

**TRANSITIONS TO LAND TENURE RIGHTS BASED ON THE ‘LIVING’ CUSTOMARY
LAW: INNOVATIONS TO SECURE LAND RIGHTS IN PERI-URBAN AREAS OF SUB-
SAHARAN AFRICA**

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Abstract

The ‘living’ customary land tenure system describes the shifting policies and practices that characterize access to land, and secure land rights emerging from peri-urban areas. These policies and practices illustrate legal pluralism: the existence of multiple legal systems within a given community or residential space. We use sub-Saharan case studies on Zimbabwe and South Africa to illustrate these research concerns. Generally, peri-urbanity is on the increase in most sub-Saharan Africa because of migration and urbanization processes resulting in increased mix of legal systems on access to land, and secure land rights in these areas. Participatory Geographic Information Systems is identified as a useful planning tool for peri-urban areas. Implementation of this planning tool in land allocation can enhance equity and security for all residents, including children, women, and the poor in particular.

Key Words: ‘living’ customary land tenure, legal pluralism, transitions, peri-urban, sub-Saharan Africa

1. Introduction

The common distinction between rural and urban land and the consequent distinction between divergent land rights in these two categories of spaces conceal what happens in peri-urban areas of most sub-Saharan African cities. In this paper, the term ‘living’ customary land tenure is used to describe the shifting policies and practices that characterize land tenure and land rights emerging from these peri-urban areas. These policies and practices illustrate legal pluralism: the existence of multiple legal systems within a given community or residential space.

Transitions to the ‘living’ customary land tenure system through recognition of legal pluralism in securing land rights in peri-urban areas of sub-Saharan Africa requires urgent attention. Land in peri-urban areas of sub-Saharan Africa is administered through a conflation of land laws and land tenure systems, as well as parallel land administration institutions comprising traditional leaders and local government authorities. As peri-urban areas continuously experience profound change as a result of twin forces of migration and urbanization, residents in these areas generate methods to access land rights - a shift from existing structures on land laws and land tenure systems that regulate access to land rights in these zones. This is a response to the ubiquitous change that characterizes peri-urban zones globally. The orthodox structures on accessing land and securing land rights in most peri-urban areas are increasingly losing relevance, and no longer hold leaving the land rights of the marginalized groups insecure. This paper therefore calls for a shift from conformity to structures that ‘traditionally’ regulate access to land rights in peri-urban areas to procedures that allow for a transition to responsive land tenure systems; and ultimately land laws that enable a diversity of land users to access and secure land rights in peri-urban areas – legal pluralism. According to the World Bank Report (2017), legal pluralism provides for the existence of multiple legal systems within a given community or a socio-political space. Legal pluralism has its basis in law (Ingwani & Bekker, Forthcoming). Clearly, legal pluralism entails the recognition of multiple legal systems on access to secure land rights. Legal pluralism is apparent in peri-urban areas of most sub-Saharan cities.

There is an increase of the urban population in the peri-urban areas of most sub-Saharan Africa countries because of incessant urbanization, and migration. Movement of people to zones of comparative advantage engenders the demand for housing and settlement in the periphery of burgeoning cities of these countries where the dynamics of accessing land for housing are somewhat relaxed and less bureaucratic. Yet, the orthodox communal and customary land tenure systems still apply leaving the land rights of indigenes and migrants insecure. A transition from the existing land tenure systems (largely communal and customary)

to a more pluralistic; unified; inclusive; flexible, and responsive land tenure system - the living customary - is therefore critical.

Dynamics of securing land rights of people particularly those living in peri-urban area under the 'living' customary land tenure system have been given little attention. Yet, insecure land rights in peri-urban areas of sub-Saharan African cities have been on the increase as access to land rights in these zones is characterized by complex land laws, processes, and procedures - legal pluralism. Land rights of the poor and marginalized groups such as women and children are the most insecure due to these people's inability to influence decisions on the land markets. This paper therefore argues for a transition from the orthodox customary land tenure system to the 'living' customary land tenure system as an 'innovation' that provides for secure land rights for people living in peri-urban areas of sub-Saharan Africa. In any case, much more research is needed on the question of legal transitions (World Bank Report, 2017).

In the first place, we present a case study of a peri-urban area in Zimbabwe, complemented with a brief synopsis of a similar peri-urban area in South Africa. These cases studies introduce the reader to peri-urbanity, to legal pluralism regarding access to land and land rights, as well as to customary and modern legal systems.

2. Empirical Case Studies of 'Living' Customary Tenure

This section highlights experiences from two case studies on peri-urban areas of cities in Zimbabwe, and South Africa. In this paper, the structure-agency framework provides an analytical framework that extracts meaning on how land rights can be secured through 'officially' adopting the 'living' customary land tenure system in peri-urban area where legal pluralism is evident. In this regard, the 'living' customary land tenure system is not only viewed as a form of transition to protect and secure land rights; but also, as an 'innovation' that strengthens local governance structures in peri-urban areas (see World Bank Report, 2017). In this case, the 'living' customary land tenure system is argued as key to secure land rights in the peri-urban areas where community residents inclusive of indigenes and migrants with diverse identities are capacitated to negotiate, and balance their interests on access to land and secure land rights amidst legal pluralism. While the 'living' customary land tenure system enables communities of peri-urban zones to access land rights within the existing structures, such land rights are often deemed insecure from the perspective of statutory land laws.

This paper is based on empirical evidence from case studies on peri-urban areas of Zimbabwe, and South Africa where dynamics of the 'living' customary land tenure systems, as well as legal pluralism are apparent. The main case study is on Zimbabwe, and is based on two years of extensive fieldwork. This case study is complemented by a briefer case study of South Africa. While most residents from peri-urban areas in these cases made efforts to follow the system of customary land tenure, new ways of accessing and securing land rights were adopted and accepted thereby initialising the transitions to 'living' customary land tenure system as people abandoned structures they regarded as obsolete or unnecessary. The residents from peri-urban areas employed individual agency to move beyond the structures on land tenure to non-conformity, and break the set rules on accessing and securing land rights. Given the circumstances of change in the two case studies, new households emerged and settled in these peri-urban areas because of migration and urbanization. Little attention has been paid to ways of securing land rights under the system of the 'living' customary land tenure in peri-urban areas of sub-Saharan African cities where legal pluralism is apparent as demonstrated by two case studies of Zimbabwe and South Africa.

2.1 A Case Study of Zimbabwe

Box 1: Legal pluralism in peri-urban Zimbabwe: a case study of Domboshava

The peri-urban communal area of Domboshava is situated twenty kilometres northeast of Harare, the capital city of Zimbabwe. Domboshava as one of Harare's peri-urban settlements, is influenced by the location of Harare in many ways due to irresistible forces of urbanization and migration. In terms of local governance, Domboshava is considered as a rural area, and falls under traditional authority and a local authority called Goromonzi Rural District Council. Land in Domboshava falls under communal land tenure system, and is administered under the system of customary land tenure. A combination of statutes on land and settlement, and local customs and tradition legally constitute the structure that regulates access to land in this peri-urban communal area – legal pluralism.

Land in Domboshava is deemed by the local authorities as non-tradable, untitled, and of no market value. Yet, through individual agency indigenes of Domboshava transact land to migrant land seekers through buying and selling, renting and in some cases land grabbing. The community residents of Domboshava simply invent and accept new ways of transacting land and abandoned practices they regard as obsolete and cumbersome under customary land tenure. Under these circumstances, new 'rules' on transacting land inspired by agency and not the structures emerge driven by individual purpose and choices to survive in the peri-urban area.

Two kinds of households emerge in Domboshava. These are the indigenes (tribal) and migrant households. In Domboshava, indigenes households are those with historically sanctioned land rights under the system of customary land tenure. These tribal members comprise individuals born and bred in Domboshava often with a lengthy lineage history to this area. Tribal households and their members are presumed to 'own' land (in communal areas) that supposedly belongs to their ancestors (Bullock, 1972; Bourdillon; 1976). The indigene status is therefore associated with individuals' long-term autochthonous relationship with particular land parcels, belonging, as well as 'ownership' of land in this rural area.

On the other hand, migrants are outsiders without legitimate lineage land rights in Domboshava. Migrants constitute a diverse group of strangers in terms of aspects such as place of origin, language, culture, and ethnicities. Migrant households migrated from elsewhere to live in this communal area. Migrants nevertheless acquire land sometimes within the system of customary land tenure, but in most cases outside these parameters - thereby reproducing the structure that regulates access to secure land rights in the peri-urban area. Migrants that access land rights through land transactions are also labelled variously and adopt new identities.

These relationships between indigenes and migrants are significant in shaping and reconstructing the terms and conditions on accessing and securing land rights under the system of customary land tenure in Domboshava. Positioning indigenes on one hand and migrants on the other is important because migrants constitute a category of 'other' land rights holders in Domboshava. Both indigenes and migrants invent structures of traditions on land transactions through agency. Clearly, the residents of Domboshava are adopting the 'living' customary land tenure system as migrants and indigenes access and secure land rights under the systems of communal and customary land tenure.

Source: (see Hungwe, 2014)

2.2 A Case Study of South Africa

Box 2: Legal pluralism in metropolitan South Africa: a case study of eThekweni in South Africa

The metropolitan area of eThekweni, in the KwaZulu-Natal Province of South Africa, was established as a metropolitan council and municipality in 2001 through the amalgamation of a number of municipal structures in the city of Durban and its periphery. Demographically, it is the third largest metropolitan municipality in the country with a population of three and a half million (in 2011). Spatially, its zone of jurisdiction covers some 2 300 square kilometres – the largest metro in the country – and comprise four areas: the Southern, Central and Northern spatial districts on the coast, and the Western spatial district in the interior of the province (Draft IDP 2013/14). This new municipal metro was planned to establish a new representative centralised authority aimed at promoting greater equity in service delivery to the residents of the former city of Durban (which was situated principally in the Central district). The metro council is made up of two groups of councillors: those elected by proportional representation, and those elected by voters within each of the 103 wards of the metro (Bekker & Hill, 2016).

The Western district in the interior covers a little more than a third of the metro's surface area, and accommodates just 16% of its population. Before the establishment of eThekweni, most of this area fell within the former homeland of KwaZulu, and remains land in which traditional authority and customary law exist parallel to ward councillor representation and metropolitan authority. Its smaller population lives under peri-urban conditions where a scattering of homesteads rather than housing within a planned built environment is the norm.

A recent case study of a single ward in this district, Umbumbulu-Nkomokazi, situated in the southern-interior region of the metro, illustrates what may be considered an approach of 'living' customary tenure (Bekker & Hill, 2016). Before 1994, it fell within the homeland of KwaZulu and currently it is a peri-urban area in which parallel traditional and metro authority exist. The traditional authority (the *inkhosi*) takes responsibility for land tenure issues whilst the metro authority (via the ward councillor) takes responsibility for service delivery, water, sewage, electricity and transport in particular. Such dual authority may lead to tension and conflict (Palmary 2004). Anecdotal evidence suggests that, on certain occasions, outsiders may access land for residential purposes in the ward by making a gift available to the *inkosi* for his clan. Once a residential unit has been constructed on this land, there is a danger that other households residing in the ward may complain that this land which had been intended for communal grazing purposes, was now being used for other purposes.

Over time, metropolitan planners claim, as residential densities rise, a planned cadastral system identifying residential plots will be introduced in such wards and individual tenure may ensue. During research in 2016 however all residents approached in this ward were aware of the names of both their *inkosi* and their ward councillor and expressed little criticism of either.

Source: (see Bekker & Hill, 2016).

In summary, there is no single story about the dynamics of these experiences, but an aggregate of disparate accounts narrated in the two case studies. However, the dynamics of the 'living' customary land tenure systems and legal pluralism are more or less the same. Community residents in these case studies established new rules and new institutional arrangements to access and secure land rights in response not only to changing circumstances within peri-urban areas, but to suit their choices. Along these transitions

to the 'living' customary land tenure, new forms of securing land rights and relationships through legal pluralism also emerged.

3. Dynamics of Peri-Urban Areas of Sub-Saharan Africa

Land in peri-urban areas of sub-Saharan Africa falls into three distinct categories – rural, urban and peri-urban. Rural areas typically comprise indigenous traditional villages, and farmland for the practice of subsistence farming. On the other hand, urban areas are constitutive of metropolitan cities of different magnitude largely characterized by non-farm commercial activities. A clear dichotomy exists between rural and urban areas of sub-Saharan Africa although residents from both spaces endlessly straddle the divide. Whereas, peri-urban areas carry a dual character. These spaces are neither rural nor urban. Peri-urban areas represent spaces that lie on the edge of cities. Peri-urban spaces depict the end of urban spaces, and the beginning of rural areas. As such, peri-urban areas are characterized with a conflation of land uses and land users. Competition to access and to secure land rights and other resources in peri-urban areas is inevitable. In most cases, such competition is defined by endless struggles and conflict.

While land administration in rural and urban areas of sub-Saharan Africa is distinctly structured, land administration in peri-urban areas such as Domboshava in Zimbabwe and Umbumbulu-Nkomokazi in South Africa is characterized by a plurality of systems. For example, land in these areas is administered through both the traditional leaders and local government authorities on behalf of the state. Since these peri-urban areas exhibit a combination of rural and urban forms, structures on land administration are neither rural nor urban, but a conflation of both. This is because peri-urban areas are by nature zones in transition from being typically rural to urban. As such, emerging structures on accessing and securing land rights are simply responding to these transitions. Whereas, the orthodox structure of the customary land tenure system remains static. Through evidence on experiences from Domboshava and Umbumbulu-Nkomokazi peri-urban areas in sub-Saharan Africa, this paper highlights the complex interaction of individuals with land tenure systems as they continuously challenge existing structures that regulate access to secure land rights.

4. Access to, and Securing Land Rights in Peri-Urban Areas of Sub-Saharan Africa

Secure land rights in sub-Saharan Africa determine the wellbeing of people in many ways (Walker, 2009). According to Quan & Payne (2008), land rights entail interests that are recognized in land or property vested in individuals or groups of people to access, use, and control of land parcels and other natural resources (inclusive of pastures, water, forests, grazing land, wetlands). Land rights typically are recognized

interests in land that may include customary, statutory or other social practices approved by society (Ibid). Land rights can be categorized as private, individual, group, and communal (Cousins, 1990). Thus, land rights arise from relationships between people, and not necessarily between people and ‘things’ - property rights (Tsikata & Whitehead, 2003: 76-77). These land rights are also conceptualized beyond the biophysical attributes of land, to include the wellbeing of people in terms of household survival strategies (cf. Walker, 2009). Clearly, there are different kinds of land rights in peri-urban areas of sub-Saharan Africa, and these vary in space and time. As such, recognition of individuals’ secure land rights remains important in the discussions presented in this paper because land rights carry different meanings to different categories of people in space and time.

In sub-Saharan Africa, land rights are often limited since land ownership rests in collectives such as tribes, kinships, chiefdoms, and the state (Peters, 2007; Bennett, 2008). Secure individual land rights for vulnerable groups of people such as women are often absent (Peters, 1994; 2004; 2007). In most cases, women hold secondary land use rights since they lack primary land rights. Under these circumstances, women’s rights to land are directly linked to those of men who are primary land rights holders (Okoth-Ogendo, 2008). As such, issues of women’s land rights require in-depth interrogation particularly in contexts where land users and land uses are multiple. Secondary land rights holders such as migrants, women, and children often lack political power to influence their interests and positions on land issues.

There are many ways of securing land rights in sub-Saharan Africa. In most cases, individual and group land rights are secured through existing land tenure systems. In contemporary sub-Saharan Africa, multiple land tenure systems exist predominantly in rural areas (Cousins, 2000; Peters, 2007). For example, the two case studies of Domboshava and Umbumbulu-Nkomokazi demonstrate that the existing land tenure systems in peri-urban areas are deeply rooted in statutory principles that demonstrate colonial legacy - the land law. As such, there is need to adjust existing land law(s) to suit prevailing circumstances. In peri-urban areas of sub-Saharan Africa, land laws provide regulatory mechanisms uniformly adopted across communities regardless of the diversity of interests, needs, customs and traditions of land users. This clearly demonstrates the variability of outcomes from land laws and legal pluralism used to secure land use rights of individuals and communities. Such practices enable the influential and powerful individuals to access and secure their rights even in unorthodox ways within the existing land tenure systems.

There exist many systems of land tenure in peri-urban areas of sub-Saharan Africa. These include freehold, leasehold, communal, and customary (Quan & Payne, 2008). Of interest to our debate are the communal and customary land tenure systems. Communal land tenure is a mixture of tenure rights, uses, and user

obligations ranging from individuals, groups, and nation states (Cousins, 2000). Communal land tenure is a form of property rights clearly distinct from that of individuals (Cousins, 2000; 2008). All members of a group have rights of access to communal land since it is held in common jointly, and in perpetuity by a group of people (Cousins, 2000; Bennett 2008; Cousins, 2008).

The notion of communal land rights and access to land under the communal system of land tenure in sub-Saharan Africa is however variable, contingent, and relevant to social and political contexts in which it is applied (Sjaastad & Cousins 2008). For example, in South Africa, communal land tenure is defined in Chapter 1 of the Communal Lands Rights Act (CLRA) 11 of 2004 of South Africa as, “land occupied or used by members of a community subject to the rules or custom of the community” (Cousins, 2008:109). In Zimbabwe, land in peri-urban areas is deemed communal, and is administered through a plethora of Acts including the Communal Lands Act (CLA) Chapter 20:04 of 2002, TLA Act (TLA) Chapter 29:17 of 2001, the Regional Town and Country Planning Act (RTCPA) Chapter 29:12 of 2001, and the Rural District Council Act (RDCA) Chapter 29:13 of 2002. These regulatory mechanisms depict a mix of legal systems that address access to, and secure land rights in these countries.

Communal land tenure provides for access and use of land parcels to residents in communal areas as individuals and as collectives. In most sub-Saharan Africa, individuals lack rights to dispose of land at will since ‘communal’ implies some form of collectivity (Cousins, 1990; Nyambara, 2001; Cousins, 2000; Bennett, 2008). The communal system of land tenure therefore represents sets of elusive relations often overlapping and nested with regards the rights to access land and other resources (Cousins, 2000; Cousins, 2007; Cousins, 2008; Sjaastad & Cousins, 2008). This context in most peri-urban areas of sub-Saharan African countries does not only demonstrate pluralism of the communal land tenure system in terms of its content, but the legal pluralism in terms of statutory provisions that also regulate communal rights to land (Delville, 2000; Nyambara, 2001; Berry, 2002; Wehrmann, 2008; Cousins, 2009). This also demonstrates pluralism and overlapping rights and institutions that regulate access to secure land rights. In this case, legal pluralism in peri-urban areas is embedded in the structures that define land users; land uses; land administration; land laws; above the aggregate community needs and interests.

In most sub-Saharan African countries, land rights of peri-urban residents are often overshadowed by provisions of codified statutory laws that are applied concurrently with customary land tenure provisions (Delville, 2000). According to Adams *et al.* (2000), this situation is also apparent where communal tenure is not only providing a conflation of tenure regimes, but also interchangeably refers to customary land tenure. However, communal and customary land tenure systems do not necessarily mean the same

(Cousins, 2009). They represent a dualism, as well as plurality of overlaps in provisions and conditions for land use under the land tenure systems.

Customary land tenure is governed by land relations among the community members, and is viewed as tribal law or simply custom. Written procedures on the practice of customary land tenure unlike communal land tenure are absent. Customary land tenure systems are largely shaped by local interests and institutions (O'Flaherty, 1998). Customary land tenure features cultural and religious symbolisms rooted in local customs and tradition of community residents as land 'ownership' is vested in local traditional authorities (Delville, 2000; Mathieu et al., 2003; Wehrmann, 2008). These local traditions and customs define the context in which people "live their lives" (Giddens, 2001:643).

Individuals and collectives under customary land tenure assume rights to hold and use land without title (Moyo, 1995; Cousins, 2009). Customary land tenure systems do not define each person's rights by which they access and obtain resources (Chauveau, 1998 in Delville, 2000:98). Under customary land tenure, communal residents hold kinship rights to land, and they can always claim such rights even after their long absence from their communities (Christodoulou, 1990). The tenets of customary land tenure lie within the norms, beliefs, and values of communities often connected to ancestral spirits (Ibid). These principles of customary land tenure continue to apply in most peri-urban areas of sub-Saharan Africa even though the circumstances evolve. For example, in Domboshava and Umbumbulu-Nkomokazi.

In most cases, customary land tenure is viewed as informal, traditional, as well as separate from and opposed to the formal systems of tenure, that is, land law (Peters, 2004). What makes customary land tenure systems 'formal' is their grounding in land laws although customary land tenure systems are largely oral in form. However, absence of written text as reference points does not necessarily make customary land tenure 'informal' since land laws recognize the legitimacy of customs and traditions through statutes. For example, in the Domboshava and Umbumbulu-Nkomokazi cases; statutes on land and settlement recognize customary land tenure as legal although the systems of land tenure are defined through the custom of communities where they are applied.

Clearly, administration of land and property rights under customary land tenure in peri-urban areas of sub-Saharan Africa is through both statutes (laws) and traditional system of authority. For example, in Domboshava and Umbumbulu-Nkomokazi traditional authorities administer land under customary tenure on behalf of the state. These traditional authorities do not necessarily derive their power from laws (statutes) per se, but from local tradition and custom, and are expected to observe the laws in the discharge

of their duties (O’Flaherty, 1998). The relationships between the state and traditional leaders on land administration under customary land tenure in these peri-urban areas also vary from country to country; are localized, and are never homogeneous. Different countries of sub-Saharan Africa vest different degrees of power and authority on traditional leaders since African traditions, cultures, norms, values, and rituals are themselves divergent. Clearly, legal pluralism is apparent in peri-urban areas of sub-Saharan Africa, and thus struggles to access and to secure land rights are inevitable.

Since land in peri-urban areas of sub-Saharan Africa falls under communal, as well as customary land tenure systems; often migrants and indigenes take land matters into their own hands thereby inventing procedures to access and to secure such land rights to their advantage – as demonstrated by the two case studies of Domboshava and Umbumbulu-Nkomokazi. Under these circumstances, peri-urban areas experience environmental, spatial, and socio-economic challenges including overcrowding; unplanned settlements; competing and incompatible land uses; resource degradation; disappearance of the commons; as well as insecure land rights of the poor and marginalized groups such as women and children.

5. Reflecting on the ‘Living’ Customary Land Tenure System, and Legal Pluralism

Customary land tenure systems present a form of legal pluralism since they are definable through tradition and custom. This is largely because customary land tenure systems are not static, and are under constant change in response to new circumstances. These circumstances present the concept of the ‘living’ customary land tenure system. In peri-urban areas of sub-Saharan cities, the ‘living’ customary land tenure system provides for access to land rights to different land users within the context, conditions, and circumstances in which local community residents live. It is far from being a series of precise rules, but an outcome from local negotiations (Delville, 2000; Peters, 2004; Peters, 2007). The ‘living’ customary land tenure system is a land law that is shaped by local systems and practices within local customs and traditions (Bennett, 2008). It demonstrates considerable flexibility, negotiability, and adaptability within the surrounding changing circumstances (Hilhorst, 2000; Delville, 2000; Quan, 2000, Peters, 2004; Peters, 2007; Oomen, 2005 in Sjaastad & Cousins, 2008). The ‘living’ customary land tenure system also encompasses the resources that people use to argue their claims to land tenure rights, and these range from custom, statutory law, constitutional principles, development as a desired goal, and even the Bible (Oomen, 2005 in Sjaastad & Cousins, 2008:8). The ‘living’ customary land law is therefore not a “fixed body of formally classified and easily ascertainable rules ... by its very nature it evolves as the people who live by its norms change their patterns of life” (Claassens, 2008:360). What distinguishes the ‘living’ customary tenure from ‘fixed’ customary land tenure is its ability to adapt to change within the local conditions

(Peters, 2004). Hilhorst (2000) and Quan (2000) see the 'living' customary law as capable of responding to new needs and opportunities. Benjaminsen & Lund (2003) in Peters (2007:14) view the 'living' customary law as "informalization of the formal" customs and traditions. The 'living' customary law thus provides a new dispensation of a formal structure within a formalized informal customary system of land tenure (Okoth-Ogendo, 2008). Simply put, the 'living' customary law represents the 'formalization of the informal' customary land tenure – legal pluralism.

The main theme of our discussion rest on the adoption and institutionalization of the 'living' customary land tenure system as an 'official' regulatory mechanism for access to, and securing land rights in the 'third' space. The 'living' customary law is not yet part of land laws in many sub-Saharan African countries as with customary law. However, the challenge on the 'living' customary law remains - customs, norms, rules, and values of societies are subject to infinite variations, and are neither universal nor homogeneous to communities (Bennett, 2008). Often these rules, norms, values, and customs provide 'unstandardized' guidance on how the system of the land tenure within the realms of the 'living' customary law are practiced and recognized through individuals' lived experiences - these are diverse. However, as residents continuously interact with the structure, the new adaptations are eventually recognized.

In peri-urban communities of Domboshava and Umbumbulu-Nkomokazi, the 'living' customary system of land tenure is simply another form of invention of tradition on ways of accessing and securing land rights under the existing, recognised, and functional codes and procedures of customary land tenure systems. The concept of the 'living' customary land tenure system thus remains important in the conceptualization of securing land rights within social systems that are in transition such as these peri-urban areas. In this regard, the 'living' customary land tenure system allows tensions and conflicts between different actors with varying degrees and sources of power to be recognized. For example, community residents on one side, and the municipal and government officials on the other.

Adoption of the 'living' customary land tenure system in peri-urban areas is thus another approach to secure land rights where legal pluralism is ubiquitous. This way, the 'living' customary land tenure system will provide access to secure land rights rooted in tradition and codified laws (see Hungwe, 2014). The case studies of Domboshava and Umbumbulu-Nkomokazi clearly demonstrate that legal pluralism is an element of the 'living' customary land tenure system characterized in the variability of nested layers of legal instruments, institutions, traditions, and customs that regulate access to land rights; while securing these rights at the same time.

6. An Innovative Approach to Shifts from Customary to the ‘Living’ Customary Land Tenure System Using Participatory GIS

Experiences from Domboshava and Umbumbulu-Nkomokazi demonstrate the functional relevance of land tenure systems as guiding principles in land allocation through legal pluralism. In these cases, legal pluralism is revealed through multiple functions of the ‘living’ customary land tenure system to constrain and enable individuals to access land.

A great deal of the evidence presented in this paper also demonstrates that the ‘living’ customary land tenure system in peri-urban areas of Domboshava and Umbumbulu-Nkomokazi evolved and adapted over time to allow for a range of indigenes and migrants to secure their land rights through land transactions. The status quo in these peri-urban areas is built on long-standing ideas and practices about procedures for obtaining membership within a land-holding group, as well as strong family and individual rights within the overall system of customary land tenure. Thus, a process that compromises and reconciles the diverse interests while at the same time guards against the extinction of tribal land rights, those of migrants, children, and women - the ‘living’ customary land tenure - is critical. It is therefore imperative that the land laws be adjusted and adapted to suit the changing realities and circumstances peri-urban zones – legal pluralism.

7. The Role of Participatory Geographic Information Systems in Securing Land in Peri-Urban Areas of Sub-Saharan Africa

A successful and smooth transition from the customary land tenure system to the ‘living’ customary land tenure system requires implementation of modern technological approaches such as Participatory Geographic Information Systems (PGIS). Participatory Geographic Information Systems (PGIS) is a combination of spatial tools and processes used to collect, analyse, visualize, communicate, and extract meaning from spatial data (McCall, 2004). Spatial technologies such as PGIS are critical in sustainable management and securing of land rights in peri-urban areas through providing platforms for collaboration and active participation of actors (with diverse interests) particularly the poor and marginalized groups (whose rights are ‘tied’ to those of primary rights of men and kin) in the spatial decision-making processes.

Participatory Geographic Information Systems can usefully be employed to promote planning in peri-urban areas with a view of establishing equity and security for all residents including children and women, and the poor in particular. This enables the plurality of actors and institutions to collaborate and plan for

the present and future of peri-urban zones so that these spaces conform with standards expected of habitable zones in transition. Through PGIS the community residents and technocrats on land administration of peri-urban areas can map and create an inventory of existing land parcels (including ‘hot spots’), as well as set ‘own’ rules on accessing and securing the land rights (Vajjhala, 2005). Emphasis is on empowering residents of peri-urban areas to set ‘rules’ in the realm of the ‘living’ customary land tenure system, and access secure land rights through legal pluralism. This will enable the indigenes and migrants to preserve their traditions and customs, while at the same time enabling vulnerable groups to access and secure land rights.

8. Conclusion

Clearly, the transition from the customary land tenure system to the ‘living’ customary land tenure system in peri-urban areas requires approaches that secure land rights while responding to the prevailing circumstances at the same time. In light of peri-urban areas of burgeoning cities such as Harare in Zimbabwe and Durban in South Africa, customary law needs to shift as new migrants arrive and existing urban governance structures do not work. There are potentially conflictual demands for access to land and secure land rights. This renders different legal systems and structures on local customary governance inferior. We therefore propose adoption of a planning tool by local authorities, the PGIS, to provide a platform for community engagement to overcome community problems through collective action. Given the dilemmas in land administration in peri-urban areas, the PGIS may help stabilize the land situation – at least for a while.

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10. List of Boxes

Box 1: Legal pluralism in peri-urban Zimbabwe: a case study of Domboshava

Box 2: Legal pluralism in metropolitan South Africa: a case study of eThekweni in South Africa