efficiently provide water once the external agency withdraws financial and logistical support is questionable. Finally, private operators and some NGOs resist the water policy on the grounds that cost recovery in the water sector cannot be avoided. The result is that local people in some rural areas where the private sector is operating are neither aware of their right to free water nor have received the minimum 25 litres for free.

Source: SLSA Research Paper 17.

## 6.5 Resources and capacity

There is a need for financial commitments and the development of local capacity to deliver rights. Since rights are often conceived at either the international or national level, there is a mismatch in the roles, responsibilities and resources of players who conceive rights and those who need to implement them. Often district or local-level officials, politicians and bureaucrats played no role in conceiving rights, and also do not have the necessary resources, capacity or the will to implement these rights. But devolution and decentralisation processes make them responsible for the implementation of these rights as the example of the free and basic water policy in South Africa indicates (Box 9).

## 7 Conclusions

The contexts for claiming rights over natural resources in southern Africa are complex and often confusing. Contested discourses on rights by different actors interact with overlapping, sometimes ambiguous, institutional routes for claiming rights. At the local level knowledge about available rights and capacities to claim them are often limited, and at least selective. The arenas for claiming rights are also often highly contested, with power and politics influencing who gains what and how. In southern Africa, colonial and post-colonial histories, in turn, influence the institutional architecture for rights claiming, with customary, constitutional, nationalist, market-based and other frameworks existing in highly dynamic variable and overlapping arrangements.

With so many different actors claiming rights on so many different bases, and through such a complex and messy set of institutional arrangements, how can a “rights-based approach” support sustainable livelihoods? How are different, competing rights claims decided upon, and who makes the decision? The SLSA work takes a normative stance of poverty and livelihoods. The work has been focused on how poor people in marginal rural areas in the region gain access to resources for livelihoods. Our aim has been to explore ways of improving this through institutional and policy change. In this article, we have explored the question: can a rights-based approach help?

Certainly the specification and granting of rights, such as through the South African constitution or new natural resource legislation elsewhere, has opened up opportunities and debate. But the ability to make these newly granted rights real has been constrained. And, as the case study work has shown, it is not always the poorest and more marginalised who gain from such notionally progressive constitutional and legal reform. With a weak, distant or incapacitated state, limited access to legal redress, poor organisational and mobilisation capacity, most people living in our study areas benefit little in tangible terms that transform their livelihoods from these new provisions.

Given the type of complexities highlighted through the SLSA work, a simplistic promotion of “rights-based approaches”, currently fashionable among donors as part of international “good governance” and “participation” agendas, premised on often naïve, a-historical understandings of local settings, look doomed to failure.

A number of conclusions emerge from this work:

- Rights-based approaches may open up opportunities for improved access to resources, as in the water sector reforms in South Africa and Zimbabwe, but only if the relevant support and capacity is there. In tandem with legislative reform, greater investment in institutional development is required. Changing the law is clearly not enough, although an important first step.
- A conventional western liberal, individualist approach to rights is inappropriate in many contexts in southern Africa. A recognition of group or collective rights, for instance around land, is an important complement. A broader definition of rights, based on people’s own conceptions is therefore key, and this must incorporate cultural, religious and ethnic dimensions, as well as material needs. Appropriate legal mechanisms are required to uphold such collectively-held rights, and these may not be based on conventional private property rights concepts. However, again in the case of land for example, it is not always possible or appropriate to legislate land rights and design administrative systems that account for the complexity, variability and fluidity of land-holding systems and emphasis needs to be placed on institutions and processes, rather than formal legalistic rights frameworks.
- Recognising that the institutional context for rights claiming is complex and contested is an important, often missed, step. Ignoring power and politics in institutional design results in sure failure and capture by those with power and resources. Thus new “participatory” institutions may be far from that, as, for example, in the catchment councils of Zimbabwe or many “community-based” initiatives across the region.
- The notion of rights to livelihood survival for the poor needs to be highlighted in the context of competing claims by different, richer, more powerful actors. But upholding these rights against claims by other, powerful private sector players, state officials demanding patronage, or “traditional” authorities seeking control, for example, requires a strong and effective mediator and arbiter, on behalf of the poor and marginalised. Where the state is weak, not trusted, predatory and exploitative or simply absent, a rights free-for-all, will result potentially in the undermining of livelihoods of the poor. And, even if strong and effective, state intervention may undermine the flexibility and responsiveness of existing plural systems.
- Reinforcing state capacity, competence and legitimacy is a key component of encouraging a rights-based approach. But also support for

effective, representative organisation and mobilisation is the other side of the equation in order to increase voice, demand and accountability. This raises the issue of language, communication and information and, more generally, access of poor people in rural areas to the type of resources required to claim rights effectively.

Currently in rural southern Africa, the prospect of a rights-based transformation of development

practice seem remote in the extreme. The retreat of the state through neo-liberal economic reform and deconcentration, or its effective collapse, have fundamentally undermined the state's developmental capacity and responsiveness. The same donors who are now advocating a rights-based approach have been party to these changes, and will need to reconsider their strategy if the rhetorical claims of supporting rights, and eliminating poverty are to have any impact on poor people's livelihoods.

## Notes

- \* The Sustainable Livelihoods in Southern Africa (SLSA) Team comprises: Caroline Ashley, Joseph Chaumba, Ben Cousins, Edward Lahiff, Zefanias Matsimbe, Lyla Mehta, Kgopotso Mokgope, Solomon Mombeshora, Sobona Mtisi, Isilda Nhantumbo, Alan Nicol, Simon Norfolk, Zolile Ntshona, João Pereira, Ian Scoones, Shaila Seshia and William Wolmer. Celestine Nyamu-Musembi provided helpful comments on this article.
1. According to the constitution, the state can only grant rights to land to certain applicants after *taking*

*into account its social purpose*. There were also constitutional directives to the effect that *direct users and producers must be afforded priority* and that the laws developed by the state may not permit use and benefit rights of land to be used to *favour situations of economic domination or privilege to the detriment of the majority of citizens*.

2. The complete list of *SLSA Research Papers* is found on page 116 of this *Bulletin* and at: [www.ids.ac.uk/slsa](http://www.ids.ac.uk/slsa).

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